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Front Matter

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Preface

Kyndal Currie
Golden Gate University School of Law

Leticia Chavez
Golden Gate University School of Law

PREFACE

Welcome to Volume 50 of the *Golden Gate University Law Review Ninth Circuit Survey*. The *Survey* is the only law review in the country dedicated exclusively to decisions issued by the United States Court of Appeals for the Ninth Circuit. The *Survey* provides students an opportunity to explore topics in depth by analyzing the underlying reasoning, effect, and possible implications on future law. The Notes in this edition highlight pivotal and recent decisions issued by the Ninth Circuit—each exploring a different area of law.

We would like to begin by extending a very heartfelt thank you to Judge Jacqueline H. Nguyen, who graciously provided the introduction to this edition of the *Survey*. Judge Nguyen was generous in providing insightful commentary that touches on the Ninth Circuit's dedication to civic education.

We would also like to express our gratitude to: Dean Anthony Niedwiecki, who has been an advocate for the journal and has provided us with continued support; Academic Dean Mark Yates for providing his invaluable guidance and expertise to *Golden Gate University Law Review*; Heather Varanini, who has our deepest gratitude for her editorial and Bluebook assistance; and Professor Jennifer Babcock for her expert guidance and continued support as *Golden Gate University Law Review's* Faculty Advisor. Finally, we offer our sincerest thanks to each author for their articles as these Notes represent the culmination of our authors' time, passion, and devotion to critical issues.

As the Editor-in-Chief and Managing Editor for the 2019–2020 year, we have been excited and inspired by many aspects of the Ninth Circuit, from its judges and jurisprudence to its history and heritage. We have also been energized by the hard work and dedication of the 2019–2020 *Golden Gate University Law Review* Staff Writers, Associate Editors, and Executive Board Members who worked tirelessly to make this edition possible. A law review issue is never an individual effort, but instead the result of much collaboration. It is our privilege to present this edition of the *Golden Gate University Law Review Ninth Circuit Survey*.

Kyndal Currie
Editor-in-Chief

Leticia Chavez
Managing Editor

Golden Gate University Law Review

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Introduction

Jacqueline H. Nguyen
United States Court of Appeals for the Ninth Circuit

INTRODUCTION

THE HONORABLE JACQUELINE H. NGUYEN

On behalf of the Ninth Circuit, I would like to thank the *Golden Gate University Law Review* for its continued commitment to analyzing Ninth Circuit decisions in its annual *Ninth Circuit Survey*.

The *Survey* highlights some of the Ninth Circuit's most challenging and notable cases. This year's issue features *Perez v. Roseville*, 882 F.3d 843 (9th Cir. 2019), *superseded by* 926 F.3d 511 (9th Cir. 2019), and *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018). In *Perez*, the court considered the complex issue of whether the defendants, police officials who had investigated a complaint against a fellow officer that led to the officer's termination, were entitled to qualified immunity from 42 U.S.C. § 1983 claims. *Williams*, by contrast, was a copyright infringement action arising out of the allegation that Pharrell Williams and Robin Thicke's "Blurred Lines" had copied from Marvin Gaye's "Got to Give It Up." These cases, two of the thousands that the Ninth Circuit resolves every year, evidence the breadth and weight of the court's docket.

Although the Ninth Circuit's caseload garners most of the public's interest, the court does more than decide cases. The judges, staff, and attorneys who practice in the Circuit are also engaged in important efforts to promote civic education. One such effort is an annual civics contest—a Circuit-wide essay and video competition for high school students—led by its Courts and Community Committee (ably chaired by District Judge Janis L. Sammartino). The contest, designed to help young people become knowledgeable citizens who are better able to participate in our democracy, focuses on the role of the judicial branch in preserving our constitutional rights. The theme of the 2019 contest was: "The 4th Amendment in the 21st Century—What is an 'Unreasonable Search and Seizure' in the Digital Age?" Students were challenged to write an essay or produce a short video focusing on how the federal courts have applied Fourth Amendment protections to electronic data devices, including cellphones. The court also hosted over 50 students at a "Law Day" event to discuss the contest's theme. In all, 1,308 essays and 138 videos were submitted by students from across the Circuit. Top finishers in each com-

petition received a monetary prize and were invited to attend the Ninth Circuit Judicial Conference in Spokane, Washington.

The Ninth Circuit regularly hosts tour groups at the historic San Francisco courthouse. In partnership with Experiencing Justice, a program dedicated to civic outreach, volunteer docents lead tours that provide a curated experience for students to learn about the judiciary. Judges, law clerks, and court staff have fully embraced the program, often participating in question-and-answer sessions with students—an experience that is both meaningful and memorable. Students also take advantage of the opportunity to observe oral arguments. This year (as of August 2019), the court has facilitated 51 question-and-answer sessions with students and has welcomed over 1,700 students in total—with over 2,000 projected to visit by the end of the year.

On September 17, 2019, the court commemorated Constitution Day with events across the Circuit. Judges presided over naturalization ceremonies at baseball stadiums in San Diego and Los Angeles, and the Kennedy Learning Center in Sacramento hosted a "Constitution Café," at which students engaged in discussions of whether particular provisions of the Constitution should be re-drafted.

According to the 2017 Annenberg Constitution Day Civics Survey, only 26 percent of Americans can name all three branches of government and more than a third of Americans cannot name any of the rights guaranteed under the First Amendment.[1] The court's efforts to promote civics education recognize that democracy best thrives when its citizens and engaged.

[1] *Americans Are Poorly Informed About Basic Constitutional Provisions*, ANNENBERG PUBLIC POLICY CENTER (Sept. 12, 2017), https://www.annenbergpublicpolicycenter.org/americans-are-poorly-informed-about-basic-constitutional-provisions.

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Judges of the United States Court of Appeals for the Ninth Circuit

JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT[1]

CHIEF JUDGE SIDNEY R. THOMAS

Judge Thomas is currently serving a seven-year term as Chief Judge. President Clinton nominated Judge Thomas to the Ninth Circuit on July 19, 1995 and the Senate confirmed him on January 2, 1996. He received his B.A. from Montana State University in 1975, and his J.D. from the University of Montana School of Law in 1978.

Judge Thomas practiced law with the firm of Moulton, Bellingham, Longo and Mather from 1978 until his appointment to the Ninth Circuit. He served as an adjunct instructor at Rocky Mountain College from 1982 to 1995.

Judge Thomas maintains his chambers in Billings, Montana.

SENIOR JUDGE ALFRED T. GOODWIN

President Nixon nominated Judge Goodwin to the Ninth Circuit on November 3, 1971, and the Senate confirmed him on November 23, 1971. He served as Chief Judge from 1988 until 1991. He assumed senior status on January 31, 1991. Judge Goodwin received both his B.A., in 1947, and his J.D., in 1951, from the University of Oregon.

Judge Goodwin served as a Captain in the United States Army from 1943 to 1946 and served in the Army Reserve as a Judge Advocate from 1960 to 1969, attaining the rank of Lieutenant Colonel. Judge Goodwin was a Circuit Judge for the Second Judicial District of Oregon from 1955 to 1960, an Associate Justice of the Oregon Supreme Court from 1960 to 1969, and a United States District Court Judge for the District of Oregon from 1969 until his appointment to the Ninth Circuit.

Judge Goodwin maintains his chambers in Pasadena, California.

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[1] These biographies have been primarily derived from the following sources: *Biographical Directory of Federal Judges*, FED. JUD. CTR., www.fjc.gov/history/judges.html (last visited Nov. 5, 2018); *The Judges of This Court in Order of Seniority*, U.S. CT. OF APPEALS FOR THE NINTH CIRCUIT, www.ca9.uscourts.gov/content/view_seniority_list.php (last visited Nov. 5, 2019).

SENIOR JUDGE J. CLIFFORD WALLACE

President Nixon nominated Judge Wallace to the Ninth Circuit on May 22, 1972, and the Senate confirmed him on June 28, 1972. Judge Wallace served as Chief Judge of the Ninth Circuit from 1991 until 1996. He assumed senior status on April 8, 1996. Judge Wallace received his B.A. from San Diego State University in 1952, and his LL.B. from the University of California, Berkeley, Boalt Hall School of Law in 1955.

Judge Wallace served as a Second Class Petty Officer in the United States Navy from 1946 to 1949. After law school, Judge Wallace practiced with Gray, Cary, Ames and Frye in San Diego from 1955 until 1970, when he began his service as a judge in the United States District Court for the Southern District of California, serving until his appointment to the Ninth Circuit in 1972.

Judge Wallace maintains his chambers in San Diego, California.

SENIOR JUDGE MARY M. SCHROEDER

President Carter nominated Judge Schroeder to the Ninth Circuit on May 3, 1979, and the Senate confirmed her on September 25, 1979. Judge Schroeder served as Chief Judge of the Ninth Circuit from 2000 to 2007. She was the Ninth Circuit's first female chief judge. She assumed senior status on December 31, 2011. Judge Schroeder received her B.A. from Swarthmore College in 1962 and her J.D. from the University of Chicago Law School in 1965, where she was one of only six women in her law school class.

Judge Schroeder practiced as a trial attorney in the Civil Division of the United States Department of Justice from 1965 to 1969. She clerked for Arizona Supreme Court Justice Jesse A. Udall from 1969 to 1970. Judge Schroeder entered the private sector in 1971, working for Lewis and Roca in Phoenix, Arizona until 1975. As a lawyer in Arizona, she chaired the committee that drafted and secured passage of Arizona's first civil rights law. From 1975 to 1979, Judge Schroeder served on the Arizona Court of Appeals. Judge Schroeder also served as visiting instructor at the Arizona State University Law School from 1975 to 1976 and in 1978, and as a lecturer at Duke University in 1995.

Judge Schroeder maintains her chambers in Phoenix, Arizona.

SENIOR JUDGE JEROME FARRIS

President Carter nominated Judge Farris to the Ninth Circuit on July 12, 1979, and the Senate confirmed him on September 26, 1979. Judge Farris assumed senior status on March 4, 1995. Judge Farris received his B.S. from Morehouse College in 1951, his M.S.W. from Atlanta University in 1955, and his J.D. from the University of Washington in 1958.

Judge Farris practiced in the private sector in Seattle from 1958 to 1969. Prior to his appointment to the Ninth Circuit, Judge Farris was a Judge for the Washington State Court of Appeals from 1969 to 1979.

Judge Farris maintains his chambers in Seattle, Washington.

SENIOR JUDGE DOROTHY W. NELSON

President Carter nominated Judge Nelson to the Ninth Circuit on September 28, 1979, and the Senate confirmed her on December 19, 1979. Judge Nelson assumed senior status on January 1, 1995. She received her A.B. in 1950 from the University of California, Los Angeles and her J.D. in 1953 from the University of California, Los Angeles, School of Law. In 1956, she received an LL.M. from the University of Southern California Law School.

Judge Nelson began her career at the University of Southern California Law School as a Research Associate Fellow. During this time, she also practiced in the private sector from 1954 to 1957. She continued to work for the University from 1957 to 1980, as an Instructor from 1957 to 1958, Assistant Professor from 1958 to 1961, Associate Professor from 1961 to 1967, Professor from 1967 to 1980, Associate Dean from 1965 to 1967, and Dean from 1967 to 1980. Since 1980, Judge Nelson has been an Adjunct Professor for the University.

Judge Nelson maintains her chambers in Pasadena, California.

SENIOR JUDGE WILLIAM C. CANBY, JR.

President Carter nominated Judge Canby to the Ninth Circuit on April 2, 1980, and the Senate confirmed him on May 21, 1980. On May 23, 1996, Judge Canby assumed senior status. After graduating Phi Beta Kappa with a B.A. from Yale University in 1953, Judge Canby received his LL.B. from the University of Minnesota Law School in 1956.

Judge Canby was a Lieutenant in the JAG Corps of the United States Air Force from 1956 to 1958. Judge Canby served as clerk to Justice Charles

Whittaker of the United States Supreme Court from 1958 to 1959. He then joined Oppenheimer, Hodgson, Brown, Beer and Wolf in St. Paul, Minnesota, where he practiced until 1962. From 1962 to 1964, Judge Canby worked as the Associate Director and then Deputy Director for the Peace Corps in Ethiopia. Judge Canby then served as the Director for the Peace Corps in Uganda from 1964 to 1966. In 1966, he served as Special Assistant to United States Senator Walter Mondale. Judge Canby also taught as a Professor of Law at Arizona State University from 1967 to 1980, and as a Fulbright Professor at Makerere University in Kampala, Uganda, from 1970 to 1971.

Judge Canby maintains his chambers in Phoenix, Arizona.

JUDGE DIARMUID F. O'SCANNLAIN

President Reagan nominated Judge O'Scannlain to the Ninth Circuit on August 11, 1986, and the Senate confirmed him on September 25, 1986. Judge O'Scannlain received his B.A. from St. John's University in 1957, his J.D. from Harvard Law School in 1963, and his LL.M. from the University of Virginia School of Law in 1992.

Prior to his appointment to the appellate bench, Judge O'Scannlain served in the United States Army Reserve, Judge Advocate General Corps, from 1955 to 1978. He was a tax attorney for Standard Oil Company of New Jersey and New York City from 1963 to 1965 and maintained a private practice in Portland, Oregon from 1965 to 1969 and 1975 to 1986. Judge O'Scannlain also served as Deputy Attorney General for the Oregon Department of Justice from 1969 to 1971, Commissioner of the Public Utility Commission of Oregon from 1971 to 1973, and Director of the Oregon State Department of Environmental Quality from 1973 to 1974. He was a Consultant for the Office of the President-Elect of the United States from 1980 to 1981, Team Leader for the President's Private Sector Survey on Cost Control ("Grace Commission") from 1982 to 1983, and the Chairman of the Advisory Panel to the United States Secretary of Energy from 1983 to 1985.

Judge O'Scannlain maintains his chambers in Portland, Oregon.

SENIOR JUDGE EDWARD LEAVY

President Reagan nominated Judge Leavy to the Ninth Circuit on February 2, 1987, and the Senate confirmed him on March 20, 1987. He assumed senior status on May 19, 1997. Judge Leavy received his A.B.

from the University of Portland in 1950, and his LL.B. from University of Notre Dame Law School in 1953.

Judge Leavy briefly entered private practice upon finishing law school and then became Deputy District Attorney for Lane County, Oregon from 1954 to 1957. He served as a Judge for the District Court of Lane County from 1957 to 1961, Judge for the Circuit Court of Lane County from 1961 to 1976, and Justice Pro Tempore of the Oregon Supreme Court in 1974. From 1976 to 1984, Judge Leavy served as a Magistrate Judge in the United States District Court for the District of Oregon. In 1984, he was appointed as an Article III judge in the same court, where he served until his appointment to the Ninth Circuit.

Judge Leavy maintains his chambers in Portland, Oregon.

SENIOR JUDGE STEPHEN S. TROTT

President Reagan nominated Judge Trott to the Ninth Circuit on August 7, 1987 and the Senate confirmed him on March 24, 1988. He assumed senior status on December 31, 2004. He received his B.A. from Wesleyan University in 1962, and his LL.B. from Harvard Law School in 1965.

Judge Trott worked at the Los Angeles County District Attorney's Office from 1966 to 1981, where he was chief from 1975 to 1979. From 1981 to 1983, Judge Trott served as U.S. Attorney for the Central District of California. From 1983 to 1986, he served as Assistant Attorney General at the United States Department of Justice's Criminal Division. He became Associate Attorney General in 1986, where he served until appointed to the Ninth Circuit.

Judge Trott maintains his chambers in Boise, Idaho.

SENIOR JUDGE FERDINAND F. FERNANDEZ

President George H.W. Bush nominated Judge Fernandez to the Ninth Circuit on February 28, 1989, and the Senate confirmed him on May 18, 1989. Judge Fernandez assumed senior status on June 1, 2002. He received both his B.S., in 1958, and his J.D., in 1962, from the University of Southern California. Judge Fernandez obtained an LL.M. from Harvard Law School in 1963.

Judge Fernandez clerked for Judge William M. Byrne of the United States District Court for the Central District in California from 1963 to 1964. He then entered private practice from 1964 to 1980. From 1980 to

1985, Judge Fernandez served as a Judge for the San Bernardino Superior Court. Prior to his appointment to the Ninth Circuit, he was a United States District Court Judge in the Central District of California from 1985 to 1989.

Judge Fernandez maintains his chambers in Pasadena, California.

SENIOR JUDGE ANDREW J. KLEINFELD

President George H.W. Bush nominated Judge Kleinfeld to the Ninth Circuit on May 23, 1991, and the Senate confirmed him on September 12, 1991. He assumed senior status on June 12, 2010. Judge Kleinfeld received his B.A. from Wesleyan University in 1966 and his J.D. from Harvard Law School in 1969.

After law school, Judge Kleinfeld was a law clerk for Alaska Supreme Court Justice J. A. Rabinowitz from 1969 to 1971. He then served as Magistrate Judge in the United States District Court for the District of Alaska from 1971 to 1974. At this time, he also maintained a private practice in Fairbanks, Alaska from 1971 to 1986. In 1986, Judge Kleinfeld was appointed as an Article III Judge in the United States District Court, where he served until his nomination to the Ninth Circuit.

Judge Kleinfeld maintains his chambers in Fairbanks, Alaska.

SENIOR JUDGE MICHAEL DALY HAWKINS

President Clinton nominated Judge Hawkins to the Ninth Circuit on July 13, 1994, and the Senate confirmed him on September 14, 1994. He assumed senior status on February 12, 2010. Judge Hawkins received both his B.A., in 1967, and his J.D., in 1970, from Arizona State University. He received an LL.M. from the University of Virginia School of Law in 1998.

Judge Hawkins served in the United States Marine Corps as a Special Court Martial military judge from 1970 to 1973, attaining the rank of Captain. He practiced in the private sector from 1973 to 1976. He then served as U.S. Attorney for the District of Arizona from 1977 to 1980, after which he returned to the private sector as a partner at Daughton Hawkins Brockelman Guinan and Patterson, until his appointment to the Ninth Circuit. Judge Hawkins also served as Special Prosecutor for the Navajo Nation from 1985 to 1989.

Judge Hawkins maintains his chambers in Phoenix, Arizona.

SENIOR JUDGE A. WALLACE TASHIMA

President Clinton nominated Judge Tashima to the Ninth Circuit on April 6, 1995, and the Senate confirmed him on January 2, 1996. He assumed senior status on June 30, 2004. He received his B.A. from the University of California, Los Angeles in 1958, and his LL.B. from Harvard Law School in 1961.

Judge Tashima served as a Sergeant in the United States Marine Corps in Korea from 1953 to 1956. After law school, he served as Deputy State Attorney General for California from 1961 to 1967. He then worked as an attorney for Spreckels Sugar Division of Amstar Corporation from 1968 to 1972 and became General Attorney and Vice President of Amstar Corporation from 1972 to 1977. Judge Tashima practiced law in the Los Angeles office of Morrison and Foerster from 1977 to 1980. Prior to his appointment to the Ninth Circuit, Judge Tashima served as a judge in the United States District Court for the Central District of California from 1980 to 1996.

Judge Tashima maintains his chambers in Pasadena, California.

JUDGE BARRY G. SILVERMAN

President Clinton nominated Judge Silverman to the Ninth Circuit on November 8, 1997, and the Senate confirmed him on January 28, 1998. Judge Silverman received his B.A. in 1973 from Arizona State University and his J.D. in 1976 from Arizona State University College of Law.

Judge Silverman was the Assistant City Prosecutor in Phoenix, Arizona from 1976 to 1977, Deputy County Attorney for Maricopa County from 1977 to 1979, and Maricopa County Superior Court Commissioner from 1979 to 1984. Additionally, he served as a Superior Court Judge in Arizona from 1984 to 1995. From 1995 to 1998, he was a Magistrate Judge in the United States District Court for the District of Arizona.

Judge Silverman maintains his chambers in Phoenix, Arizona.

JUDGE SUSAN P. GRABER

President Clinton nominated Judge Graber to the Ninth Circuit on July 30, 1997, and the Senate confirmed her on March 17, 1998. Judge Graber received her B.A. from Wellesley College in 1969, and her J.D. from Yale Law School in 1972.

After graduating law school, Judge Graber worked as an Assistant Attorney General in the New Mexico Bureau of Revenue from 1972 to 1974. For the next fourteen years, she practiced in the private sector. In 1986, she was awarded the Founders Award from Pro Bono Service for the Northwest Women's Law Center. She served as the Presiding Judge of Department 3 at the Oregon Court of Appeals from 1988 to 1990 and as an Associate Justice on the Oregon Supreme Court from 1990 until her appointment to the Ninth Circuit.

Judge Graber maintains her chambers in Portland, Oregon.

JUDGE M. MARGARET MCKEOWN

President Clinton nominated Judge McKeown to the Ninth Circuit on January 7, 1997, and the Senate confirmed her on March 27, 1998. Judge McKeown received her B.A. from the University of Wyoming in 1972 and her J.D. from Georgetown University Law Center in 1975.

Judge McKeown maintained a private law practice in Seattle, Washington from 1975 to 1998. During that time, she was selected to be a White House Fellow, serving as a Special Assistant to the Secretary of the Interior, Cecil Andrus, from 1980 to 1981.

Judge McKeown maintains her chambers in San Diego, California.

JUDGE KIM MCLANE WARDLAW

President Clinton nominated Judge Wardlaw to the Ninth Circuit on January 27, 1998, and the Senate confirmed her on July 31, 1998. She received her A.B. from the University of California, Los Angeles in 1976, and a J.D. in 1979 from the University of California, Los Angeles, School of Law.

After law school, she clerked for Judge William P. Gray of the United States District Court for the Central District of California until 1980. She worked with the firm O'Melveny and Myers in Pasadena, California from 1980 to 1996. Judge Wardlaw was a member of Justice Team I of the Clinton-Gore Presidential Transition Team from 1992 to 1993 and a member of Mayoral Transition Committee for Los Angeles Mayor-elect Richard Riordan in 1993. From 1995 until her appointment to the Ninth Circuit, she served as an Article III Judge in the United States District Court for the Central District of California.

Judge Wardlaw maintains her chambers in Pasadena, California.

JUDGE WILLIAM A. FLETCHER

President Clinton nominated Judge William Fletcher to the Ninth Circuit on January 7, 1997. He was confirmed by the Senate on October 8, 1998. Judge Fletcher received two B.A. degrees, one from Harvard College in 1968, and one from Oxford University in 1970. He received his J.D. from Yale Law School in 1975.

Prior to receiving his J.D., Judge Fletcher served as a Lieutenant in the United States Navy from 1970 to 1972. Judge Fletcher clerked for Judge Stanley Weigel of the United States District Court for the Northern District of California from 1975 to 1976 and for United States Supreme Court Justice William J. Brennan, Jr. from 1976 to 1977. Judge Fletcher was a Professor of Law at the University of California, Berkeley, Boalt Hall School of Law from 1977 to 1998. Judge Fletcher is the son of Senior Judge Betty Fletcher, who passed away in 2012.

Judge Fletcher maintains his chambers in San Francisco, California.

SENIOR JUDGE RAYMOND C. FISHER

President Clinton nominated Judge Fisher to the Ninth Circuit on March 15, 1999, and the Senate confirmed him on October 5, 1999. Judge Fisher received his B.A. from the University of California, Santa Barbara in 1961, and his LL.B. from Stanford Law School in 1966, where he was President of the Stanford Law Review.

After law school, Judge Fisher clerked for Circuit Judge J. Skelly Wright of the United States Court of Appeals for the District of Columbia Circuit from 1966 to 1967 and for United States Supreme Court Jus- tice William J. Brennan, Jr. from 1967 to 1968. Judge Fisher entered private practice from 1968 to 1997, which included working at Tuttle and Taylor in Los Angeles from 1968 to 1988. During this time, he also served as Deputy General Counsel for the Independent Commission on the Los Angeles Police Department in 1990 and as president of the Los Angeles Police Commission from 1995 to 1997. Prior to his appointment to the Ninth Circuit, Judge Fisher served as the Associate Attorney General from 1997 to 1999, under President Clinton.

Judge Fisher maintains his chambers in Pasadena, California.

JUDGE RONALD M. GOULD

President Clinton nominated Judge Gould to the Ninth Circuit on January 26, 1999, and the Senate confirmed him on November 17, 1999. Judge

Gould received his B.S. from the University of Pennsylvania in 1968, and his J.D. from the University of Michigan Law School in 1973.

After graduating law school, Judge Gould clerked for Judge Wade McCree of the United States Court of Appeals for the Sixth Circuit until 1974 and for United States Supreme Court Justice Potter Stewart from 1974 to 1975. From 1975 until 1999, Judge Gould practiced law with Perkins Coie in Seattle, Washington. Judge Gould was also an Adjunct Professor of Law at the University of Washington Law School from 1986 to 1989.

Judge Gould maintains his chambers in Seattle, Washington.

JUDGE RICHARD A. PAEZ

President Clinton nominated Judge Paez to the Ninth Circuit on January 26, 1999, and the Senate confirmed him on March 9, 2000. Judge Paez received his B.A. from Brigham Young University in 1969, and his J.D. from the University of California, Berkeley, Boalt Hall School of Law in 1972.

After law school, Judge Paez spent several years in the public interest sector. He held staff attorney positions at California Rural Legal Assistance from 1972 to 1974, and the Western Center on Law and Poverty in Los Angeles from 1974 to 1976. At the Legal Aid Foundation of Los Angeles, he served as Senior Counsel from 1976 to 1978, Director of Litigation from 1978 to 1979, Deputy Director of Litigation from 1979 to 1980, and Acting Executive Director and Director of Litigation from 1980 to 1981. In 1981, he was appointed to the Los Angeles Municipal Court. In 1994, President Clinton appointed him to the United States District Court for the Central District of California, where he served until his appointment to the Ninth Circuit.

Judge Paez maintains his chambers in Pasadena, California.

JUDGE MARSHA S. BERZON

President Clinton nominated Judge Berzon to the Ninth Circuit on January 26, 1999, and the Senate confirmed her on March 9, 2000. She received her B.A. from Radcliffe College in 1966, and her J.D. from the University of California, Berkeley, Boalt Hall School of Law in 1973.

After law school, Judge Berzon clerked for Judge James R. Browning of the United States Court of Appeals for the Ninth Circuit until 1974, and for United States Supreme Court Justice William J. Brennan, Jr., from

1974 to 1975. She practiced in the private sector in Washington D.C. from 1975 to 1977, and at San Francisco's Altshuler Berzon LLP from 1978 until her appointment to the Ninth Circuit.

Judge Berzon maintains her chambers in San Francisco, California.

JUDGE RICHARD C. TALLMAN

President Clinton nominated Judge Tallman to the Ninth Circuit on October 20, 1999 and the Senate confirmed him on May 24, 2000. Judge Tallman received his B.Sc. from the University of Santa Clara in 1975, and his J.D. from Northwestern University School of Law in 1978.

After law school, Judge Tallman clerked for Judge Morell E. Sharp of the United States District Court for the Western District of Washington until 1979. Judge Tallman then worked in the criminal division of the United States Department of Justice as a trial attorney from 1979 to 1980, and served as Assistant U.S. Attorney for the Western District of Washington from 1980 to 1983. After entering private practice in 1983, he joined Bogle and Gates as chairman of its white-collar criminal defense practice group in 1990. Judge Tallman co-founded Tallman and Severin in 1999, which specializes in white-collar criminal defense and complex federal commercial litigation.

Judge Tallman maintains his chambers in Seattle, Washington.

JUDGE JOHNNIE B. RAWLINSON

President Clinton nominated Judge Rawlinson to the Ninth Circuit on February 22, 2000, and the Senate confirmed her on July 21, 2000. With this appointment, Judge Rawlinson became the first African-American woman to serve on the Ninth Circuit Court of Appeals. Judge Rawlinson received her B.S. from North Carolina Agricultural and Technical State University in 1974, and her J.D. from the University of the Pacific, McGeorge School of Law in 1979.

Judge Rawlinson entered private practice in Las Vegas, Nevada from 1979 to 1980. She then served as a Staff Attorney for Nevada Legal Services in 1980. Prior to taking the bench, Judge Rawlinson spent eighteen years with the Office of the District Attorney in Las Vegas, Nevada. First, she served as Deputy District Attorney from 1980 to 1989, then as Chief Deputy District Attorney from 1989 to 1995, and finally as Assistant District Attorney from 1995 to 1998. From 1998 until her appoint-

ment to the Ninth Circuit, Judge Rawlinson was a United States District Court Judge for the District of Nevada.

Judge Rawlinson maintains her chambers in Las Vegas, Nevada.

JUDGE RICHARD R. CLIFTON

President George W. Bush nominated Judge Clifton to the Ninth Circuit on September 4, 2001, and the Senate confirmed him on July 18, 2002. Judge Clifton received his A.B. from Princeton University in 1972, and his J.D. from Yale Law School in 1975.

After law school, Judge Clifton clerked for Judge Herbert Y.C. Choy of the United States Court of Appeals for the Ninth Circuit from 1975 to 1976. Judge Clifton maintained a private practice in Honolulu, Hawaii, from 1977 to 2002, where he also served as an Adjunct Professor at the University of Hawaii, Richardson School of Law, from 1978 to 1980 and again from 1983 to 1989.

Judge Clifton maintains his chambers in Honolulu, Hawaii.

JUDGE JAY S. BYBEE

President George W. Bush nominated Judge Bybee to the Ninth Circuit on January 7, 2003, and the Senate confirmed him on March 13, 2003. Judge Bybee received his B.A. in 1977 from Brigham Young University and his J.D. in 1980 from Brigham Young University, J. Reuben Clark Law School.

After law school, Judge Bybee clerked for Judge Donald Russell of the United States Court of Appeals for the Fourth Circuit until 1981. He went into private practice in Washington D.C. from 1981 to 1984. Judge Bybee served as an attorney for the Office of Legal Policy, U.S. Department of Justice from 1984 to 1986, attorney for the Civil Division, U.S. Department of Justice from 1986 to 1989, associate counsel to the President from 1989 to 1991, and served as Assistant Attorney General of the Office of Legal Counsel, U.S. Department of Justice prior to his appointment to the federal bench. Judge Bybee also helped found the William S. Boyd School of Law at the University of Nevada, Las Vegas, where he was a Professor of Law from 1999 to 2000.

Judge Bybee maintains his chambers in Las Vegas, Nevada.

JUDGE CONSUELO M. CALLAHAN

President George W. Bush nominated Judge Callahan to the Ninth Circuit on February 12, 2003, and the Senate confirmed her on May 22, 2003. She received her A.B. from Stanford University in 1972, her J.D. from the University of the Pacific, McGeorge School of Law in 1975, and her LL.M. from the University of Virginia School of Law in 2004.

Judge Callahan served as Deputy City Attorney in Stockton from 1975 to 1976. From 1976 to 1986, Judge Callahan first held the position of Deputy District Attorney and then Supervisory District Attorney in San Joaquin County, California. In 1992, Judge Callahan became the first Hispanic woman to serve on the San Joaquin County Superior Court. She was elevated to the California Court of Appeal for the Third District in 1996, where she served until her appointment to the Ninth Circuit in 2003. Judge Callahan became the second of only two Hispanic members of the Ninth Circuit, joining Judge Kim McLane Wardlaw.

Judge Callahan maintains her chambers in Sacramento, California.

JUDGE CARLOS T. BEA

President George W. Bush nominated Judge Bea to the Ninth Circuit on April 11, 2003, and the Senate confirmed him on September 29, 2003. Born in San Sebastian, Spain, Judge Bea's parents immigrated to Cuba. Judge Bea received his B.A. in 1956 from Stanford University and his J.D. in 1958 from Stanford Law School.

Judge Bea spent more than thirty years in private practice before his appointment to the San Francisco Superior Court in 1990, where he sat until his appointment to the federal bench in 2003.

Judge Bea maintains his chambers in San Francisco, California.

JUDGE MILAN D. SMITH, JR.

President George W. Bush nominated Judge Smith to the Ninth Circuit on February 14, 2006, and the Senate confirmed him on May 16, 2006. Judge Smith received his B.A. from Brigham Young University in 1966 and his J.D. from the University of Chicago Law School in 1969.

Judge Smith worked in private practice in Los Angeles, California from 1969 to 2006. He served as President of the Los Angeles State Building Authority from 1983 to 1991 and General Counsel from 1991 to 2006.

Judge Smith also served as Vice Chairman of the California Fair Employment and Housing Commission from 1987 to 1991.

Judge Smith maintains his chambers in El Segundo, California.

JUDGE SANDRA S. IKUTA

President George W. Bush nominated Judge Ikuta to the Ninth Circuit on February 8, 2006, and the Senate confirmed her on June 19, 2006. Judge Ikuta received her A.B. from the University of California, Berkeley in 1976, her M.S. from Columbia University in 1978, and her J.D. from the University of California, Los Angeles, School of Law in 1988.

After graduating law school, Judge Ikuta clerked for Judge Alex Kozinski from 1988 to 1989 and for United States Supreme Court Justice Sandra Day O'Connor from 1989 to 1990. Judge Ikuta worked in private practice in California at O'Melveny and Myers from 1990 to 2004, and served as Deputy Secretary and General Counsel for the California Resources Agency from 2004 to 2006.

Judge Ikuta maintains her chambers in Pasadena, California.

JUDGE N. RANDY SMITH

President George W. Bush nominated Judge Smith on January 16, 2007, and the Senate confirmed him on February 15, 2007. He received his B.S. in 1974 from Brigham Young University, and his J.D. in 1977 from Brigham Young University, Reuben Clark School of Law.

Judge Smith was first an Associate and then Assistant General Counsel for J.R. Simplot Company from 1977 to 1981, and worked in private practice in Pocatello, Idaho from 1982 to 1995. He previously taught

Accounting classes at Boise State University and Brigham Young University, and currently serves as an Adjunct Professor in Management and Political Science at Idaho State University. Prior to his appointment to the Ninth Circuit, he served as District Judge for the Sixth Judicial District of Idaho from 1995 to 2007.

Judge Smith maintains his chambers in Pocatello, Idaho.

JUDGE MARY H. MURGUIA

President Obama nominated Judge Murguia to the Ninth Circuit on March 25, 2010, and the Senate confirmed her on December 22, 2010.

Judge Murguia received her B.A. and B.S. from the University of Kansas in 1982, and her J.D. from the University of Kansas Law School in 1985.

Judge Murguia served as an Assistant District Attorney for the Wyandotte County District Attorney's Office from 1985 to 1990. In 1990, she served as an Assistant U.S. Attorney for the District of Arizona until 2000. While at the U.S. Attorney's Office, Judge Murguia worked in the Executive Office for U.S. Attorneys from 1998 to 2000, serving as Counsel to the Director's Staff from 1998 to 1999, Principal Deputy Director in 1999, and Director from 1999 to 2000. Before her appointment to the Ninth Circuit, President Clinton appointed Judge Murguia to the United States District Court for the District of Arizona, where she served from 2000 to 2010.

Judge Murguia maintains her office in Phoenix, Arizona.

JUDGE MORGAN B. CHRISTEN

President Obama nominated Judge Christen to the Ninth Circuit on May 18, 2011, and the Senate confirmed her on December 15, 2011. Judge Christen received her B.A. from the University of Washington in 1983, and her J.D. from Golden Gate University School of Law in 1986.

After law school, Judge Christen clerked for Judge Brian Shortell of the Alaska Superior Court until 1987. Judge Christen went into private practice in Anchorage, Alaska from 1987 to 2002. From 2002 to 2009, she served as a Judge for the Alaska Superior Court, acting as Presiding Judge from 2005 to 2009. From 2009 to 2011, Judge Christen served as a Justice for the Alaska Supreme Court.

Judge Christen maintains her chambers in Anchorage, Alaska.

JUDGE JACQUELINE H. NGUYEN

President Obama nominated Judge Nguyen to a new seat on the Ninth Circuit on September 22, 2011, and the Senate confirmed her on May 7, 2012. Judge Nguyen received her A.B. from Occidental College in 1987, and her J.D. from the University of California, Los Angeles, School of Law in 1991.

After law school, Judge Nguyen went into private practice until 1994. She then became an Assistant U.S. Attorney for the Central District of California from 1995 to 2002, where she served as deputy chief in the General Crimes Division from 2000 to 2002. In 2002, she became a Judge for the Superior Court of California until her appointment to the

United States District Court for the Central District of California in 2009. She served as an Article III Judge until her appointment to the Ninth Circuit in 2012.

Judge Nguyen maintains her chambers in Pasadena, California.

JUDGE PAUL J. WATFORD

President Obama nominated Judge Watford to the Ninth Circuit on October 17, 2011, and the Senate confirmed him on May 21, 2012. Judge Watford received his B.A. from the University of California, Berkeley in 1989 and his J.D. from the University of California, Los Angeles, School of Law in 1994.

After law school, Judge Watford clerked for Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit from 1994 to 1995 and for United States Supreme Court Justice Ruth Bader Ginsburg from 1995 to 1996. Judge Watford entered private practice in Los Angeles, California from 1996 to 1997, and again from 2000 to 2012. From 1997 to 2000, Judge Watford served as an Assistant U.S. Attorney for the Central District of California. Judge Watford also taught at the University of Southern California, Gould School of Law as a Lecturer-in-Law from 2007 to 2009.

Judge Watford maintains his chambers in Pasadena, California.

JUDGE ANDREW D. HURWITZ

President Obama nominated Judge Hurwitz to the Ninth Circuit on November 2, 2011, and the Senate confirmed him on June 12, 2012. Judge Hurwitz received his A.B. from Princeton University in 1968, and his J.D. from Yale Law School in 1972.

After his undergraduate studies, Judge Hurwitz served in the Connecticut National Guard from 1969 to 1973, and then in the United States Army Reserve from 1973 to 1975. Upon graduating law school, Judge Hurwitz clerked for Judge Jon O. Newman of the United States District Court for the District of Connecticut in 1972, for Judge J. Joseph Smith of the United States Court of Appeals for the Second Circuit from 1972 to 1973, and for United States Supreme Court Justice Potter Stewart from 1973 to 1974. Judge Hurwitz entered private practice from 1974 to 1980, and again from 1983 to 2003. During a hiatus from private practice, Judge Hurwitz served as Chief of Staff to Governor Bruce Babbitt from 1980 to 1983. Judge Hurwitz is a faculty member for Arizona State Uni-

versity, Sandra Day O'Connor College of Law. In 2003, Judge Hurwitz became a Justice for the Arizona Supreme Court until his appointment to the Ninth Circuit. He served as Vice Chief Justice from 2009 to 2012.

Judge Hurwitz maintains his chambers in Phoenix, Arizona.

JUDGE JOHN B. OWENS

President Obama nominated Judge Owens to the Ninth Circuit on January 6, 2014, and the Senate confirmed him on March 31, 2014. Judge Owens received his B.A. from the University of California, Berkeley in 1993, and his J.D. from Stanford Law School in 1996.

After law school, Judge Owens clerked for Judge J. Clifford Wallace of the United States Court of Appeals for the Ninth Circuit until 1997, and for United States Supreme Court Justice Ruth Bader Ginsburg from 1997 to 1998. From 1998 to 1999, Judge Owens held the trial attorney position at the Office of Consumer Litigation of the United States Department of Justice, and went into private practice from 2000 to 2001. Judge Owens then held the positions of Assistant U.S. Attorney, Deputy Chief, and Chief in the Central and Southern Districts of California until 2011. From 2012 until his appointment to the Ninth Circuit, Judge Owens was in private practice at Munger, Tolles and Olson.

Judge Owens maintains his chambers in San Diego, California.

JUDGE MICHELLE T. FRIEDLAND

President Obama nominated Judge Friedland to the Ninth Circuit on January 6, 2014, and the Senate confirmed her on April 28, 2014. Judge Friedland received her B.S. from Stanford University in 1995, and her J.D. from Stanford Law School in 2000.

After graduating law school, Judge Friedland clerked for Judge David Tatel of the United States Court of Appeals for the District of Columbia Circuit until 2001, and for United States Supreme Court Justice Sandra Day O'Connor from 2001 to 2002. From 2002 to 2004, Judge Friedland was a Lecturer at Stanford Law School, and was in private practice at Munger, Tolles and Olson from 2004 until her appointment to the Ninth Circuit.

Judge Friedland maintains her chambers in San Jose, California.

JUDGE MARK J. BENNETT

President Trump nominated Judge Bennett to the Ninth Circuit on February 15, 2018, and the Senate confirmed him on July 10, 2018. Judge Bennett received his B.A. from Union College in 1976, and his J.D. from Cornell Law School in 1979.

After graduating from law school, Judge Bennett clerked for Judge Samuel P. King of the United States District Court for the District of Hawaii. He then became an Assistant U.S. Attorney for the District of Columbia from 1980 to 1982, and for the District of Hawaii from 1982 to 1989. Thereafter, Judge Bennett went into private practice as a partner at McCorriston, Miller, Mukai, MacKinnon LLP. While continuing his work in private practice, Judge Bennett also taught as an adjunct professor of law at William S. Richardson School of Law, University of Hawaii. From 1997 to 1998, he served as a Special Prosecuting Attorney for the City and County of Honolulu, Hawaii and then went on to become the Special Deputy Attorney General for the State of Hawaii. In 2003, he became the Attorney General for the State of Hawaii and in 2015, he served as the Special Deputy Corporation Counsel for the City and County of Honolulu, Hawaii until his appointment to the Ninth Circuit.

Judge Bennett maintains his chambers in Honolulu, Hawaii.

JUDGE RYAN D. NELSON

President Trump nominated Judge Nelson on May 15, 2018, and the Senate confirmed him on October 11, 2018. Judge Nelson received his B.A. from Brigham Young University in 1996, and his J.D. from Brigham Young University, J. Reuben Clark Law School in 1999.

After graduating law school, Judge Nelson clerked for Judge Karen LeCraft Henderson of the United States Court of Appeals for the District of Columbia until 2000. He then clerked for Judges Charles N. Brower and Richard M. Mosk of the Iran-United States Claims Tribunal in The Hague. In 2001, Judge Nelson went into private practice in Washington, D.C. at Sidley Austin. From 2006 to 2008, he served as Deputy Assistant Attorney General for the Environment and Natural Resource Division of the U.S. Department of Justice. Thereafter, he served as Deputy General Counsel for the Office and Management of Budget for the Executive Office of the President. Judge Bennett has also served as Special Counsel for the U.S. Senate Committee on the Judiciary. From 2009 until his appointment to the Ninth Circuit in 2018, Judge Bennett was General Counsel for Melaleuca, Inc. in Idaho Falls, Idaho.

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Judge Nelson maintains his chambers in Idaho Falls, Idaho.

JUDGE ERIC D. MILLER

President Trump nominated Judge Miller to the Ninth Circuit on January 23, 2019, and the Senate confirmed him on February 26, 2019. Judge Miller received his A.B. from Harvard University in 1996, and his J.D. from the University of Chicago School of Law in 1999.

After graduating from law school, Judge Miller clerked for Judge Laurence H. Silberman of the United States Court of Appeals for the District of Columbia until 2000. He then clerked for United States Supreme Court Justice Clarence Thomas from 2000 through 2001. Judge Miller then went on to serve as Appellate Staff Attorney, and later as Attorney-Advisor, at the United States Department of Justice. From 2006 to 2007, Judge Miller joined the Federal Communications Commission as Deputy General Counsel. For the five years following his time on the Federal Communications Commission, Judge Miller served as Assistant to the Solicitor General at the Department of Justice, after which he entered into private practice. In 2014 and 2017, Judge Miller also lectured part-time at the University of Washington School of Law.

JUDGE BRIDGET S. BADE

President Trump nominated Judge Bade on January 23, 2019, and the Senate confirmed the nomination on March 26, 2019. Judge Bade received both her B.A., in 1987, and her J.D., in 1990, from Arizona State University.

After graduating law school, Judge Bade clerked for Judge Edith H. Jones of the United States Court of Appeals for the Fifth Circuit, from 1990 to 1991. Judge Bade dedicated the next four years following her clerkship to serving as a Trial Attorney at the United States Department of Justice. From 1995 through 2006, Judge Bade then entered into private practice. Judge Bade also served as Assistant United States Attorney for the District of Arizona, from 2006 through 2012.

JUDGE DANIEL P. COLLINS

President Trump nominated Judge Collins to the Ninth Circuit on February 6, 2019, and the Senate confirmed on May 21, 2019. Judge Collins received his B.A. from Harvard College in 1985, and his J.D. from Stanford Law School in 1988.

From 1988 to 1989, Judge Collins clerked for Judge Dorothy W. Nelson of the United States Court of Appeals for the Ninth Circuit. For the two years following his clerkship, Judge Collins then went on to serve as Attorney-Advisor at the United States Department of Justice. Judge Collins later served an additional clerkship, this time in the chambers of United States Supreme Court Justice Antonin Scalia from 1991 though 1992. After completing his second clerkship, Judge Collins worked from 1992 to 1996 as Assistant United States Attorney for the Central District of California. From 1996 through 2001, and again from 2003 though 2019, Judge Collins maintained a career in private practice. In 1997, 1998, 2017, and 2018, Judge Collins also taught as an adjunct professor at Loyola Law School. From 2001 to 2003, he served as Associate Deputy Attorney General at the United States Department of Justice.

JUDGE KENNETH KIYUL LEE

President Trump nominated Judge Lee to the Ninth Circuit on February 6, 2019, and the Senate confirmed the nomination on May 15, 2019. Judge Lee received his B.A. from Cornell University in 1997, and his J.D. from Harvard Law School in 2000.

After graduating from law school, Judge Lee clerked for Judge Emilio M. Garza of the United States Court of Appeals for the Fifth Circuit, from 2000 to 2001. Judge Lee thereafter entered into private practice until 2006. During his time in private practice, Judge Lee also served as Special Counsel to the United States Senate Committee on the Judiciary in 2005. From 2006 to 2009, Judge Lee served as Associate Counsel and Special Assistant to President George W. Bush, after which he re-entered private practice until 2019. Judge Lee also taught at Pepperdine Law School as an adjunct faculty member from 2010 to 2011.

JUDGE DANIEL A. BRESS

President Trump nominated Judge Bress on February 6, 2019, and the Senate confirmed the nomination on July 9, 2019. Judge Bress received his A.B. from Harvard College in 2001, and received his J.D. from the University of Virginia School of Law in 2005.

After graduating law school, Judge Bress served two clerkships. His first clerkship was for Judge J. Harvie Wilkinson III of the United States Court of Appeals for the Fourth Circuit, from 2005 to 2006. He served his second clerkship in the chambers of United States Supreme Court Justice Antonin Scalia, from 2006 to 2007. After completing his clerk-

ships, Judge Bress entered and remained in private practice until 2019. While working in private practice, Judge Bress also taught as an adjunct professor at the University of Virginia School of Law, from 2009 through 2011, and at Catholic University of America's Columbus School of Law, in 2016 and 2019.

JUDGE DANIELLE J. HUNSAKER

President Trump nominated Judge Hunsaker to the Ninth Circuit on September 19, 2019, and the Senate confirmed on November 6, 2019. Judge Hunsaker received her A.A.S. from Ricks College (now Brigham Young University) in 1996; her B.S. from the University of Idaho in 2001; and her J.D. from the University of Idaho College of Law in 2004.

After earning her J.D., Judge Hunsaker served two consecutive clerkships. Judge Hunsaker first clerked for Judge Paul J. Kelly, Jr. of the United States Court of Appeals for the Tenth Circuit, from 2004 to 2005. She then clerked for Judge Michael W. Mosman of the United States District Court for the District of Oregon, from 2005 through 2007. After completing her clerkships, Judge Hunsaker worked in private practice from 2007 to 2008 and from 2008 to 2017. In 2008, Judge Hunsaker also clerked for Judge Diarmuid F. O'Scannlain of the United States Court of Appeals for the Ninth Circuit. From 2011 through 2016, Judge Hunsaker taught as an adjunct professor at Lewis & Clark Law School. Then, from 2017 to 2019, she served as judge at the Oregon Circuit Court, where she acted as Chief Civil Judge and Presiding Judge in 2019.

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United States v. Cano: The Ninth Circuit Limits Warrantless Searches of Cell Phones at the Border

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CASE SUMMARY

UNITED STATES V. CANO: THE NINTH CIRCUIT LIMITS WARRANTLESS SEARCHES OF CELL PHONES AT THE BORDER

*KATE CHRISTENSEN**

INTRODUCTION

In 1956, the first commercial hard drive could store 3.75 megabytes of data between 50 disks.[1] The operating system weighed over one ton.[2] Today, Apple's iPhone 11 Pro can store up to 512 gigabytes of data on a device that weighs under seven ounces.[3] This means that today an individual can have approximately 140,000 times more data stored on a cell phone in their pocket. With this storage capacity, cell phones can store data containing your favorite songs, texts messages sent between friends, and the call history between you and your grandmother. However, a cell phone may contain more sensitive information, such as an electronic record of your location history, an e-book that indicates your political party affiliation, or private photos sent between you and your significant other.

Individuals crossing the United States border with their cell phones, likely containing both innocuous and sensitive data, may have their cell phones searched by a United States Customs and Border Patrol officer or

* J.D. Candidate, Golden Gate University School of Law, May 2020; B.A. Spanish Language and Literature, University of Utah, Salt Lake City, December 2016. The author would like to express her gratitude the members of the *Golden Gate University Law Review* for their support and her fiancé, Eric R. Bennion, for his encouragement and the many happy years they have shared together.

[1] *1956: First Commercial Hard Disk Drive Shipped*, COMPUTER HISTORY MUSEUM (Sept. 19, 2018), https://www.computerhistory.org/storageengine/first-commercial-hard-disk-drive-shipped/.

[2] *Id.*

[3] *iPhone 11 Pro,* APPLE, INC., https://www.apple.com/iphone-11-pro/specs/ (last visited Oct. 12, 2019).

Homeland Security agent.[4] In *United States v. Cano*, the Ninth Circuit Court of Appeals held that certain limitations apply to searches of cell phones at the border.[5] First, the search must be limited in scope; the search must be conducted to discover digital contraband, not evidence of a future crime.[6] Second, if the search is forensic, meaning the search greatly intrudes upon the privacy of an individual, the search is only valid if the government actor had reasonably believed that the cell phone possessed contraband.[7]

I. BACKGROUND

A. FACTUAL BACKGROUND

On July 25, 2016, Defendant-Appellant Miguel Angel Cano traveled from Tijuana to the San Ysidro Port of Entry to cross the border between the United States and Mexico.[8] A United States Customs and Border Patrol (CBP) officer conducted a routine primary inspection of Cano.[9] Cano informed the officer that Cano lived in Mexico, worked in San Diego, and intended to visit Los Angeles on that particular day.[10] The CBP computer system randomly selected Cano as a candidate for secondary inspection.[11] As part of the secondary inspection, a narcotics-detecting dog alerted a CBP official to the spare tire located on the undercarriage of Cano's truck.[12] The official removed the spare tire and discovered 14 vacuum sealed packages collectively containing 14.03 kilograms of cocaine.[13] Cano was arrested and Cano's cell phone was seized as an administrative procedure associated with the arrest.[14]

CBP officials notified Homeland Security of Cano's arrest.[15] Two Homeland Security agents, Petonak and Medrano, were dispatched to the scene.[16] Petonak manually inspected the contents of Cano's cell phone in search of investigative leads pertinent to the current case and evidence related to transportation of other materials across the border.[17] Petonak

[4] U.S. v. Cano, 934 F.3d 1002, 1012 (9th Cir. 2019).
[5] *Id*. at 1007.
[6] *Id*. at 1013–14.
[7] *Id*. at 1014–16 (9th Cir. 2019).
[8] *Id*. at 1008.
[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] *Id*.
[17] *Id*.

noted that Cano's cell phone contained a robust call log but no text messages.[18]

Petonak interrogated Cano, who waived his *Miranda* right to stay silent.[19] Cano denied knowledge of the cocaine.[20] Cano told Petonak that he had moved from Los Angeles to Tijuana and crossed the border every day for the past three weeks in search of work in San Diego.[21] Cano stated that, on this particular day, he crossed the border to obtain work from a carpet store in Chula Vista.[22] Petonak asked Cano the name and address of the carpet store in Chula Vista, but Cano was unable to provide this information and claimed that he intended to search for the store on Google after crossing the border.[23] Cano explained that he did not have flooring tools on his person or in his truck because his tools were located in Los Angeles and he planned to retrieve them only after he was successful in obtaining work in San Diego.[24] Petonak questioned Cano about the contents of his cell phone.[25] Petonak asked why Cano did not have text messages on his phone and Cano stated that, based on the advice of his cousin, he deleted all of his text messages to avoid potential conflict with Mexican police.[26]

While Petonak questioned Cano, Medrano conducted a second manual search of Cano's cell phone.[27] Medrano recorded some of the phone numbers that appeared on Cano's call log and took photographs of two text messages that Cano received since arriving at the border.[28] Medrano then conducted a forensic examination of Cano's cell phone.[29] Medrano used the computer software program, Cellebrite, which allows an individual to search for and selectively download content from a cell phone.[30] The content can include text messages, contacts, call logs, media, and data related to applications installed on the cell phone.[31] Cellebrite does not access data stored within third-party applications.[32] Medrano presented the findings of the second manual search and the fo-

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[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] *Id*.
[22] *Id*.
[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] *Id*.
[28] *Id*.
[29] *Id*.
[30] *Id*. at 1008-09.
[31] *Id*.
[32] *Id*. at 1009.

rensic search to Petonak.[33] Later, Petonak determined that Cano's call log did not contain records of phone calls to any carpet stores in San Diego.[34]

B. PROCEDURAL BACKGROUND

Cano was indicted for the importation of cocaine, a controlled substance.[35] Before Cano's initial trial, Cano asked the district court to suppress evidence obtained from the warrantless search of his cell phone conducted by agents Petonak and Medrano at the United States-Mexico border.[36] The court denied Cano's request, holding that both manual searches and the forensic search were permissible border searches.[37]

For trial, Cano prepared a defense in which he implicated his cousin, Jose Medina, by claiming that Medina placed the cocaine on Cano's truck without the knowledge or consent of Cano.[38] As evidence, Cano planned to bring evidence that showed Medina had access to the truck because Medina had a key to the truck and Medina had recently driven the truck across the United States-Mexico border.[39] Cano also prepared to present evidence of Medina's past criminal convictions for possession of cocaine, Medina's membership in the Chico-based gang, the Latin Kings, and the Latin Kings' system of cocaine distribution throughout the United States and across the United States-Mexico border.[40]

To gather more evidence to aid in the establishment of the defense, Cano requested that the district court order the Homeland Security Investigations (HSI), the Federal Bureau of Investigation (FBI), and the Drug Enforcement Agency (DEA) to turn over information that shows Medina's involvement in drug trafficking and the presence of the Latin King gang in Southern California.[41] The government argued that Cano was not entitled to information from the FBI and DEA because the information sought was not sufficiently important to Cano's case and these federal agencies were not involved in the matter.[42] The district court approved Cano's request, noting that the HSI can facilitate the dissemination of information from the two federal agencies to Cano.[43] Cano received Me-

[33] *Id*. at 1008-09.
[34] *Id*. at 1009.
[35] *Id*.
[36] *Id*.
[37] *Id*.
[38] *Id*.
[39] *Id*.
[40] *Id*.
[41] *Id*.
[42] *Id*.
[43] *Id*. at 1009-10.

dina's immigration file and Bureau of Prisons records from the HSI.[44] The prosecutor requested access to information from the FBI and DEA.[45] Both agencies denied the prosecutor's request.[46] The lower court, in reconsidering Cano's motion to receive information from the FBI and DEA, held that the prosecutor did not have an obligation to turn over this information because the prosecutor did not have access to potential evidence in the possession of the two federal departments.[47]

The government offered Medina immunity from criminal charges and immigration to the United States in exchange for his cooperation regarding the drug importation scheme.[48] Initially, Medina denied involvement in any drug-related matters, but he later indicated that he would cooperate with the government's efforts because he could assist the government in stopping organized criminal activity on a large scale.[49] The information conveyed between Medina and the government was available to Cano.[50]

At Cano's trial, the government presented the evidence gathered from Cano's cell phone by agents Petonak and Medrano.[51] Cano presented a defense in which he implicated his cousin, Jose Medina.[52] The first trial resulted in a mistrial because there was a hung jury.[53] However, Cano was convicted at the retrial.[54]

II. ANALYSIS

Cano appealed to the Ninth Circuit Court of Appeals, claiming that the evidence obtained from his cell phone should have been suppressed at trial because the warrantless search violated Cano's rights under the Fourth Amendment, the prosecutor's failure to disclose materials from the FBI and DEA violated due process, and the government engaged in prosecutorial misconduct during closing argument.[55] Ultimately, the Ninth Circuit held that the evidence obtained from the warrantless search of Cano's cell phone should have been suppressed at trial but the government did not violate due process by failing to deliver documents from the

[44] *Id*. at 1010.
[45] *Id*.
[46] *Id*.
[47] *Id*.
[48] *Id*. at 1009.
[49] *Id*.
[50] *Id*.
[51] *Id*.
[52] *Id*. at 1009–10.
[53] *Id*. at 1010.
[54] *Id*.
[55] *Id*.

FBI and DEA.[56] The court did not address the question of prosecutorial misconduct.[57] Based on these findings, the court reversed the district court's order denying Cano's motion to suppress evidence obtained from the warrantless searches of his cell phone and vacated Cano's conviction.[58]

A. The Lower Court Erred by Permitting Evidence Obtained from Cano's Cell Phone in Violation of the Fourth Amendment to Be Admitted at Trial

The Ninth Circuit began by quoting the Fourth Amendment of the United States Constitution which states that it is "'[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'"[59] Interpreting this passage and binding precedent, the court explained a search is presumed to be in violation of the Fourth Amendment unless a judicial officer issues a warrant, based on probable cause, that describes the location of the search.[60] However, there are certain searches that can be conducted without a warrant, such as searches that occur at the border that promote the nation's interest in "'examining persons and property crossing into this country.'"[61]

A warrantless search conducted at the border must be conducted to enforce importation laws by seizing "'merchandise which . . . shall have been introduced into the United States in any manner contrary to law.'"[62] A warrantless search at the border cannot be used to generally enforce law.[63] Warrantless, forensic searches of cell phones may only be conducted by a border agent if the agent had reasonable suspicion that the individual possessed contraband.[64] On appeal, Cano claimed that the warrantless, forensic search of his cell phone at the border violated the Fourth Amendment.[65]

Although Cano argued that all searches of cell phones at the border violate the Fourth Amendment because the searches are not used to enforce importation laws since cell phones cannot contain contraband, the

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[56] *Id*.
[57] *Id*.
[58] *Id*. at 1026.
[59] *Id*. at 1010 (quoting U.S. Const. amend. IV).
[60] *Id*.
[61] *Id*. at 1011–12 (quoting U.S. v. Cotterman, 709 F.3d 952, 960 (9th Cir. 2013)).
[62] *Id*. at 1013 (quoting U.S. v. Soto-Soto, 598 F.2d 545, 548-59 (9th Cir. 1979)).
[63] *Id*.
[64] *Id*. at 1012 (citing U.S. v. Montoya de Hernandez, 473 U.S. 531, 537-51 (1985)).
[65] *Id*.

Ninth Circuit disagreed.[66] Reasoning that contraband can be stored on cell phones in digital form, such as child pornography, the court held that searches of cell phones at the border can be conducted to enforce importation laws.[67]

However, the Ninth Circuit agreed with Cano's second argument, holding that this specific cell phone search violated the Fourth Amendment because the agents acted to prevent future crimes rather than to enforce importation laws by seizing contraband.[68] Cano argued that the search was not limited to a search for contraband because the agents searched Cano's call log and text messages in order to find investigative leads and evidence related to future criminal activity.[69] The court held that border searches must be limited to searches designed to enforce importation laws, such as seizing contraband.[70] The court acknowledged the difference between contraband and evidence, offering several examples.[71] For example, child pornography would constitute both contraband and evidence because it is illegal to possess such material, deeming the photos contraband, and also proof of a crime, deeming the photos evidence.[72] On the other hand, emails on a cell phone are not contraband because it is not outright illegal to possess emails, but the same emails could be used as evidence to prove a price-fixing case.[73] Here, the court held that the search of Cano's cell phone, namely the call logs and text messages, violated the Fourth Amendment because the officers searched for evidence of a future crime rather than contraband.[74]

Third, the court rejected Cano's argument, supported by an amicus brief filed by the Electronic Frontier Foundation, that forensic searches of cell phones must be supported by probable cause rather than reasonable suspicion because cell phones contain intimate details of individuals.[75] Probable cause is a heightened standard of suspicion, which would only allow an officer to conduct the search if the officer believed, based on the evidence, that the individual committed or will commit a crime.[76] However, in *Cotterman*, the court previously held that electronic devices, specifically laptops, can be forensically searched so long as the officer had reasonable suspicion that the individual may have committed or will

[66] *Id*. at 1013–14.
[67] *Id*. at 1014.
[68] *Id*. at 1018–19.
[69] *Id*. at 1026.
[70] *Id*. at 1017.
[71] *Id*.
[72] *Id*.
[73] *Id*.
[74] *Id*. 1016–19.
[75] *Id*. at 1014–1015.
[76] *Probable Cause*, BLACK'S LAW DICTIONARY (2nd ed. 1910).

commit a crime.[77] The court rejected Cano and EFF's proposal to adopt the heightened standard of probable cause because precedent in *Cotterman* allows for forensic searches at the border of electronic devices, now including cell phones, to be based on reasonable suspicion.[78]

However, the court agreed with Cano that the search violated the Fourth Amendment because the forensic search of Cano's cell phone was not supported by reasonable suspicion that the cell phone contained contraband.[79] The court articulated that, while a manual search of a cell phone can be conducted without suspicion, a forensic search - which is more intrusive into the privacy of the individual - of a cell phone must be supported by reasonable suspicion that the individual possessed contraband.[80] In Cano's case, the court stated that the initial, manual search of Cano's cell phone was justified as this search did not require heightened suspicion.[81] However, because the officers did not have reasonable suspicion that the cell phone contained contraband, the forensic search using the Cellebrite software violated the Fourth Amendment.[82]

The court held that contraband can take digital form, warrantless border searches must be limited to searches for contraband, and forensic searches must be justified by reasonable suspicion.[83] Because the second search of Cano's cell phone was a search for evidence of a future crime rather than contraband, and the forensic search was not based on reasonable suspicion that the cell phone contained contraband, the search of Cano's cell phone violated the Fourth Amendment.[84] The lower court erred by allowing evidence found on Cano's cell phone to be admitted at trial.[85]

B. The Lower Court Erred by Permitting Illegally Obtained Evidence to Be Admitted at Trial Because the Officers Did Not Search Cano in Reliance on Binding Judicial Precedent

Generally, the exclusionary rule prohibits the use of illegally obtained evidence at trial.[86] However, evidence obtained from an illegal search can be introduced at trial as an exception to the exclusionary rule

[77] *Cano*, 934 F.3d at 1014–15.
[78] *Id*. at 1016.
[79] *Id*. at 1021.
[80] *Id*. at 1019-20.
[81] *Id*. at 1019.
[82] *Id*. at 1021.
[83] *Id*. at 1014.
[84] *Id*. at 1019.
[85] *Exclusionary Rule*, Black's Law Dictionary (2nd ed. 1910).
[86] *Cano*, 934 F.3d at 1021.

"'when [a government official] conduct[s] a search in objectively reasonable reliance on binding judicial precedent.'"[87] The court emphasized that the government official must be acting in good faith on binding appellate precedent that "'specifically authorizes'" the conduct to obtain the evidence; it is not sufficient for a government actor to rely on case law that is "'unclear.'"[88]

The court found that the evidence obtained from the unlawful search of Cano's cell phone should not have been introduced at trial pursuant to the exclusionary rule because the officers did not act in reliance on binding judicial precedent.[89] The government argued that Petonak and Medrano acted in reliance on the binding judicial precedent in *Cotterman* to conduct the search of Cano's cell phone.[90] The court stated that *Cotterman* was not binding precedent on this case because *Cotterman* permitted searches for contraband; *Cotterman* did not permit searches for evidence of future crimes.[91] The court further explained that "[s]earching for evidence and searching for contraband are not the same thing."[92] Ultimately, the court found that the exclusionary rule barred the introduction of evidence obtained from the unlawful search of Cano's cell phone because there was no precedent that permitted agent Petonak and Medrano's search for evidence of a future crime.[93]

C. The Prosecutor Did Not Violate the Due Process Clause by Failing to Deliver Documents Held by Other Federal Agencies

Cano argued that the prosecutor violated the Due Process Clause by withholding information from the FBI and DEA.[94] The court held that the prosecutor did not violate the Due Process Clause because the prosecutor did not have access to FBI and DEA documents.[95]

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[87] *Id*. (quoting Stone v. Powell, 428 U.S. 465, 239 (1976)).

[88] *Id*. (quoting U.S. v. Lara, 815 F.3d 605, 613-14 (9th Cir. 2016)).

[89] *Id*. at 1021-22.

[90] *Id*. at 1021.

[91] *Id*. at 1022.

[92] *Id*.

[93] *Id*. at 1021-22.

[94] *Id*. at 1025.

[95] *Id*. at 1026.

D. THE COURT DID NOT ADDRESS THE ISSUE OF PROSECUTORIAL MISCONDUCT

On appeal, Cano claimed that the prosecutor committed prosecutorial misconduct.[96] Because the court vacated Cano's conviction based on the introduction of illegally obtained evidence at trial, the court did not address this issue.[97]

III. IMPLICATIONS

The Ninth Circuit's conclusions in *Cano* are in conflict with *United States v. Kolsuz*, a decision by the United States Court of Appeals for the Fourth Circuit.[98] In *Kolsuz*, two federal agents received a tip that Kolsuz was known to smuggle firearms and would soon be traveling through the Washington Dulles International Airport.[99] Based on this information, the agents conducted a warrantless, forensic search of Kolsuz's cell phone.[100] Although the agents did not have cause to believe that Kolsuz was currently smuggling firearms, the Fourth Circuit ratified the agents' conduct by stating that the warrantless, forensic search was justified by "the prevention and disruption of ongoing efforts to export contraband illegally."[101] The broad language in *Kolsuz* allows the government to conduct warrantless, forensic searches of cell phones at the border so long as the individual poses a threat to enforcement efforts; the government does not need to have belief that the individual is currently committing a crime to conduct the intrusive search.[102] The Fourth Circuit's holding is in direct conflict with the Ninth Circuit's ruling in *Cano*, which states that warrantless, forensic searches of cell phones at the border must be supported by a particularized suspicion that the individual is currently engaged in a violation of importation laws.[103]

Because the rulings of the Ninth Circuit and the Fourth Circuit are in conflict, this issue of whether the government can conduct a warrantless, forensic search of a cell phone at the border is prime for review by the Supreme Court.

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[96] *Id*. at 1010.

[97] *Id*.

[98] *Id*. at 1017.

[99] U.S. v. Kolsuz, 890 F.3d 133, 138 (4th Cir. 2018).

[100] *Kolsuz*, 890 F.3d at 139.

[101] *Kolsuz*, 890 F.3d at 143–44.

[102] *Kolsuz*, 890 F.3d at 143–44.

[103] *Cano*, 934 F.3d at 1017.

CONCLUSION

For the many people traveling across the United States border with a cell phone containing large amounts of personal information, there will be uncertainty as to what prerequisites must be satisfied before a federal agent can conduct a warrantless, forensic search of a person's cell phone. Until the judiciary provides clarity on this point, travelers should be ware.

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Patel v. Facebook, Inc.: The Collection, Storage, and Use of Biometric Data as a Concrete Injury under BIPA

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CASE SUMMARY

PATEL V. FACEBOOK, INC.: THE COLLECTION, STORAGE, AND USE OF BIOMETRIC DATA AS A CONCRETE INJURY UNDER BIPA

*JESSICA ROBLES**

INTRODUCTION

Facebook, Inc. ("Facebook") amassed one of the most extensive facial-template databases in the world through the use of facial-recognition technology.[1] However, Facebook is not alone; both private and public sector entities are heavily investing in improving their facial-identification technology.[2] Facial geometry data are unique to each person[3] and can be used to identify an individual. Once a facial image has been captured and stored in a facial-template database, "the individual has no recourse" because one cannot change facial geometry as quickly as a password or a social security number.[4]

Although companies may use facial-recognition technology for valid purposes, uses of facial-recognition technology to target specific groups raise "questions around abuse, consent, weaponization, and discrimina-

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[1] Cade Metz, *Facial Recognition Tech Is Growing Stronger, Thanks to Your Face*, N.Y. TIMES (July 13, 2019), https://www.nytimes.com/2019/07/13/technology/databases-faces-facial-recognition-technology.html.

[2] Kristine Hamann & Rachel Smith, *Facial Recognition Technology: Where Will It Take Us?*, AM. BAR ASS'N, https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2019/spring/facial-recognition-technology/ (last visited Sept. 30, 2019).

[3] Cade Metz, *Facial Recognition Tech Is Growing Stronger, Thanks to Your Face*, N.Y. TIMES (July 13, 2019), https://www.nytimes.com/2019/07/13/technology/databases-faces-facial-recognition-technology.html.

[4] Patel v. Facebook, Inc., 932 F.3d 1264, 1269 (2019) (quoting the Biometric Information Privacy Act, 740 ILL. COMP. STAT. § 14/5(c) (2008) (internal quotation marks omitted)).

tory uses of this technology."[5] From a privacy standpoint, the potential use of facial-recognition technology to search against millions of photographs without the consent of "law-abiding citizens is a major privacy violation."[6] These concerns have fueled an increase in data privacy legislation[7] as well as litigation, such as *Patel v. Facebook, Inc*.

I. BACKGROUND

Both private sector and public sector facial identification databases put individuals at risk of mistaken identity, unauthorized searches, and erosion of due-process protections.[8] With these risks in mind, a few states enacted biometric privacy statutes.[9] In 2008, the Illinois General Assembly passed the Illinois Biometric Information Privacy Act ("BIPA") to regulate the use of biometric identifiers.[10] BIPA is unique because it provides for a private right of action, meaning that Illinois residents can file a lawsuit seeking damages for violations of the statute.[11] This contrasts with the laws in other states, which only allow state actors to bring claims on behalf of private individuals. Allowance of a private cause of action has generated a multitude of lawsuits.[12] Two re-

[5] Kate Kaye, *This Little-Known Facial-Recognition Accuracy Test Has Big Influence*, INT'L ASS'N OF PRIVACY PROF'LS (Jan. 7, 2019), https://iapp.org/news/a/this-little-known-facial-recognition-accuracy-test-has-big-influence/ (quoting Joy Buolamwini (internal quotations omitted)).

[6] Catie Edmondson, *ICE Used Facial Recognition to Mine State Driver's License Databases*, N.Y. TIMES (July 7, 2019), https://www.nytimes.com/2019/07/07/us/politics/ice-drivers-licenses-facial-recognition.html?module=inline; *see also* Drew Harwell, *FBI, ICE Find State Driver's License Photos Are a Gold Mine for Facial-Recognition Searches*, WASH. POST. (July 7, 2019 12:54 p.m.), https://www.washingtonpost.com/technology/2019/07/07/fbi-ice-find-state-drivers-license-photos-are-gold-mine-facial-recognition-searches/.

[7] *Consumer Data Privacy Legislation*, NAT'L CONFERENCE OF STATE LEGISLATURES (Oct. 14, 2019), http://www.ncsl.org/research/telecommunications-and-information-technology/consumer-data-privacy.aspx.

[8] Nicole Black, *Who Stole My Face? The Risks of Law Enforcement Use of Facial Recognition Software*, ABOVE THE LAW (Nov. 14, 2019), https://abovethelaw.com/2019/11/who-stole-my-face-the-risks-of-law-enforcement-use-of-facial-recognition-software/.

[9] Molly K. McGinley, Kenn Brotman, Erinn L. Rigney, *The Biometric Bandwagon Rolls On: Biometric Legislation Proposed Across the United States*, NAT'L L. REV. (Mar. 25, 2019), https://www.natlawreview.com/article/biometric-bandwagon-rolls-biometric-legislation-proposed-across-united-states.

[10] Biometric Information Privacy Act, 740 ILL. COMP. STAT. §§ 14/1-14/99 (2008).

[11] Biometric Information Privacy Act, 740 ILL. COMP. STAT. § 14/20 (2008).

[12] *See, e.g.* Rosenbach v. Six Flags Entm't Corp., 129 N.E.3d 1197, 1207 (Ill. 2019) (finding Article III standing where defendant failed to provide notice or obtain written consent for the collection, storage, and use of a fourteen year old's fingerprint). *But see* Santana v. Take-Two Interactive Software, Inc., 717 Fed.App'x. 12, 16-17 (2d Cir. 2017) (finding no Article III standing where defendant informed users that a face scan used to create a gaming avatar would be visible to other players); Rivera v. Google, 366 F. Supp. 3d 998, 1007-11 (N.D. Ill. Dec. 29, 2018) (finding no Article III standing where plaintiffs failed to provide evidence that the collection of facial scans created a substantial risk of identity theft); McCollough v. Smarte Carte, Inc., No. 16C03777, 2016

cent cases finding Article III standing are *Rosenbach v. Six Flags Entertainment Corp.* and *Patel v. Facebook, Inc.*

Private individuals who bring a claim under BIPA must still have standing to sue. To have standing to sue, the plaintiff must allege an injury-in-fact that is fairly traceable to the defendant's conduct, and that the injury is likely to be redressed by a favorable judicial opinion.[13] In *Rosenbach*, the Illinois Supreme Court defined an injury-in-fact by holding that "in order to qualify as an 'aggrieved' person and be entitled to seek liquidated damages and injunctive relief pursuant to [BIPA]," the individual does not need to claim a harm "beyond [a procedural] violation of his or her rights under [BIPA]."[14] In *Patel*, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") echoed the Illinois Supreme court's decision in *Rosenbach* by reaffirming that, for purposes of establishing standing in the federal courts, a violation of intangible statutory rights under BIPA without further harm is a sufficient injury-in-fact.[15] Moreover, in *Patel*, the Ninth Circuit applied this definition of an injury-in-fact to affirm the district court's class certification and denial of a motion to dismiss for lack of standing.[16]

A. FACTUAL BACKGROUND

Facebook is a social networking company with over two billion active users worldwide.[17] New users register, create a user profile, may add friends, and interact with their network by sharing content.[18] In 2010, Facebook launched its tag suggestions program.[19] The tag suggestions program uses facial-recognition technology to scan the photographs that users upload to suggest to the user to tag a specific person.[20]

When a user creates a profile and adds a picture of one's face, Facebook gathers information from the image and creates a face tem-

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U.S. Dist. LEXIS 100404 (N.D. Ill. Aug. 1, 2016) (finding no Article III standing where defendants failed to notify or obtain consent prior to scanning fingerprints used to lock and unlock storage lockers).

[13] Patel v. Facebook Inc., 290 F. Supp. 3d 948, 952 (N.D. Cal. 2018).

[14] Rosenbach v. Six Flags Entm't Corp., 129 N.E.3d 1197, 1207 (Ill. 2019).

[15] *See* Patel v. Facebook, Inc., 932 F.3d 1264, 1274 (9th Cir. 2019).

[16] *See Id*.

[17] J. Clement, *Number of Facebook Users Worldwide 2008-2019*, STATISTA (Aug. 9, 2019), https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/ (last visited Sept. 27, 2019).

[18] J. Clement, *Number of Facebook Users Worldwide 2008-2019*, STATISTA (Aug. 9, 2019), https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/ (last visited Sept. 27, 2019).

[19] *Facebook*, 932 F.3d at 1268.

[20] *Id*.

plate.[21] Facebook stores face templates in one of its data centers,[22] many of which are located in the United States.[23] When a second user uploads a picture, the facial-recognition technology gathers "various geometric data points" from that image and generates a facial map or "signature."[24] Under BIPA, a person's facial signature or facial geometry, is a biometric identifier.[25] The technology then runs these new facial signatures against its large database of face templates to determine whether the face signature matches a face template already in the database.[26] If there is a match, Facebook then suggests the second user tag the person in the image who matches a face template.[27]

B. PROCEDURAL BACKGROUND

Plaintiffs Carlo Licata, Nimesh Patel, and Adam Penzen, sued Facebook in separate lawsuits for BIPA violations.[28] In August 2015, the plaintiffs consolidated their separate lawsuits into a class action complaint and became class representatives.[29] The Illinois plaintiffs alleged that the tag suggestions program violated sections 15(a) and 15(b) of BIPA because Facebook failed to provide notice and obtain written consent before generating, storing, and using their biometric identifiers.[30]

On February 26, 2018, the district court denied a motion to dismiss for lack of standing.[31] The district court held that a transgression of the BIPA notice and consent provisions "is an intangible harm that constitutes a concrete injury-in-fact."[32] Two months later, on April 16, 2018, the district court certified the class consisting of "Facebook users located in Illinois for whom Facebook created and stored a face template after June 7, 2011."[33] Facebook then appealed the district court's ruling.[34]

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[21] *Id*.

[22] *Id*.

[23] Rachel Peterson, *Data Centers Year in Review*, FACEBOOK ENG'G (Jan. 1, 2019), https://engineering.fb.com/data-center-engineering/data-centers-2018/.

[24] *Facebook*, 932 F.3d at 1268.

[25] Biometric Information Privacy Act, 740 ILL. COMP. STAT. § 14/10 (2008).

[26] *Facebook*, 932 F.3d at 1268.

[27] *Id*. at 1268.

[28] *Facebook*, 290 F. Supp. 3d at 950–51.

[29] *See Facebook*, 932 F.3d at 1268; *see also In re* Facebook Biometric Info. Privacy Litig., 185 F. Supp. 3d 1155, 1159 (N.D. Cal. 2016).

[30] *Facebook,* 932 F.3d at 1268; *Facebook*, 290 F. Supp. 3d at 951.

[31] *Facebook*, 290 F. Supp. 3d at 950.

[32] *Id*. at 954.

[33] *In re Facebook*, 326 F.R.D. at 540.

[34] *Facebook*, 932 F.3d at 1269–70.

II. NINTH CIRCUIT ANALYSIS

A. ARTICLE III STANDING TWO-STEP APPROACH

The Ninth Circuit began its analysis by determining whether the plaintiffs had standing.[35] The court explained that to establish Article III standing, a plaintiff must have suffered an injury-in-fact.[36] To establish an injury-in-fact, the court must find that the harm to the plaintiff is concrete and particularized, and actual or imminent.[37] The Ninth Circuit clarified that even an intangible injury might qualify as an injury-in-fact as long as it is sufficiently concrete.[38] To determine whether an injury is sufficiently concrete, the court considers history and legislative intent.[39]

Similar to the district court, the Ninth Circuit used a traditional two-step approach to determine whether the statutory violation caused a concrete injury.[40] Under the test, a court asks (1) whether "the statutory provisions at issue were established to protect the plaintiff's concrete interests, and if so, (2) whether the specific procedural violations alleged in this case actually harm, or present a material risk of harm to, such interests."[41] The Ninth Circuit then applied each part of the test.

1. The Capture and Use of Biometric Information Without Consent Invades Concrete Interests

Facebook contended that their alleged non-compliance with BIPA's notice and consent provisions amounted to a procedural violation of BIPA without actual harm to the plaintiffs.[42] Moreover, Facebook argued that a statutory violation of BIPA was insufficient to establish a concrete injury for purposes of Article III standing.[43] The plaintiffs argued that under BIPA, they suffered a concrete injury when Facebook generated, stored, and used their facial geometries without their consent.[44] Addi-

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[35] *Facebook*, 932 F.3d at 1270.

[36] *Id*.

[37] *Id*. (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (internal quotations omitted)).

[38] *Id*.

[39] *Id*. (quoting Robins v. Spokeo, Inc., 867 F.3d 1108, 1113 (9th Cir. 2017) (internal quotations omitted)).

[40] *Id*. at 1270–71.

[41] *Id*. (quoting *Spokeo*, 867 F.3d at 1113 (internal quotations omitted)).

[42] *Id*. at 1271.

[43] *Id*. at 1271.

[44] *Id*. at 1271.

tionally, the plaintiffs stated that a procedural violation is a concrete injury, and that they did not have to claim additional harms.[45]

To determine whether a concrete interest existed, the Ninth Circuit first looked to history to assess whether the alleged privacy harm resembled one that provided grounds for a lawsuit in the past.[46] The court found that the Supreme Court of the United States had recognized that a right to privacy existed at common law stemming from both tort law and constitutional law.[47] Moreover, the court stated that the majority of American jurisdictions have recognized the existence of a right to privacy and that many states have actions to remedy privacy torts.[48] Additionally, the court explained that the Supreme Court of the United States has considered how new technology intrudes on the right of privacy in its Fourth Amendment jurisprudence.[49] The Ninth Circuit concluded that a violation of an individual's biometric privacy rights "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[50]

The Ninth Circuit explained that the common law understanding of privacy includes the "individual's control of information concerning his or her person."[51] The court stated that, similar to the cell-site location technology in *Carpenter v. United States*,[52] facial-recognition technology could gather highly-detailed information.[53] The detailed information could be used to identify an individual in any of the millions of photographs uploaded to Facebook and to pinpoint the individual's location.[54] The court also looked to future uses of facial-recognition technology such as to identify the individual from a street surveillance photograph or to unlock their cell phone.[55] Hence, the creation of a face template using facial-recognition technology without consent and without alleging further harm infringes on concrete interests.[56]

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[45] *See id*.

[46] *Id*. at 1271–72 (quoting Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016) (internal quotation marks omitted)).

[47] *Id*. at 1271–73.

[48] *Id*. at 1272.

[49] *See id*. 1272–73; Kyllo v. U.S., 533 U.S. 27, 34 (2001) (involving thermal imaging); U.S. v. Jones, 565 U.S. 400, 416 (2012) (involving GPS); Carpenter v. U.S., 138 S. Ct. 2206, 2215 (2018) (involving cell-site location information); Riley v. CA, 573 U.S. 373, 386 (2014) (involving cell phone storage).

[50] *Id*. at 1273 (quoting *Spokeo*, 136 S. Ct. At 1549 (internal quotation marks omitted)).

[51] *Id*. (quoting U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 763 (1989) (internal quotation marks omitted)).

[52] *Carpenter*, 138 S. Ct. 2206.

[53] *Facebook*, 932 F.3d at 1273.

[54] *Id*. at 1273.

[55] *Id*.

[56] *Id*.

Next, the Ninth Circuit examined legislative judgment. The court observed that the Illinois General Assembly stated that "[t]he public welfare, security, and safety will be served by regulating" the collection, storage, use, and deletion or biometric information.[57] Moreover, the court found that BIPA was enacted to protect an individual's privacy rights in their biometric identifiers.[58] The Ninth Circuit agreed with the Illinois Supreme court that a person "could be 'aggrieved' . . . whenever a private entity fails to comply" with section 15 of BIPA.[59] The Ninth Circuit concluded that section 15 of BIPA was designed to protect concrete interests.[60]

2. *The Collection, Storage, and Use of Plaintiffs' Face Templates Is A Substantive Harm*

The plaintiffs contended that the collection, use, and storage of their face templates without consent violated section 15(b) of BIPA and that they did not need to claim further harms.[61] Facebook argued that plaintiffs needed to claim harm beyond a procedural violation and relied on *Bassett v. ABM Parking Services*.[62] In *Bassett*, the defendant violated the Fair Credit Reporting Act by not redacting a credit card's expiration date on a receipt.[63] The *Bassett* court did not find a substantive harm because the violation did not cause a disclosure of the consumer's financial information.[64]

The Ninth Circuit stated that under the common law, an intrusion into privacy rights by itself makes a defendant subject to liability.[65] The court explained that the protected privacy right "is the right not to be subject to the collection and use of such biometric data . . . ."[66] Furthermore, the Ninth Circuit distinguished *Bassett* because the Fair Credit Reporting Act was designed to prevent disclosure and identity theft.[67] In *Bassett*, Congress specified in amendments to the Fair Credit Reporting Act that to establish a willful violation of the statute requires an allega-

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[57] *Id*. (quoting Biometric Information Privacy Act, 740 ILL. COMP. STAT. § 14/5(g) (2008) (internal quotations omitted)).

[58] *Id*.

[59] *Id*. at 1274 (quoting Rosenbach v. Six Flags Entm't Corp., 129 N.E.3d 1197, 1206 (Ill. 2019)).

[60] *Id*.

[61] *Id*.

[62] *Id*. at 1271; Bassett v. ABM Parking Servs., 883 F.3d 776 (9th Cir. 2018).

[63] *Facebook*, 932 F.3d at 1274.

[64] *Id*.

[65] *Id*.

[66] *Id*.

[67] *Bassett*, 883 F.3d 776.

tion of harm to the consumer's identity.[68] BIPA does not require a further allegation of disclosure or harm.[69]

Thus, under BIPA, the mere collection and use of biometric data without consent "would necessarily violate the plaintiffs' substantive privacy interests."[70] Since both parts of the two-step approach were met, the Ninth Circuit held that the plaintiffs alleged a concrete and particularized harm, sufficient to establish Article III standing.[71]

B. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING CLASS CERTIFICATION

The general standard of review when parties appeal from the grant of class certification is "abuse of discretion."[72] The district court is given more deference when reviewing a grant of class certification than when reviewing a denial.[73] A district court abuses its discretion when it makes an error of law.[74] The court had to review de novo the legal determinations made in support of the decision to grant class certification.[75]

Facebook argued that the district court abused its discretion by granting class certification.[76] First, Facebook claimed that questions of law or fact common to class members did not predominate over questions affecting individual plaintiffs.[77] Second, Facebook contended that the potential for a significant statutory damages award would make individual actions superior to the difficulties of managing a class action lawsuit.[78]

3. Questions of Law or Fact Common to Class Members Predominate

Facebook argued that questions of law or fact common to class members did not predominate over questions affecting individual plaintiffs.[79] Facebook contended that BIPA violations can occur in several

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[68] *See Bassett*, 883 F.3d at 778.

[69] *See Facebook*, 932 F.3d at 1275.

[70] *Id*. at 1274.

[71] *Id*. at 1275.

[72] *Id*.

[73] *Id*. (quoting Just Film, Inc. v. Buono, 847 F.3d 1108, 1115 (9th Cir. 2017) (internal quotations omitted)).

[74] *Id*. (quoting Sali v. Corona Reg'l Med. Ctr., 909 F.3d 996, 1002 (9th Cir. 2018)).

[75] *Id*.

[76] *Id*.

[77] *Id*. at 1276.

[78] *Id*. (citing FED. R. CIV. P. 23(b)(3)).

[79] *Id*.

locations, such as where: the person uses Facebook, Facebook scans photographs, or Facebook stores face templates.[80] Using the Illinois extraterritoriality doctrine, Facebook believed that each plaintiff must provide evidence that events in their case occurred primarily and substantially within the state of Illinois.[81] Facebook suggested that class members provide individualized proof of the location where relevant events transpired.[82] Relevant events would include where: the photograph was uploaded, Facebook performed facial recognition analysis, or Facebook gave a tag suggestion.[83] Thus, according to Facebook, questions individual to each class member would predominate.[84]

The court stated that there was predominance sufficient for class certification when "questions of law or fact common to class members predominate over any questions affecting only individual members."[85] Moreover, under the Illinois extraterritoriality doctrine, an Illinois plaintiff may not maintain a cause of action under a state statute for transactions that transpired outside of Illinois.[86] However, plaintiffs can bring an action if the events of the transaction occurred "primarily and substantially within Illinois."[87]

The Ninth Circuit expressed that extraterritoriality questions could be decided on a class-wide basis without defeating predominance.[88] The questions created by the extraterritoriality doctrine included whether relevant events took place primarily and substantially in Illinois, or outside of Illinois.[89] Additionally, the court determined that the Illinois General Assembly intended that BIPA apply to "individuals who are located in Illinois, even if some relevant activities occur outside the state."[90] Thus, the court found that the district court did not err in finding predominance.[91] Next, the court analyzed whether the lower court erred by finding superiority.

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[80] *Id*. at 1275.

[81] *Id*.

[82] *Id*.

[83] *Id*.

[84] *Id*. at 1275–76.

[85] FED. R. CIV. P. 23(b)(3).

[86] *Id*. at 1275 (citing Avery v. State Farm Mut. Auto. Ins. Co., 835 N.E.2d 801, 853 (Ill. 2005)).

[87] *Id*. (quoting *Avery*, 835 N.E.2d at 853–54 (internal quotation marks omitted)).

[88] *Id*. at 1276.

[89] *Id*.

[90] *Id*.

[91] *See id*.

4. The Potential for Significant Statutory Damages Does Not Make Individual Actions Superior to a Class Action Lawsuit

Facebook contended that individual lawsuits would be superior because it would be difficult to manage such a large class action.[92] Additionally, Facebook claimed that individual actions would be superior to a class action because of the potential for a significant statutory damages award.[93] BIPA allows for damages of one thousand dollars for each negligent violation, or five thousand dollars for each intentional or reckless violation.[94]

The court explained that there is superiority sufficient for class certification when the class action is "superior to other available methods for fairly and efficiently adjudicating the controversy."[95] The court responded to Facebook's argument by clarifying that the issue of caps on statutory damages depends on the intent of the legislature, which the court gathers from the express statutory language and legislative history.[96] The court explained that BIPA's text and legislative history did not cap statutory damages.[97] Moreover, the text and legislative history did not indicate that substantial statutory damages were contrary to the intent of the Illinois General Assembly.[98] Therefore, the court affirmed the district court's ruling and added that there was no error of law or abuse of discretion in granting class certification.[99]

III. IMPLICATIONS OF PATEL V. FACEBOOK, INC.

Following the Ninth Circuit's opinion, on October 18, 2019, the court denied a petition for rehearing en banc.[100] On October 30, 2019, the court granted a motion to stay while Facebook petitions for writ of certiorari in the Supreme Court of the United States.[101] A Supreme Court of the United States' decision could resolve the current circuit split and

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[92] *See id*. (citing FED. R. CIV. P. 23(b)(3)).

[93] *Id*. (citing FED. R. CIV. P. 23(b)(3)).

[94] Biometric Information Privacy Act, 740 ILL. COMP. STAT. § 14/20 (2008).

[95] *Id*. (quoting FED. R. CIV. P. 23(b)(3)(D)).

[96] *Id*. 1276.

[97] *See id*. at 1277.

[98] *Id*.

[99] *Id*. at 1276–77.

[100] Josh Constine, *$35B Face Data Lawsuit Against Facebook Will Proceed*, TECH CRUNCH (Oct. 18, 2019), https://techcrunch.com/2019/10/18/facebook-35-billion-lawsuit/.

[101] Daniel R. Stoller, *Facebook Biometric Case Halted Pending Supreme Court Appeal*, BLOOMBERG LAW (Oct. 31, 2019, 7:17 AM), https://news.bloomberglaw.com/privacy-and-data-security/facebook-biometric-case-halted-pending-supreme-court-appeal.

clarify which intangible privacy harms are sufficient to bring a claim in federal court.[102]

The increasing number of privacy-related lawsuits and government fines reflect society's growing concern that emerging technologies' ability to collect detailed personal information can negatively impact individuals now and in the future. In addition to lawsuits brought by plaintiffs, government agencies have enforced fines on technology companies for privacy violations.[103] For example, in July 2019, the Federal Trade Commission and Facebook announced a five billion dollar settlement for privacy-related violations.[104]

On September 3, 2019, a month after the Ninth Circuit's decision, Facebook responded by changing its tag suggestions program from a default setting of on with an opt-out option to a default setting of off with an opt-in option.[105] Facebook's modifications to its tag suggestion program following the court's opinion indicate that both litigation and government fines are helping to enforce higher data privacy standards. Fears of similar litigation and penalties for privacy violations will motivate other companies to evaluate their use of data to comply with existing privacy laws and future legislation.[106]

CONCLUSION

The Ninth Circuit's decision affirmed the district court's denial of a motion to dismiss for lack of standing and affirmed the class certification.[107] This case reinforces that an intangible injury such as the collection, storage, and use of biometric data without consent can be sufficient to constitute a concrete injury-in-fact to confer Article III standing.[108] If the United States Supreme Court denies Facebook's petition for certio-

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[102] *Id*.

[103] Jay Cline, *U.S. Takes The Gold in Doling Out Privacy Fines*, COMPUTERWORLD (Feb. 17, 2014), https://www.computerworld.com/article/2487796/jay-cline—u-s—takes-the-gold-in-doling-out-privacy-fines.html.

[104] *FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook*, FED. TRADE COMM'N (July 24, 2019), https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions.

[105] Srinivas Narayanan, *An Update About Face Recognition on Facebook*, FACEBOOK NEWSROOM (Sept. 3, 2019), https://newsroom.fb.com/news/2019/09/update-face-recognition/.

[106] *Consumer Data Privacy Legislation*, NAT'L CONFERENCE OF STATE LEGISLATURES (Oct. 14, 2019), http://www.ncsl.org/research/telecommunications-and-information-technology/consumer-data-privacy.aspx.

[107] *See Facebook*, 290 F. Supp. 3d at 956; *see also In re Facebook*, 326 F.R.D.

[108] *Facebook*, 932 F.3d at 1270 (citing *Spokeo*, 136 S. Ct. at 1549 (2016)).

rari, the underlying class action will continue to trial in the district court, where Facebook stands to lose billions of dollars in damages.[109]

[109] Josh Constine, *$35B Face Data Lawsuit Against Facebook Will Proceed*, TECH CRUNCH (Oct. 18, 2019), https://techcrunch.com/2019/10/18/facebook-35-billion-lawsuit/.

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Williams v. Gaye: Further Blurring the Lines Between Inspiration and Infringement

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NOTE

WILLIAMS V. GAYE: FURTHER BLURRING THE LINES BETWEEN INSPIRATION AND INFRINGEMENT

*ALYSSA CHAVERS**

> "It must be remembered that, while there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing; and much fewer still suit the infantile demands of the popular ear. Recurrence is not therefore an inevitable badge of plagiarism."[1]

INTRODUCTION

During the summer of 2013, Robin Thicke's ("Thicke") and Pharrell Williams's ("Williams") song "Blurred Lines" became wildly popular and occupied music charts for weeks.[2] The song was dubbed as Billboard's Song of the Summer for 2013,[3] and was the best-selling single of 2013;[4] thus, it was no surprise when the controversies over "Blurred

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[1] Darrell v. Joe Morris Music Co., 113 F.2d 80, 80 (2d Cir. 1940) (per curiam).

[2] Liat Kornowski, *15 Notable Events of Summer 2013*, HUFF. POST (Sept. 2, 2013, 8:46 AM), https://www.huffingtonpost.com/2013/09/02/notable-events-of-summer-2013_n_3836247.html.

[3] Gary Trust, *Robin Thicke's 'Blurred Lines' Is Billboard's Song of the Summer*, BILLBOARD (Sept. 5, 2013), http://www.billboard.com/articles/news/5687036/robin-thickes-blurred-lines-is-billboards-song-of-the-summer.

[4] Stuart Dredge, *Global Music Sales Fell in 2013 Despite Strong Growth for Streaming Services*, THE GUARDIAN (Mar. 18, 2014, 9:00 AM), http://www.theguardian.com/technology/2014/mar/18/music-sales-ifpi-2013-spotify-streaming (reporting that "Blurred Lines" sold 14.8 million units in track downloads and equivalent streams).

Lines" made headlines.[5] The song was highly controversial. It included misogynistic lyrics,[6] and a music video that was removed, and then censored on YouTube for violating the site's policies regarding nudity.[7] During an interview, Thicke discussed the overwhelming popularity of the song stating, "We felt like maybe it was something special but it was so different. We didn't know it would be this big."[8] While "Blurred Lines" enjoyed chart-topping popularity, a separate controversy was developing. Marvin Gaye's ("Gaye") family accused Thicke and Williams of copying the "feel and sound" of Gaye's song "Got to Give It Up."[9] Thicke had previously, and publicly, indicated that "Got to Give It Up" was the influence for "Blurred Lines."[10]

The case began in the United States District Court in the Central District of California ("district court"), with a jury finding in favor of Nona Marvisa Gaye, Frankie Christian Gaye, and Marvin Gaye III ("Gaye Parties").[11] The Thicke Parties (Pharrell Williams, Robin Thicke, Clifford Harris, Jr., and More Water from Nazareth Publishing, Inc.) appealed to the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit"), where the Ninth Circuit affirmed the district court's ruling, holding that "Blurred Lines infringed on the copyright in "Got to Give It Up."[12] The decision set the music world into a flurry–artists

[5] Dorian Lynskey, *Blurred Lines: The Most Controversial Song of the Decade*, THE GUARDIAN (Nov. 13, 2013, 2:32 PM), https://www.theguardian.com/music/2013/nov/13/blurred-lines-most-controversial-song-decade.

[6] Geeta Dayal, *Robin Thicke's "Blurred Lines": It's sexist and awful.*, SLATE (Dec. 19, 2013, 2:44 PM), http://www.slate.com/articles/arts/the_music_club/features/2013/music_club_2013/robin_thicke_s_blurred_lines_it_s_sexist_and_awful.html (quoting lyrics, such as "I know you want it" and "I hate these blurred lines").

[7] Jessica Rawden, *Robin Thicke's Blurred Lines Video Banned from YouTube*, CINEMA BLEND, https://www.cinemablend.com/pop/Robin-Thicke-Blurred-Lines-Video-Banned-From-YouTube-54244.html.

[8] Radio.com, *GRAMMY Behind The Song: Robin Thicke's "Blurred Lines*," YOUTUBE (Dec. 10, 2013), https://www.youtube.com/watch?time_continue=63&v=pHP_yOGs-HQ.

[9] Zoe Chace, *Robin Thicke's Song Sounds Like Marvin Gaye. So He's Suing Gaye's Family*, NPR (Aug. 19, 2013, 1:05 PM), http://www.npr.org/sections/money/2013/08/19/213471083/robin-thickes-song-sounds-like-marvin-gaye-so-thicke-is-suing-gayes-family.

[10] Jon Caramanica, *Yesterday's Style, Today's Hits*, THE NEW YORK TIMES (Aug. 2, 2013), https://www.nytimes.com/2013/08/03/arts/music/blurred-lines-makes-robin-thicke-white-souls-leader.html.

[11] Williams v. Bridgeport Music, Inc., Case No. LA CV13–06004 JAK (AGRx), 2015 WL 4479500, at *1 (C.D. Cal. 2015), *aff'd in part, rev'd in part sub nom.* Williams v. Gaye, 895 F.3d 1106 (9th Cir. 2018).

[12] Williams v. Gaye, 895 F.3d 1106, 1138 (9th Cir. 2018) (the Ninth Circuit affirmed in part and reversed in part. The Ninth Circuit affirmed the district court's ruling regarding copyright infringement, but reversed the judgment against Harris and the Interscope Parties).

feared that the decision would limit their creativity and put a stop to any music that has the same feel or groove as other music.[13]

The first opinion was published on March 21, 2018 and applied the inverse-ratio rule as the standard for the court's analysis.[14] The inverse-ratio rule operates like a "sliding scale"—the greater the showing of access to a song, the lesser the showing of substantial similarity is required.[15] The rule is binding precedent in the Ninth Circuit, and as the opinion states, the court was "bound to apply it."[16] However, about four months later, on July 11, 2018, the court unexpectedly published a modified opinion to the *Williams v. Gaye* case.[17] The two opinions look virtually identical, with one glaring omission—all discussion of the inverse-ratio rule is gone.[18]

If the court was bound by precedent to apply the inverse-ratio rule to this particular case, then it is reasonable to question why the rule was omitted entirely in the subsequent, and therefore binding opinion.[19] The inverse-ratio rule is heavily criticized[20] and the second, modified opinion may have been the Ninth Circuit's way of adapting to the changing landscape in the copyright realm. This Note argues, in part, that the omission of the inverse-ratio rule in the second *Williams* opinion is proof of the Ninth Circuit quietly abolishing the outdated rule.

Additionally, this Note demonstrates that the Ninth Circuit's decision to abandon the rule indicates their understanding that copyright law must better reflect today's technology. As with many areas of law, copyright law has been due for an update, so that the law may better reflect today's technology and refrain from stifling creativity in the music industry. For the music industry to continue to expand and thrive, adaptation

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[13] Adrienne Gibbs, *Marvin Gaye's Family Wins 'Blurred Lines' Appeal; Pharrell, Robin Thicke Must Pay*, FORBES (Mar. 21, 2018, 3:37 PM), https://www.forbes.com/sites/adriennegibbs/2018/03/21/marvin-gaye-wins-blurred-lines-lawsuit-pharrell-robin-thicke-t-i-off-hook/#a8b7104689b4; *see also* Brief of Amicus Curiae Musicologists in Support of Plaintiffs-Appellants-Cross-Appellees, 2016 WL 4592128, Williams v. Gaye, 895 F.3d 1106 (9th Cir. 2018) (over 200 songwriters, composers, musicians, and producers warned the Ninth Circuit about the effect on the music industry if infringement was found against the Thicke parties).

[14] Williams v. Gaye, 885 F.3d at 1163 (9th Cir.), *amended by* 895 F.3d 1106 (9th Cir. 2018).

[15] *Id*.

[16] *Id*.

[17] *Gaye*, 895 F.3d 1106 (9th Cir. 2018).

[18] *Gaye*, 895 F.3d 1106 (9th Cir. 2018).

[19] *Compare Gaye*, 885 F.3d at 1163 n.6 (explaining that the inverse-ratio rule is "binding precedent under [their] circuit law, and [they] are bound to apply it.") with, *Gaye*, 895 F.3d 1106 (9th Cir. 2018).

[20] David Aronoff, *Exploding the "Inverse Ratio Rule"*, 55 J. COPYRIGHT SOC'Y U.S.A. 125, 143 (2008) ("The IRR is a deleterious doctrine that provides no analytical benefits in evaluating or determining a copyright infringement case."); *see also* William F. Patry, PATRY ON COPYRIGHT § 9:91 (2019) ("There is nothing positive that can be said about a rule that lacks any clarity at all: trying to get a jury to both understand the rule and apply it properly is totally impossible.").

of past musical works through sampling and borrowing is necessary.[21] As Judge Learned Hand noted, there are only a limited number of musical note combinations that are pleasing to the listener, making the possible combination of notes for new musical works highly limited.[22] Instead of viewing the adaptation of past musical works as "copying," copyright law must support the notion that artists' work can be used as building blocks for future creators to produce their own music, especially considering the amount of music available to the public today.[23]

Part I of this Note outlines the factual and procedural history of *Williams* and discusses the Ninth Circuit's analysis in its first and second opinions. Part II discusses the historical background of copyright law in the United States, namely the Copyright Act of 1909 and the Copyright Act of 1976. Additionally, this section explains the structure of a music copyright infringement suit, including the elements required to make a successful infringement claim.

Part III argues why courts should presume access in music copyright infringement cases, and subsequently, abandon the inverse-ratio rule. The inverse-ratio rule should be abandoned because people's access to music has never been easier in today's digital world. A plaintiff's burden to prove substantial similarity between the plaintiff's song and the defendant's song, should not be diminished as a result of the defendant's access to the plaintiff's song. Instead, a defendant's access to a particular song should be presumed in copyright infringement cases. This Note does not argue that the access requirement is unnecessary in such cases. Access is still necessary for copying because one cannot copy what one has never seen. However, it does not necessarily follow that more access increases the likelihood of copying.

I. *WILLIAMS V. GAYE* – FACTUAL AND PROCEDURAL BACKGROUND

In 1976, Marvin Gaye recorded "Got To Give It Up."[24] In 1977, "Got To Give It Up" reached number one on Billboard's Hot 100 chart, and in the same year Jobete Music Company registered the song with the United States Copyright Office.[25] The registration included six pages of handwritten sheet music accrediting the words and music of "Got to Give

[21] Carys J. Craig & Guillaume Laroche, *Out of Tune: Why Copyright Law Needs Music Lessons*, *in* OSGOODE LEGAL STUDIES RESEARCH PAPER SERIES 43, 48 (B.C. Doagoo et al. eds., 2014).

[22] *Darrell*, 113 F.2d at 80.

[23] Alison P. Wynn, Note, *Copyright Law—Unique Characteristics of Music Warrant Its Own System: How Adopting the Intended Audience Test Can Save Music Copyright Litigation*, 39 W. NEW ENG. L. REV. 1, 14–15 (2017).

[24] *Gaye*, 895 F.3d at 1116.

[25] *Id*.

It Up" to Marvin Gaye.[26] Upon Marvin Gaye's death, the Gaye Parties inherited the copyrights to Marvin Gaye's musical composition.[27]

Thirty-six years later in 2012, Williams and Thicke wrote and recorded "Blurred Lines."[28] Clifford Harris, Jr.[29] ("Harris") separately wrote and recorded a verse for "Blurred Lines" that was added to the song several months later.[30] By 2013, "Blurred Lines" was the best-selling single in the United States.[31] The copyright to the musical composition of "Blurred Lines" is jointly held by Thicke, Williams, and Harris."[32]

A. THE GAYE PARTIES PREVAIL IN THE DISTRICT COURT

The Gaye Parties approached Williams and Thicke with infringement accusations after hearing "Blurred Lines."[33] When negotiations failed, Williams, Thicke, and Harris filed suit in the district court on August 15, 2013, seeking declaratory judgment of non-infringement.[34] The Gaye Parties counterclaimed against the Thicke Parties, claiming copyright infringement in "Got to Give It Up."[35]

Experts play a crucial role in helping parties establish the element of copying.[36] Both parties relied on expert testimony in this case: Sandy Wilbur testified on behalf of the Thicke Parties to show there were no similarity between the two songs; Dr. Ingrid Monson and Judith Finell testified on behalf of the Gaye Parties to show the songs were substantially similar.[37] The experts' opinions differed greatly. Wilbur testified that there was no evidence of substantial similarity between "Blurred Lines" and "Got To Give It Up,"[38] while Dr. Monson identified har-

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[26] *Id*.

[27] *Id*.

[28] *Id*.

[29] Clifford Harris, Jr. is popularly known as T.I., Williams v. Gaye, 895 F.3d 1106, 1116 (9th Cir. 2018).

[30] *Gaye*, 895 F.3d at 1116.

[31] Keith Caulfield, *Justin Timberlake's '20/20' 2013's Best Selling Album, 'Blurred Lines' Top Song*, BILLBOARD (Jan. 2, 2014), https://www.billboard.com/articles/news/5855151/justin-timberlakes-2020-2013s-best-selling-album-blurred-lines-top-song (explaining that 6.5 million copies of "Blurred Lines" were sold in 2013).

[32] *Gaye*, 895 F.3d at 1116.

[33] *Id*.

[34] *Id*.

[35] *Id*.

[36] Michael Der Manuelian, Note, *The Role of the Expert Witness in Music Copyright Infringement Cases*, 57 FORDHAM L. REV. 127, 129 (1988), *available at* https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2804&context=flr.

[37] *Gaye*, 895 F.3d at 1117.

[38] *Id*.

monic and melodic similarities between the two songs.[39] Finnell identified a "'constellation' of eight similarities" between the two songs, "consisting of the signature phrase, hooks, hooks with backup vocals, "Theme X," backup hooks, bass melodies, keyboard parts, and unusual percussion choices."[40]

Both Williams and Thicke testified that they had access to "Got to Give It Up" and that they drew inspiration from Marvin Gaye.[41] After two days of deliberations, the jury returned a verdict in favor of the Gaye Parties, finding the Thicke Parties liable for infringing the copyright in "Got To Give It Up." The jury awarded the Gaye Parties four million dollars in damages.[42] Both the Thicke Parties and the Gaye Parties appealed to the Ninth Circuit.[43]

B. THE NINTH CIRCUIT AFFIRMED THE DISTRICT COURT RULING

The Ninth Circuit affirmed the district court ruling in a published opinion on March 21, 2018 ("the first opinion").[44] On July 11, 2018, the court issued a modified opinion to the *Williams* case ("the second opinion"). The opinions are virtually identical, with the exception of the discussion regarding the inverse-ratio rule in the second opinion.

1. The Discussion and Analysis of the Inverse-Ratio Rule in the First Opinion

In the first opinion's discussion of the applicable standard in a copyright infringement claim, the court explains that they are bound to apply the inverse-ratio rule.[45] The inverse-ratio rule "operates like a sliding scale: The greater the showing of access, the lesser the showing of substantial similarity is required."[46] The court explained that because Williams and Thicke admitted to a "high degree" of access to "Got to Give It Up," the Gaye Parties' burden of proving substantial similarity was lowered.[47]

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[39] *Id*. at 1118.

[40] *Id*. at 1117.

[41] *Id*.

[42] *Id*. at 1118.

[43] *Id*. at 1115–16 (Three consolidated appeals were made to the Ninth Circuit following the district court's judgment: the Thicke parties appeal, the Interscope Parties appeal, and the Gaye family appeal. For purposes of this Note, only the Thicke parties appeal will be discussed as the Interscope Parties appeal and the Gaye family appeal are not relevant to the discussion of this Note).

[44] *Gaye*, 885 F.3d 1150 (9th Cir.), *amended by* 895 F.3d 1106 (9th Cir. 2018).

[45] *Id*. at 1163 n.6.

[46] *Id*. at 1163 (9th Cir.).

[47] *Id*.

This application of the inverse-ratio rule was also shown in a discussion of one of the instructions[48] to the jury in the district court.[49] Instruction 41 stated: "If you conclude that the Thicke Parties had access to either or both of the Gaye Parties' works before creating . . . their works, you may consider that access in connection with determining whether there is substantial similarity between . . . [the] works."[50] The court goes on to explain that the instruction was "[i]n line with our inverse ratio rule" and the instruction allows the jury to "consider access 'in connection with' substantial similarity."[51]

2. *The Omission of the Inverse-Ratio Rule in the Second Opinion and the Remaining Analyses*

On appeal, the Thicke Parties asked the Ninth Circuit to reverse the district court's denial of their motion for summary judgment and vacate the district court's judgment and remand for a new trial.[52]

The Thicke Parties requested reversal of their motion for summary judgment because they argued the district court erred in its application of the extrinsic test for substantial similarity.[53] The Ninth Circuit allowed the district court's decision to stand, and held that the order was not reviewable because the court "generally do[es] 'not review a denial of a summary judgment motion after a full trial on the merits.'"[54]

Next, the Thicke Parties request to vacate the district court's judgment and remand for a new trial was also denied.[55] There were several arguments the Thicke Parties gave for the remand of a new trial: "instructional error[56], improper admission of expert testimony, and lack of evidence supporting the verdict."[57] The Thicke Parties argued that the verdict was "against the clear weight of the evidence" because "there is

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[48] BLACK'S LAW DICTIONARY (10th ed. 2014) (defining general instruction as instructions given to the jury by the judge before they begin deliberation).

[49] *Gaye*, 885 F.3d at 1168 n.12.

[50] *Id*.

[51] *Id*.

[52] *Gaye*, 895 F.3d at 1115.

[53] *Id*. at 1122.

[54] *Id*. at 1122 (quoting Escriba v. Foster Poultry Farms, Inc., 743 F.3d 1236, 1243 (9th Cir. 2014) (quoting Banuelos v. Constr. Laborers' Tr. Funds for S. Cal., 382 F.3d 897, 902 (9th Cir. 2004)).

[55] *Id.* at 1128.

[56] *Id*. at 1115 (The Thicke Parties argued that Instructions 42 and 43 were given incorrectly, and the Ninth Circuit held that the district court did not err in giving either instruction. For purposes of this Note, further analysis on the instructional error argument is not relevant to the analysis of this Note).

[57] *Id*.

no extrinsic or intrinsic similarity between the two songs."[58] The court explained that they were bound by the "limited nature of [their] appellate function in reviewing the district court's denial of a motion for a new trial."[59]

The Ninth Circuit affirmed the district court's ruling, holding that the Thicke Parties infringed on the Gaye's copyright in "Got To Give It Up."[60] The court explained that so long as "there was some 'reasonable basis' for the jury's verdict," [they would] not reverse the district court's denial of a motion for a new trial."[61] The court will typically reverse "only when there is an *absolute absence of evidence* to support the jury's verdict."[62] For music copyright cases, courts "will not second-guess the jury's application of the intrinsic test."[63] The court also explained that their "decision does not grant license to copyright a musical style or 'groove.'"[64] The Ninth Circuit held that there was no abuse in the district court's discretion in denying the Thicke Parties' motion for a new trial.[65]

Similar to the first opinion, the court explained that, without direct evidence of copying, proof of infringement involves fact-based showings that the defendant had access to the plaintiff's work and the two works are substantially similar.[66] However, where the first opinion discussed the inverse-ratio rule immediately following that rule,[67] the second opinion omitted the discussion entirely.[68] Additionally, where the first opinion's discussion of the inverse-ratio rule is used as a justification for the language in Instruction 41,[69] the second opinion omits discussion of the inverse-ratio rule.[70] In its place, and directly after quoting the language from Instruction 41, the court writes, "Instruction 41 merely reiterates that the Gayes may choose to prove infringement by using a circumstantial theory."[71]

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[58] *Id*. at 1127.

[59] *Id*. (quoting Hung Lam v. City of San Jose, 869 F.3d 1077, 1084 (9th Cir. 2017)) (quoting Kode v. Carlson, 596 F.3d 608, 612 (9th Cir. 2010)).

[60] *Id*. at 1138 (explaining that the district court's entry of judgement against Harris and the Interscope parties was reversed, but the rest of the district court's judgment was affirmed).

[61] *Id*. at 1127 (quoting Molski v. M.J. Cable, Inc., 481 F.3d 724, 729 (9th Cir. 2007)).

[62] *Id*. (quoting Hung Lam v. City of San Jose, 869 F.3d 1077, 1084 (9th Cir. 2017)) (quoting *Kode*, 596 F.3d at 612 (9th Cir. 2010)).

[63] *Id*. (quoting Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000)).

[64] *Id*. at 1138.

[65] *Id*. at 1128.

[66] *Id*. at 1119.

[67] *Gaye*, 885 F.3d at 1163, *amended by* 895 F.3d 1106 (9th Cir. 2018).

[68] *Gaye*, 895 F.3d at 1119.

[69] *Gaye*, 885 F.3d at 1168 n.12, *amended by* 895 F.3d 1106 (9th Cir. 2018).

[70] *Gaye*, 895 F.3d at 1123 n.11.

[71] *Id*.

II. HISTORICAL BACKGROUND OF COPYRIGHT LAW IN THE UNITED STATES

A. COPYRIGHT ACT OF 1909

Copyright laws in the United States come from a 1710 English statute known as the Statute of Anne.[72] Most of the states created copyright laws that emulated some form of this statute.[73] Article I, Section 8 of the United States Constitution grants Congress the power "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[74] The primary purpose of copyright legislation is to encourage the creation and distribution of intellectual works for public welfare.[75] Another important purpose of copyright legislation is to give creators credit for their contribution to society.[76]

Federal copyright statutes have undergone several revisions over the last 200 years. "The first federal copyright statute was enacted in 1790 and covered maps, charts and books."[77] This statute gave authors and proprietors protection for 14 years with the option of renewing for a second term of 14 years.[78] General revisions were made in 1831, 1856, and 1897 to reflect concerns among musical artists.[79] In 1831, Congress amended the Copyright Act to include musical compositions in the form of sheet music.[80] In 1856, an amendment granted individual copyright holders of dramatic compositions the sole right to publicly perform the piece.[81] In 1897, Congress extended the Copyright Act to apply to anyone publicly performing a protected musical work.[82]

The Copyright Act of 1909 was based on the printing press as the main disseminator of information.[83] The Act of 1909 protected "'writ-

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[72] MARYBETH PETERS, COPYRIGHT OFFICE, LIBRARY OF CONG., GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976, ch. 1, 1:1 (1977), *available at* https://www.copyright.gov/reports/guide-to-copyright.pdf.

[73] *Id*.

[74] *Id*. (quoting U.S. CONST. art. I, § 8, cl. 8).

[75] *Id*.

[76] *Id*.

[77] *Id*.

[78] *Id*.

[79] *Id*.

[80] Copyright Act of 1831, ch. 16, § 4, 1 Stat. 436 (current version at 17 U.S.C. § 102 (2006)), *available at* https://www.copyright.gov/history/Copyright_Enactments_1783-1973.pdf.

[81] Benjamin W. Rudd, *Notable Dates in American Copyright 1783*–1969, 28 Q. J. Libr. Cong. 137, 139 (1971), *available at* https://copyright.gov/history/dates.pdf.

[82] Lydia Pallas Loren, *The Evolving Role of "For Profit" Use in Copyright Law: Lessons from the 1909 Act*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 255, 260–61 (2010).

[83] *Id*.

ings' of an author;" a writing was interpreted as a "fixation in a tangible form [that had] a certain minimum amount of original, creative authorship."[84] Fourteen classes of works were enumerated in the Act: books, periodicals, lectures, dramatic musical compositions, musical compositions, maps, works of art, reproductions of a work of art, drawings of plastic works of a scientific or technical character, photographs, prints and pictorial illustrations, motion picture photoplays, motion pictures other than photoplays, and sound recordings.[85] Musical works only received copyright protection if the work was published with a notice of copyright.[86] If the work was not published, the artist had to deposit the composition with the Copyright Office for protection.[87]

Modernly, significant changes in technology, such as the radio, television, communications satellites, cable television, computers, photocopying machines, and videotape recorders, made Congress's revision of the Copyright Act of 1909 crucial,[88] and led to the Copyright Act of 1976.

B. COPYRIGHT ACT OF 1976

The Copyright Act of 1976 brought about the most significant change to the Copyright Act. It superseded the 1909 Act and granted the public expanded rights.[89] The 1976 Act protects "original works of authorship which are fixed in a copy (material object, other than a phonorecord, from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device) or a phonorecord."[90] The 1976 Act enumerated seven classes of works: literary works, musical works (including any accompanying words), dramatic works, pantomimes and choreographic works, pictorial,

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[84] MARYBETH PETERS, COPYRIGHT OFFICE, LIBRARY OF CONG., GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976, app. 2, A2:01 (1977) (citing Section 4 of the Copyright Act of 1909), *available at* https://www.copyright.gov/reports/guide-to-copyright.pdf.

[85] *Id*. (citing Section 5 of the Copyright Act of 1909).

[86] Martin Bresslera & Robert L. Seigel, *Retroactive Protection of Visual Arts Published Without a Copyright Notice: A Proposal*, 7 CARDOZO ARTS & ENT. L.J. 115, 121–22 (1988).

[87] *Bridgeport Music*, 2014 WL 7877773, at *8.

[88] MARYBETH PETERS, COPYRIGHT OFFICE, LIBRARY OF CONG., GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976, ch. 1, 1:1 (1977), *available at* https://www.copyright.gov/reports/guide-to-copyright.pdf.

[89] MARYBETH PETERS, COPYRIGHT OFFICE, LIBRARY OF CONG., *Introduction* to GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976, (1977), *available at* https://www.copyright.gov/reports/guide-to-copyright.pdf.

[90] MARYBETH PETERS, COPYRIGHT OFFICE, LIBRARY OF CONG., GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976, app. 2, A2:01 (1977) (quoting Sections 102(a), 301, 101 of the Copyright Act of 1976), *available at* https://www.copyright.gov/reports/guide-to-copyright.pdf.

graphic, and sculptural works, motion pictures and other audiovisual works, and finally, sound recordings.[91]

An important difference between the Copyright Act of 1909 and the Act of 1976, is that only original compositions were protected under the Act of 1909, but sound recordings were not.[92] The goal of the 1976 Act was to "strike a balance between protecting original works and stifling further creativity."[93]

C. Structure of A Music Copyright Infringement Suit

A copyright infringement claim involves many steps. To establish a claim for copyright infringement, the plaintiff must show (1) that they have a valid copyright ownership of an original musical work and (2) that the defendant copied protected elements of the plaintiff's work.[94]

1. Valid Copyright Ownership

A valid copyright certificate issued to the plaintiff from the Copyright Office is considered prima facie evidence[95] that the plaintiff's ownership is valid.[96] If a defendant can show that the plaintiff's work is not sufficiently original, the defendant may rebut a presumption of validity.[97] Defendants are only required to show that certain parts of the plaintiff's work are unoriginal—the parts that the plaintiff claims the defendant is infringing upon.[98] Defendants should hire an expert musicologist to show that plaintiff's work is not original.[99] The expert must be able to show that the plaintiff's work is not original because it shares elements with prior, protected works.[100] These prior works are not subject to copyright protection because they are in the public domain.[101]

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[91] *Id*.

[92] *Gaye,* 895 F.3d at 1121.

[93] Bridgeport Music, Inc. v. Dimension Films, 401 F.3d 647, 656 (6th Cir. 2004) *amended by* Bridgeport Music v. Dimension Films, 410 F.3d 792 (6th Cir. 2005).

[94] Feist Publications, Inc. v. Rural Telephone Services Co., 499 U.S. 340, 361 (1991).

[95] Black's Law Dictionary (10th ed. 2014) (defining prima facie evidence as evidence that will establish a fact or sustain a judgment unless contradictory evidence is produced).

[96] 17 U.S.C. § 410(c) (2019).

[97] Christine Lepera & Michael Manuelian, *Music Plagiarism: A Framework for Litigation*, 15 Ent. Sport. L. 3, 3 (1997).

[98] *Id*.

[99] Michael Der Manuelian, Note, *The Role of the Expert Witness in Music Copyright Infringement Cases*, 57 Fordham L. Rev. 127, 129 (1988), *available at* https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2804&context=flr.

[100] Christine Lepera & Michael Manuelian, *Music Plagiarism: A Framework for Litigation*, 15 Ent. Sport. L. 3, 4 (1997).

[101] *Id*.

Both the courts and the Copyright Act are silent as to any definition of originality in copyright infringement cases. Typically, musical works will satisfy the originality requirement since they generally contain "some creative spark, 'no matter how crude, humble or obvious' it might be."[102]

2. Defendant Copied Protected Elements of Plaintiff's Work

If the plaintiff is able to prove that their copyright ownership of an original work is valid, then the plaintiff must show that the defendant copied protected elements of the plaintiff's work, either directly or indirectly.[103] Typically, there is no direct evidence that the defendant has copied the plaintiff's work,[104] so circumstantial evidence may be used. A plaintiff who relies on circumstantial evidence is still required to show that (1) the defendant had access to the plaintiff's work, and (2) the two works are "substantially similar."[105] Substantial similarity is satisfied by a dual extrinsic and intrinsic test.[106]

i. Plaintiff Must Prove Defendant Had Access to Their Work

To prove that the defendant had access to the plaintiff's work, the plaintiff must show that the defendant had a reasonable opportunity to view or copy the work.[107] Plaintiffs do not have to show that the defendant actually heard the musical work, only that they had a reasonable opportunity to hear it.[108] Plaintiffs may use three theories to prove the defendant had a reasonable opportunity to access or hear their work: the chain of events theory, a combination of proof of wide dissemination and subconscious copying,[109] or by showing a striking similarity between the works.[110]

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[102] *Feist Publications*, 499 U.S. at 345 (1991) (quoting Melville B. Nimmer & David Nimmer, Nimmer on Copyright §§ 2.01 [A], [B] (1990)).

[103] Three Boys Music Corp. v. Bolton, 212 F.3d 477, 481 (9th Cir. 2000) (explaining that when direct evidence of copying is not available, the plaintiff may still prove that infringement occurred, indirectly, by showing defendant had access and the two works are substantially similar).

[104] Daniel E. Wanat, *Copyright Law: Infringement of Musical Works and the Appropriateness of Summary Judgment Under the Federal Rules of Civil Procedure, Rule 56(C)*, 39 U. MEM. L. REV. 1037, 1040 (2009).

[105] Smith v. Jackson, 84 F.3d 1213, 1218–19 (9th Cir. 1996), *superseded by statute as stated in* Griffin v. Peele, Case No. EDCV 17-01153 JGB (KKx), WL 5117555, at *1 (C.D. Cal. 2018).

[106] *Id.* at 1218.

[107] *Three Boys Music*, 212 F.3d at 482 (referencing Sid and Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157, 1172 (9th Cir. 1977)).

[108] *Id*.

[109] *Id*.

[110] *Id*. at 485.

Under the chain of events theory, the plaintiff must show that someone gave protected musical work to another person, and the work was then passed on through various people before arriving with defendant.[111] Under the second theory, the plaintiff proves access by showing that their musical work was "widely distributed through extensive radio or television airplay . . . record sales . . . [or] via the Internet . . . making practically any piece of music available (legally or illegally) with a mouse click."[112] Under the third theory, the plaintiff can show a striking similarity between the musical works.[113] Plaintiff must show that "the similarity is of a type which will preclude any explanation other than that of copying."[114]

ii. Plaintiff Must Prove There Is A Substantial Similarity Between the Works

When the plaintiff proves that the defendant had access to their musical work, some courts will apply the "inverse ratio" rule.[115] The inverse-ratio rule states that the more evidence the plaintiff provides in showing the defendant's access, the less evidence of substantial similarity is needed, and vice versa.[116]

After access is established, the plaintiff must prove that their work and the defendant's work are substantially similar.[117] The Ninth Circuit uses a two-part test: "an objective extrinsic test and a subjective intrinsic test."[118] For the extrinsic test, the court "analytically dissect[s]" the musical works by considering expert testimony.[119] This dissection requires "breaking the works 'down into their constituent elements, and comparing those elements for proof of copying as measured by substantial similarity.'"[120] If the plaintiff cannot provide sufficient evidence that a jury

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[111] *See* Gaste v. Kaiserman, 863 F.2d 1061, 1067 (2d Cir. 1988) (explaining that "[a]ccess through third parties connected to both a plaintiff and a defendant may be sufficient to prove a defendant's access to a plaintiff's work" even though it is an "attenuated chain of events.").

[112] Margit Livingston & Joseph Urbinato, *Copyright Infringement of Music: Determining Whether What Sounds Alike is Alike*, 15 VAND. J. ENT. & TECH. L. 227, 265–66 (2013).

[113] Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000) ("[I]n the absence of any proof of access, a copyright plaintiff can still make out a case of infringement by showing that the songs were "strikingly similar."" *See* Smith v. Jackson, 84 F.3d 1213, 1220 (9th Cir. 1996)).

[114] Selle v. Gibb, 741 F.2d 896, 905 (7th Cir. 1984).

[115] *Bridgeport Music*, 2014 WL 7877773, at *11.

[116] *Id.* at *11.

[117] *Id.* at *5.

[118] *Id.* at *6.

[119] *Id*.

[120] *Id*.

could reasonably find extrinsic similarity, then a court must grant summary judgment for the defendant.[121]

Once the plaintiff has satisfied the extrinsic test, the court employs the intrinsic test.[122] The intrinsic test asks whether an "ordinary, reasonable person would find the total concept and feel of the works to be substantially similar."[123] The jury must determine, based on the evidence and testimony before them, whether there is a substantial similarity between the songs in question.[124]

III. ARGUMENT

A. MUSIC STREAMING SERVICES ARE BECOMING INCREASINGLY UBIQUITOUS

Music streaming services are becoming increasingly ubiquitous, making the consumer's access to music easier than ever. Even though the type of technology changed over time, the general concern by copyright holders has not: In the 1940s, the copyright concern was primarily connected to technology such as movies and radio;[125] In the 1970s, the concern stemmed from computer software and photocopying;[126] In the late 1990s and early 2000s, copyright holders were faced with a new concern spurred on by the development of the MP3 and custom CD compilation.[127] The MP3 enabled music compression for faster downloading on the Internet.[128] Shortly after its development, several companies started selling music over the Internet, allowing consumers to create custom CDs.[129] This technology was a big concern for record companies because they believed that the MP3 allowed music to be easily copied, en-

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[121] *Id*. (referencing Rice v. Fox Broad. Co., 330 F.3d 1170, 1174 (9th Cir. 2003)), *aff'd in part, rev'd in part sub nom*. Williams v. Gaye, 895 F.3d 1106 (9th Cir. 2018).

[122] Williams v. Bridgeport Music, Inc., No. LA CV13-06004 JAK (AGRx), 2015 WL 4479500, at *21 (C.D. Cal. 2015), *aff'd in part, rev'd in part sub nom*. Williams v. Gaye, 895 F.3d 1106 (9th Cir. 2018).

[123] *Bridgeport Music*, 2015 WL 4479500, at *21 (quoting Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000)).

[124] *Bridgeport Music*, 2014 WL 7877773, at *6.

[125] Mary L. Mills, Note, *New Technology and the Limitations of Copyright Law: An Argument for Finding Alternatives to Copyright Legislation in an Era of Rapid Technological Change*, 65 CHI.-KENT L. REV. 307, 307 (1989), *available at* https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=2766&context=cklawreview.

[126] *Id*. at 314.

[127] Karen Bevill, Note, *Copyright Infringement and Access: Has the Access Requirement Lost its Probative Value?*, 52 RUTGERS L. REV. 311, 327–28 (1999).

[128] *Id*. at 328.

[129] *Id*. at 327.

couraged piracy, and could impede their economic growth.[130] Scholars and the music industry alike could not have foreseen the technological advancements of today.[131] The days of burning CDs are gone, and the age of apps, custom playlists, and music streaming platforms are here. The consumer's ability to access music has never been easier.

Music streaming services have revolutionized the music industry by changing the way artists make music and the way people access music.[132] Platforms like YouTube, Spotify, Apple Music, Pandora, Napster, and SoundCloud allow anyone with Internet access to browse through each platform's library of music.

The most popular of these streaming services, Spotify and Apple Music,[133] provide its users with the largest catalogues of music available on any of the services. Spotify quickly gained popularity after its founding in 2006 as a small start-up in Sweden.[134] Today, Spotify has a library of 30-million-plus songs and adds roughly 20,000 new songs each day.[135] The entire library of music is accessible by 108 million paying subscribers worldwide.[136] Apple Music, Spotify's main competitor, launched in 2015 with on-demand music, programmed playlists, and a live radio station.[137] Today, Apple Music has a library of around 45 million songs,[138] with roughly 60 million people paying for a subscrip-

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[130] *The Big Five Hit the Web*, THE ECONOMIST (May 1999), *available at* https://www.economist.com/business/1999/05/06/the-big-five-hit-the-web.

[131] Karen Bevill, Note, *Copyright Infringement and Access: Has the Access Requirement Lost its Probative Value?*, 52 RUTGERS L. REV. 311 (1999) (discussing the MP3 and the Internet in general as the biggest concern for copyright holders. This article was published in the early years of the Internet, as the World Wide Web was only eight years old).

[132] *What is Streaming Music and How Has it Changed the Industry?*, MN2S (Apr. 23, 2018), https://mn2s.com/news/label-services/what-is-streaming-music-changed-industry/.

[133] *Most Popular Music Streaming Services in the United States as of March 2018, by Monthly Users (in millions)*, STATISTA (Mar. 2018), https://www.statista.com/statistics/798125/most-popular-us-music-streaming-services-ranked-by-audience/, (last visited Sept. 23, 2019).

[134] Jeff Parsons, *History of Spotify: How the Swedish Streaming Company Changed the Music Industry*, MIRROR (Apr. 3, 2018, 7:24 AM), https://www.mirror.co.uk/tech/history-spotify-how-swedish-streaming-12291542.

[135] Josh Levenson & Parker Hall, *Apple Music v. Spotify*, DIGITAL TRENDS (Sept. 6, 2019, 2:45 PM), https://www.digitaltrends.com/music/apple-music-vs-spotify/, (last visited Sept. 23, 2019).

[136] *Number of Spotify Premium Subscribers Worldwide from 1st Quarter 2015 to 2nd Quarter 2019 (in millions)*, STATISTA (Aug. 9, 2019), https://www.statista.com/statistics/244995/number-of-paying-spotify-subscribers/, (last visited Sept. 23, 2019).

[137] Stuart Dredge, *Apple Music Launches to Take on Spotify – and Traditional Radio*, THE GUARDIAN (June 30, 2015, 11:00 AM), https://www.theguardian.com/technology/2015/jun/30/apple-music-launch-spotify-radio.

[138] Josh Levenson & Parker Hall, *Apple Music vs. Spotify: Which Service is the Streaming King?*, DIGITAL TRENDS (Sept. 6, 2019, 2:45 PM), https://www.digitaltrends.com/music/apple-music-vs-spotify/, (last visited Sept. 23, 2019).

tion.[139] The large amount of users with access to these libraries of music does not include the number of users who choose not to pay for an account with either of the services; that number is likely in the millions, as well.[140] Even in the age of music streaming services, radio still reigns as the leading music platform with more than 243 million American adults that listen each month.[141]

B. THE ACCESS REQUIREMENT SHOULD BE PRESUMED IN EVERY MUSIC COPYRIGHT INFRINGEMENT CASE

The access requirement should be presumed in music copyright infringement cases because the requirement no longer fulfills its original purpose due to the widespread availability of music today. An original purpose of the access requirement in copyright infringement cases was to protect a defendant from punishment for accidentally infringing upon a plaintiff's copyrighted work.[142] The access requirement was intended as an available defense.[143] To prove access, a plaintiff may show that the work was widely disseminated or a particular chain of events occurred in which the defendant could have gained access to the copyrighted work.[144] A plaintiff is not required to prove that a defendant actually heard or saw the work, only that the defendant had the opportunity to hear it.[145] Based on this, it is likely that a plaintiff will always be able to satisfy the access requirement because virtually every musical work is available through one, if not more, of the music streaming platforms available to consumers today.

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[139] *Number of Apple Music Subscribers Worldwide from October 2015 to June 2019 (in millions)*, STATISTA (July 2, 2019), https://www.statista.com/statistics/604959/number-of-apple-music-subscribers/.

[140] Jon Porter, *Spotify Is First To 100 Million Paid Subscribers*, THE VERGE (Apr. 29, 2019, 7:39 AM), https://www.theverge.com/2019/4/29/18522297/spotify-100-million-users-apple-music-podcasting-free-users-advertising-voice-speakers, (explaining that including free subscribers, Spotify has a total of 217 million monthly active users worldwide).

[141] *Radio Facts and Figures*, NEWS GENERATION (compiled from 2018 Nielsen Audio Today and Pew State of the News Media 2017), https://www.newsgeneration.com/broadcast-resources/radio-facts-and-figures/.

[142] Malkin v. Dubinsky, 203 N.Y.S.2d 501, 508 (N.Y. Sup. Ct. 1960) ("Accidental similarity is not actionable plagiarism.").

[143] *Id*. (explaining that a "plaintiff must demonstrate that the defendants had access thereto" and that "copying may be shown by direct evidence of access, that the alleged plagiarist had seen or heard the plaintiff's work, or by proper circumstantial evidence . . . .").

[144] Repp v. Webber, 947 F. Supp. 105, 114 (S.D.N.Y. 1996) (citing to ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 998 (2d Cir. 1983) and Repp v. Webber, 892 F. Supp 552, 556–57 (S.D.N.Y. 1995)).

[145] *Three Boys Music*, 212 F.3d at 482 (explaining that "[t]here must be a reasonable possibility of viewing the plaintiff's work—not a bare possibility.").

To have the opportunity to listen to music streaming platforms, consumers must have access to certain devices such as radios, TVs, smartphones, and computers. A recent study shows how a majority of the United States population has access to devices compatible with music streaming services: radio reaches 92% of the population; TV reaches 87%; 81% have access to a smartphone; 54% have access to a personal computer; and 46% have access to a tablet.[146] Additionally, an overwhelming majority of the United States population listens to music, dedicating more than 25 hours each week listening to music at home, while driving, working, and doing chores.[147] With numbers such as these, the mere opportunity for a defendant to hear a particular work will always be satisfied.

If the access requirement is always found to be satisfied because of people's access to devices and music streaming platforms like Spotify and Apple, then it follows that access should be presumed in all music copyright infringement cases.

C. WITH ACCESS PRESUMED, COURTS SHOULD ABANDON THE INVERSE-RATIO RULE

1. History of The Inverse-Ratio Rule

The roots of the inverse-ratio rule date back to the late 1930s when a plaintiff alleged that his stage play was infringed by a defendant's motion picture.[148] The court held that "where there is access, there is a high degree of probability that the similarity results from copying and not from independent thought and imagination. Indeed, it might well be said that where access is proved or admitted, there is a presumption that the similarity is not accidental."[149] Although the opinion declined to use the words "inverse" or "ratio," its reasoning is considered the fundamental building blocks of the inverse-ratio rule.[150] The phrase "inverse ratio rule" was used for the first time in a 1954 copyright case.[151]

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[146] *Audio Today 2019: How America Listens*, THE NIELSEN COMPANY, at 3 (June 2019), https://www.nielsen.com/wp-content/uploads/sites/3/2019/06/audio-today-2019.pdf.

[147] *Everyone Listens to Music, But How We Listen Is Changing*, THE NIELSEN COMPANY (Jan. 22, 2015), https://www.nielsen.com/us/en/insights/article/2015/everyone-listens-to-music-but-how-we-listen-is-changing/, (explaining that 93% of the U.S. population listens to music, with 25% listening in their car, 15% listening at work, and 15% listening while doing chores).

[148] *See* Shipman v. R.K.O. Radio Pictures, 100 F.2d 533 (2d Cir. 1938).

[149] *Id*. at 538.

[150] David Aronoff, *Exploding the "Inverse Ratio Rule"*, 55 J. COPYRIGHT SOC'Y U.S.A. 125, 130 (2008) (citing to Shipman v. R.K.O. Radio Pictures, 100 F.2d 533, 538 (2d Cir. 1938)).

[151] Morse v. Fields, 127 F. Supp. 63, 66 (S.D.N.Y. 1954).

i. Critisicms of The Inverse-Ratio Rule

The inverse-ratio rule has received criticism over the years as being confusing and difficult to apply.[152] For example, the United States Court of Appeals for the Second Circuit rejected the rule in *Arc Music Corp. v. Lee* where the court examined the inverse-ratio rule and found that it lacked any analytical value.[153]

The Ninth Circuit attempted to explain its version of the inverse-ratio rule as requiring a lesser showing of substantial similarity if there is a strong showing of access.[154] This rule only works in one direction–that is, "while a strong showing of access will result in a lower threshold showing of substantial similarity, a weak showing of access does not require a greater showing of similarities between the plaintiff's and defendant's works."[155] However, when the inverse-ratio rule is applied, courts remain unsure of how less the showing of substantial similarity need be.[156] No court has provided a standard for the "ratio" itself. As one scholar stated, "If the [inverse-ratio rule] is genuinely a ratio, what quantum of additional strong access excuses what measure of weak similarity? Does 15% greater access excuse 15% less similarity?"[157]

ii. The Ninth Circuit Quietly Abolished the Inverse-Ratio Rule in the Second Opinion

In the first opinion, the Ninth Circuit used the inverse-ratio rule in its analysis of "Blurred Lines" and "Got To Give It Up."[158] Accordingly, because Williams and Thicke admitted at trial that they had a high degree of access to "Got To Give It Up," the Gayes' burden of proof for substantial similarity was lowered.[159] The first opinion of *Williams* added another case to the list of Ninth Circuit cases that failed to provide a clear standard for the inverse-ratio rule. The only explanation the court gave in the first opinion was that the Gayes' burden of proof of substantial simi-

[152] David Aronoff, *Exploding the "Inverse Ratio Rule"*, 55 J. COPYRIGHT SOC'Y U.S.A. 125, 143 (2008) ("The IRR is a deleterious doctrine that provides no analytical benefits in evaluating or determining a copyright infringement case."); *see also* William F. Patry, PATRY ON COPYRIGHT § 9:91 (2019) ("There is nothing positive that can be said about a rule that lacks any clarity at all: trying to get a jury to both understand the rule and apply it properly is totally impossible.").

[153] Arc Music Corp. v. Lee, 296 F.2d 186, 187 (2d Cir. 1961).

[154] *Three Boys Music*, 212 F.3d at 485.

[155] Gable v. Nat'l Broad. Co., 727 F. Supp. 2d 815, 823 n.2 (C.D. Cal. 2010); *see also* Bernal v. Paradigm Talent & Literary Agency, 788 F. Supp. 2d 1043, 1053 n.4 (C.D. Cal. 2010).

[156] *Id*. at 824 (recognizing that the inverse-ratio rule "is impossible to quantify").

[157] David Aronoff, *Exploding the "Inverse Ratio Rule,"* 55 J. COPYRIGHT SOC'Y U.S.A. 125, 140 (2008).

[158] *Gaye*, 885 F.3d at 1163, *amended by* 895 F.3d 1106 (9th Cir. 2018).

[159] *Id*.

larity was lowered because Williams and Thicke admitted to having a high degree of access.[160] The court did not quantify how the burden of proof was to be lowered.

However, the omission of the inverse-ratio rule in the second opinion can be construed as the Ninth Circuit quietly abolishing the inverse-ratio rule. The inverse-ratio rule should be abandoned because a plaintiff will always satisfy the access requirement with the technological advances discussed above. Lowering a plaintiff's burden to prove substantial similarity will not help the court determine whether a defendant engaged in unlawful copying of the plaintiff's musical work. Substantial similarity is proven by "comparing the two works from the perspective of the ordinary observer"[161] and this comparison should be completely unaffected by the defendant's degree of access. Instead, the courts should reiterate the importance of proving substantial similarity in music copyright infringement cases.

The omission of the inverse-ratio rule in the second opinion did not affect the rest of the court's analysis in the opinion.[162] If proving access was so crucial to the analysis, the Ninth Circuit would not have omitted the inverse-ratio rule in the second opinion. This omission proves how the Ninth Circuit is trying to adapt to the changing landscape in the copyright realm and why courts should abandon the inverse-ratio rule.

It should not follow that a plaintiff's burden of proving substantial similarity should be lowered because the public has access to the work as well. There is the possibility that a defendant in a music copyright infringement case has never heard the plaintiff's work before. Lowering the plaintiff's burden of proving substantial similarity because of a high showing of access does nothing to solve whether the works are truly substantially similar. If the access requirement will always be satisfied due to the amount of music available to consumers, then plaintiffs will only need to show a "lesser" amount of similarity, which has the possibility of leading to erroneous rulings and judgments against defendants.

The inverse-ratio rule should be abolished in courts because in the modern day, a defendant's access to a musical work will always be found to exist. Under the current standard, access is easy to demonstrate because virtually every person has access to all public musical works. Since the creation of YouTube, Spotify, Apple Music, and other similar platforms, the access to music has never been greater.

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[160] *Id*.

[161] William F. Patry, PATRY ON COPYRIGHT § 9:91 (2019).

[162] *Compare Gaye*, 885 F.3d 1150 with, *Gaye*, 895 F.3d 1106.

CONCLUSION

The *Williams* decision sent the music world into a flurry, with artists fearing that the decision might severely limit their creativity and put a stop to any music that has the same feel or groove as other music.[163] Additionally, the first *Williams* opinion added another case to the list of those that failed to provide a clear standard for the inverse-ratio rule. The access requirement must be presumed in every music copyright infringement case to adapt to the changing landscape in the copyright realm. Music streaming services revolutionized the music industry by changing the way artists make music and the way people access music.[164] Because of platforms like Spotify and Apple Music, and based on the current ways of proving access, a defendant will always be found to have access to a plaintiff's work. In addition to presuming access, and because access should be presumed, the courts should abandon the inverse-ratio rule because music streaming platforms will always satisfy the access requirement in copyright infringement cases. Lowering the plaintiff's burden of proving substantial similarity because of a high showing of access does nothing to solve whether the works are actually substantially similar.

[163] Adrienne Gibbs, *Marvin Gaye's Family Wins 'Blurred Lines' Appeal; Pharrell, Robin Thicke Must Pay*, FORBES (Mar. 21, 2018, 3:37 PM), https://www.forbes.com/sites/adriennegibbs/2018/03/21/marvin-gaye-wins-blurred-lines-lawsuit-pharrell-robin-thicke-t-i-off-hook/#a8b7104689b4; *see also* Brief of Amicus Curiae Musicologists in Support of Plaintiffs-Appellants-Cross-Appellees, 2016 WL 4592128, Williams v. Gaye, 895 F.3d 1106 (9th Cir. 2018) (over 200 songwriters, composers, musicians, and producers warn the Ninth Circuit about the effect on the music industry if infringement is found against the Thicke parties).

[164] *What Is Streaming Music and How Has it Changed the Industry?*, MN2S (Apr. 23, 2018), https://mn2s.com/news/label-services/what-is-streaming-music-changed-industry/.

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Perez v. City of Roseville: Constitutional Protection For the Public Employee in Matters Pertaining To Sex

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NOTE

PEREZ V. CITY OF ROSEVILLE: CONSTITUTIONAL PROTECTION FOR THE PUBLIC EMPLOYEE IN MATTERS PERTAINING TO SEX

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INTRODUCTION

The late Judge Reinhardt posited the following:

> As a society, we must remain solicitous of the constitutional liberties of public employees, as of any citizens, to the greatest degree possible, and should be careful not to allow the State to use its authority as an employer to encroach excessively or unnecessarily upon the areas of private life, such as family relationships, procreation, and sexual conduct, where an individual's dignitary interest in autonomy is at its apex. Nor can or should we seek to eliminate the development of ordinary human emotions from the workplace where we spend a good part of our waking hours, unless such development is incompatible with the proper performance of one's official duties.[1]

The Ninth Circuit recently addressed the relationship between the government's interests as an employer and the employee's interest in personal autonomy in *Perez v. Roseville.* In *Perez*, probationary police officer Janelle Perez was terminated after an internal affairs investigation

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[1] Perez v. Roseville, 882 F.3d 843, 847 (9th Cir. 2018) (citing Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1174 (9th Cir. 2003)), *superseded by*, 926 F.3d 511 (9th Cir. 2019).

revealed that she engaged in an off-duty, extramarital affair with another officer.[2] In her subsequent claim against the City of Roseville, Perez argued that the termination violated her rights to privacy and intimate association guaranteed by the First and Fourteenth Amendments because it was partially based upon the department's disapproval of her off-duty sexual conduct.[3]

In its initial decision, the Ninth Circuit held that taking adverse action against an employee based only on moral disapproval of their private sexual conduct violates their constitutionally protected privacy and intimate association rights.[4] Discipline, including termination, is only appropriate upon a showing that the employee's conduct affects their on-the-job performance, or otherwise violates a narrowly-tailored, constitutionally valid departmental policy.[5]

Following the publication of the original decision, Judge Reinhardt, the opinion's author, passed away.[6] The Ninth Circuit thereafter issued a replacement opinion that draws a contrary conclusion.[7] This Note demonstrates that the Ninth Circuit's original opinion properly interpreted the facts and the law with regard to the freedoms of privacy and intimate association. By re-deciding this issue, the Ninth Circuit missed an opportunity to clarify the appropriate relationship between the interests of the government employer and the personal autonomy rights of its employee. A person should not have to sacrifice aspects of their constitutional rights to personal autonomy when they accept a position with a government employer.[8]

Section I of this Note summarizes both of the Ninth Circuit's opinions in the *Perez* matter. Section II analyzes the need to prevent the government employer from intruding on its employees' personal autonomy rights. Section III discusses why the court's second opinion is problematic. Section IV demonstrates why the Ninth Circuit's first opinion is an appropriate application of the law considering the facts of the case. Sec-

[2] Perez v. Roseville, No. 2:13-CV-2150-GEB-DAD, 2015 U.S. Dist. LEXIS 80060, at *5-6 (E.D. Cal. 2015), *aff'd*, 926 F.3d 511 (9th Cir. 2019).

[3] *Perez*, 882 F.3d at 848.

[4] *Id.*

[5] *Id.* at 855-56; s*ee also* Thorne v. El Segundo, 726 F.2d 459, 471 (9th Cir. 1983).

[6] *Perez v. Roseville*, 926 F.3d at 525-526 (9th Cir. 2019). The Ninth Circuit held that an opinion can be amended or withdrawn at any point before the mandate has issued. Carver v. Lehman, 558 F.3d 869 (9th Cir. 2009). Because the initial Perez opinion "was only part way through its finalization process," the court had the authority to withdraw the opinion, and issue a replacement. Perez, 926 F.3d at 525 (quoting Carver, 558 F.3d at 878). However, Judge Reinhardt himself opined that, in the interest of "maintaining the stability and legitimacy of the court's decisions," a new majority that disagrees with a court decision should only seek to correct that decision through the en banc process. Carver, 558 F.3d at 880-81 (Reinhardt, J., concurring).

[7] *Perez*, 926 F.3d at 525–26.

[8] *See Perez*, 882 F.3d at 847.

tion V argues that the test furthered by the first *Perez* decision should be used as a standard going forward. Finally, Section VI illustrates how competing decisions in other circuits would have been decided under the *Perez* framework.

I. *PEREZ V. ROSEVILLE* AND POLICING SEXUAL PRIVACY

The Supreme Court has held that the Constitution limits the ability of a public employer to leverage the employment relationship to incidentally or intentionally restrict the liberties government employees enjoy as private citizens.[9] While government employment necessarily includes certain limitations on individual freedoms, "a citizen who works for the government is nonetheless a citizen."[10]

In *Perez v. City of Roseville*, Janelle Perez challenged the district court's grant of qualified immunity to her commanding officers.[11] The officers, after investigating a false accusation of on-duty sexual conduct, terminated Perez based on their discovery of her extramarital affair with a fellow officer.[12]

On appeal, the Ninth Circuit initially confirmed that, while the district court's finding that the investigation into Perez's affair was warranted, it erred by failing to consider whether Perez's subsequent termination violated her constitutional rights.[13] The Ninth Circuit initially concluded that the evidence presented a genuine factual dispute of whether Perez's commanding officers terminated her employment based, at least in part, on their moral disapproval of her extramarital affair in violation of 42 U.S.C. section 1983.[14] The court later withdrew this opinion and replaced it with a decision that reached contrary conclusions.[15] In both opinions, the court reaffirmed the notion that a government employer may not take adverse employment action against an employee based on private sexual conduct when such conduct does not negatively affect the employee's on-the-job performance.[16] However, the opinions

[9] *See* Garcetti v. Ceballos, 547 U.S. 410, 418–19 (2006).

[10] *Id.* (holding that while public employees are entitled to certain protections of their individual liberties, a citizen who speaks in his official capacity as a public employee is not speaking as a "private citizen" for purposes of First Amendment protection).

[11] *See* Plaintiff-Appellant Janelle Perez's Opening Brief at 11, Perez, 926 F. 3d 511 (No. 15-16430), 2016 WL 3586832.

[12] *Perez*, 882 F.3d at 848.

[13] *Id.* at 858.

[14] *Id.*

[15] *See Perez*, 926 F.3d. 511.

[16] *See id.* at 521; *see also Perez*, 882 F.3d at 857–58 (citing Thorne, 726 F.2d at 471).

differ on the correct interpretation of the reasoning for Perez's termination, and how prior precedent should apply.[17]

A. FACTUAL AND PROCEDURAL BACKGROUND

Janelle Perez began working at the Roseville Police Department ("Department") in January 2012.[18] Shortly after her appointment, Perez and another department officer, Shad Begley, began a romantic relationship.[19] Both Perez and Begley were separated from, though still legally married to, their respective spouses.[20] Approximately six months later, the Department initiated an internal affairs investigation into Perez's and Begley's conduct after Begley's estranged wife filed a citizen complaint suggesting that Perez and Begley engaged in sexual conduct while on duty.[21] Although the officers were romantically involved, the investigation revealed that the allegation of on-duty sexual conduct was false.[22] The investigation also revealed that the officers were using their cellular phones excessively while they were working.[23] Captain Moore enlisted Lieutenant Walstad to review the internal affairs report.[24] Walstad determined that Perez's and Begley's cell-phone usage violated Department policy.[25] Captain Moore thereafter concluded that Officer Perez should be terminated in light of the investigation's findings.[26] Both Moore and Walstad later made comments indicating that they morally objected to Perez's extramarital sexual conduct.[27]

Despite finding no merit to the allegations of on-duty sexual conduct, the Department issued Perez and Begley written reprimands, which charged them with "Unsatisfactory Work Performance" and "Conduct Unbecoming."[28] For unknown reasons, Begley's estranged wife was also

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[17] *See Perez*, 926 F.3d at 514; *see also Perez*, 882 F.3d at 848.

[18] Plaintiff-Appellant Janelle Perez's Opening Brief at 1–2, Perez, 926 F. 3d. 511 (No. 15-16430).

[19] *Id.*

[20] *Perez*, 2015 U.S. Dist. LEXIS 80060, at *4.

[21] *Id.* at *5.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* at *5–6.

[26] *Id.* at *6

[27] *Perez*, 882 F.3d at 849.

[28] *Id.* at 848–49. The Roseville Police Department's Policy Manual defines "Unsatisfactory Work Performance" as "including, but not limited to, failure, incompetence, inefficiency or delay in performing and/or carrying out proper orders, work assignments or instructions of supervisors without a reasonable and bona fide excuse." Memorandum in Support of Defendants' Motion for Summary Judgment and, in the Alternative, for Partial Summary Judgment at n.1, Perez, No. 2:13-CV-2150-GEB-DAD, 2015 WL 3833749 (E.D. Cal. 2015), *aff'd*, 926 F.3d 511 (9th Cir. 2019) (No. 15-16430), 2015 WL 13688484. "Conduct Unbecoming" refers to conduct that "is unbecoming of a

notified of the charges.[29] Three weeks later, Perez appealed her reprimand in an appeal meeting with Chief Daniel Hahn.[30] At the meeting, Perez received a written notice of dismissal, which had been prepared in advance.[31] The department offered no explanation for Perez's termination.[32]

In the three weeks between the written reprimand and Perez's termination, Perez received a citizen complaint that she was rude and insensitive while responding to a domestic violence call.[33] During that time, her supervisor also reported an incident to Chief Hahn in which Perez questioned her supervisor, and displayed an angry and agitated demeanor.[34] Neither report was investigated further.[35] However, both incidents provided support for the Department's proffered reasons for firing Perez—namely that a complaint was submitted regarding Perez's conduct during a service call, and that Perez had exhibited a "bad attitude" toward her supervisor.[36] The department also cited a complaint that Perez "did not get along well with other female officers" as a reason for her dismissal.[37]

Nearly a week after her termination, Perez received a revised, written reprimand which reversed the findings of "Unsatisfactory Work Performance" and "Conduct Unbecoming," but introduced new charges of "Use of Personal Communication Devices." The officers' on-duty phone use, although a concern, was not one that would "warrant termination."[38] Subsequently, Perez sued the City of Roseville, the Department, and the officers involved in her termination for infringing her rights to privacy and free association in violation of 42 U.S.C. section 1983.[39] Perez also alleged a violation of her right to due process, as well as sex discrimination under Title VII of the Civil Rights Act of 1964.[40]

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member of the Department or which is contrary to good order, efficiency or morale, or which tends to reflect unfavorably upon the Department or its members." *Id.*

[29] *Perez*, 882 F.3d at 849 (9th Cir. 2018) *superseded by* 926 F.3d 511 (9th Cir. 2019).

[30] *Perez*, 2015 U.S. Dist. LEXIS 80060, at *6.

[31] *Id.* at *6–7.

[32] Plaintiff-Appellant Janelle Perez's Opening Brief at 9, Perez, 926 F. 3d 511 (No. 15-16430).

[33] *Perez*, 2015 U.S. Dist. LEXIS 80060, at *8.

[34] *Perez*, 882 F.3d at 849.

[35] *Id.*

[36] *Id.* at 853.

[37] *Id.*

[38] *Id.* at 855 n.7. Although the officers' phone records, were deemed "abnormal," the investigation concluded that they had not texted each other excessively during their shifts. *Id.* Further, Chief Hahn himself testified that the phone use alone was "not enough to warrant termination." *Id*.

[39] *Perez*, 2015 U.S. Dist. LEXIS 80060, at *29-30.

[40] *Id.*

B. THE NINTH CIRCUIT ORIGINALLY CONCLUDES THAT PEREZ'S TERMINATION MAY HAVE BEEN UNCONSTITUTIONALLY MOTIVATED.

Initially, the Ninth Circuit held that the court's precedent set by *Thorne v. City of El Segundo*, as well as the Supreme Court's decision in *Lawrence v. Texas* governed the Department's conduct and protected the employee's privacy rights.[41] The court's first opinion, however, reached a different conclusion than more recent jurisprudence in the Fifth and Tenth Circuits, creating a split in authority.[42]

1. Thorne v. El Segundo *Sets a Standard for the Protection of Employee Privacy.*

The Ninth Circuit first acknowledged a public employee's right to privacy and free association in *Thorne v. El Segundo*.[43] In *Thorne*, the City of El Segundo ("City") denied a clerk-typist within the department a promotion to police officer.[44] An investigation of the denial revealed that the City forced Thorne to disclose details about her personal sexual matters, and that it ultimately denied Thorne employment based in part on the nature of such activities.[45]

The court held that the benefits of public employment do not require a potential employee to sacrifice her constitutionally protected rights.[46] The court noted that the inquiry by the police department involved the core constitutional guarantees of privacy and free association.[47] For this reason, the City needed to show that its inquiry was narrowly-tailored to meet a legitimate interest.[48] This level of "heightened scrutiny" is essen-

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[41] *Perez*, 882 F.3d at 848, 855 N.8.

[42] *Compare Perez*, 882 F.3d (holding that a government employer may not terminate an employee based on her off-duty sexual conduct, unless such conduct interferes with her work performance or violates a constitutionally valid department policy), *with* Seegmiller v. LaVerkin City, 528 F.3d 762, 770–72 (10th Cir. 2008), (holding that the asserted liberty interest "to engage in a private act of consensual sex" was not fundamental, and the City needed only to survive a rational basis review to restrict the interest), *and* Coker v. Whittington, 858 F,3d 304, 306–07 (5th Cir. 2017) (holding that the expansion of rights regarding personal sexual choices promulgated by *Lawrence v. Texas* did not warrant a change in public employment policies, and that by accepting the privilege of public employment, individuals necessarily give up some of their constitutional rights).

[43] *See generally Thorne*, 726 F.2d. 459.

[44] *Id.* at 461–62.

[45] *Id.* at 468.

[46] *Id.* at 469 (citing Kelley v. Johnson, 425 U.S. 238, 245 (1976)).

[47] *Id.*

[48] *Id.*

tial to protect individual liberties from "majoritarian or capricious coercion."[49]

The Ninth Circuit concluded that the City impermissibly denied Thorne's employment based in part on its disapproval of her affair with a married police officer.[50] The court thus set the standard for evaluating the relationship between an employee's private conduct and her job performance.[51] Unless there is evidence that "private, off-duty, personal activities" negatively affect an applicant's job performance, the State may not consider such information in its decision to reject an applicant for employment.[52] The court explained that such an intrusion "cannot be upheld under any level of scrutiny."[53]

2. Lawrence v. Texas *Further Acknowledges That the Government's Conception of Morality Should Not Govern Personal Intimate Choices.*

Thirty years after the Ninth Circuit's decision in *Thorne*, the Supreme Court addressed whether the liberty interest protected by the Fourteenth Amendment[54] encompasses "an autonomy of self that includes freedom [to engage in] certain intimate conduct."[55] In *Lawrence v. Texas,* the Court invalidated Texas statute that criminalized "deviate sexual intercourse"[56] between two persons of the same sex, but did not criminalize the same conduct for two persons of different sexes.[57]

In *Lawrence,* the Court found that it was inappropriate for the State to use only majoritarian bias to "mandate [its] own moral code."[58] Thus, the Court held that "[t]he State cannot demean a . . . person's existence or control their destiny by making their private sexual conduct a crime."[59] The Court concluded that the Texas statute unconstitutionally violated Petitioners' rights under the Due Process Clause because adult

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[49] *Id.* at 470 (citing United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938)).

[50] *Id.* at 466 nn.7–8.

[51] *See id*. at 471.

[52] *Id.*

[53] *Id.*

[54] The Fourteenth Amendment to the United States Constitution prohibits states from depriving citizens of "life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

[55] Lawrence v. Texas, 539 U.S. 558, 562 (2003).

[56] Texas defines "deviate sexual intercourse" as "any contact between any part of the genitals of one person and the mouth or anus of another person; or . . . the penetration of the genitals or the anus of another person with an object." TEX. PENAL CODE §21.01 (2005).

[57] *Lawrence*, 539 U.S. at 578-79.

[58] *Id.* at 571 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992) (internal quotation marks omitted)).

[59] *Id.* at 578.

citizens have a liberty interest in conducting themselves as they choose with regards to private sexual decision-making.[60]

The Court did not expressly identify the appropriate standard of review for analyzing an intrusion of an individual's sexual autonomy.[61] However, Justice Kennedy suggested that the Texas law would not survive the minimum rational basis review, by indicating that it "furthers no legitimate state interest."[62]

3. Applying Thorne *and* Lawrence, *the Ninth Circuit Finds Perez's Termination Unconstitutional.*

Based on the precedent set by *Thorne* and *Lawrence*, the court found that Perez's private sexual conduct fell within the constitutional protections of privacy and intimate association, the violations of which cannot be maintained "under any level of scrutiny."[63] Evidence in the record sufficiently suggested that Perez's superiors were motivated to terminate her, at least in part, by her extramarital affair.[64] For example, Hahn provided inconsistent testimony with regard to whether the investigation into Perez's affair was a factor in his decision to terminate her.[65] Similarly, Moore expressed concern that the affair "could reflect unfavorably on the police department."[66] Walstad also indicated disapproval of Perez's private sexual conduct, in light of the fact that both Begley and Perez "were married and have young children."[67] Additionally, the court found that, based on the proximity to the internal affairs investigation, the three "reasons" given for Perez's termination[68] could be found to be pretexts for the true reason for Perez's termination: disapproval of her extramarital affair.[69]

The court further concluded that, while the Roseville Police Department was justified in its investigation due to the allegations of on-duty

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[60] *Id.* at 572.

[61] *See id.* at 586 (2003) (Scalia, J., dissenting) (arguing that the majority fails to announce a specific standard of review).

[62] *See id.* at 578 (2003). Under rational basis review, a law is presumed valid so long as it "is rationally related to a legitimate state interest." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

[63] *Perez*, 882 F.3d at 854 (quoting Thorne, 726 F.2d at 471).

[64] *Id.* at 851.

[65] *Id.*

[66] *Id.* at 852.

[67] Plaintiff-Appellant Janelle Perez's Opening Brief at 4, Perez, 926 F.3d. 511 (No. 15-16430).

[68] The Department cited the following as reasons for Perez's termination: (1) she did not get along with other female officers; (2) the Department received a complaint about her from a domestic violence victim; and (3) she had a "bad attitude[.]" *Perez*, 882 F.3d at 853.

[69] *Id.*

conduct, the Department was not permitted to terminate Perez on the basis of such conduct when it found that Begley's work-related allegations lacked merit.[70] The precedent set by *Thorne* provided fair notice to all reasonable police officials that such a termination was not permitted.[71] Consequently, neither the Department nor the individual officers could assert qualified immunity for their subsequent violation.[72]

For these reasons, the court found that there was sufficient evidence that the Roseville Police Department violated Perez's constitutional rights to privacy and free association, and that the claim should thereby survive summary judgment.[73] Absent any indication that Perez's off-duty conduct had a substantial effect on her job performance or violated a "narrowly tailored department regulation," the court concluded that the defendants violated Perez's constitutional rights by making her extramarital affair the basis for her termination.[74]

4. The Fifth and Tenth Circuits Differ from The Ninth Circuit's Initial Holding.

The Ninth Circuit's initial opinion differs from recent cases out of the Fifth and Tenth Circuits.[75] In *Coker v. Whittington*, the Fifth Circuit resolved that public employees relinquish some of their constitutional rights in exchange for the privilege of public employment.[76] In *Coker*, two sheriff's deputies in Bossier Parish, Louisiana took up residence in the other's house and exchanged spouses without first divorcing their own respective wives.[77] The Chief Deputy Sheriff found both officers in violation of the Sheriff's Code of Conduct.[78] The Code provides that officers "[shall] not engage in any illegal, immoral, or indecent conduct, nor engage in any *legitimate* act which, when performed in view of the public, would reflect unfavorabl[y] upon the Bossier Sheriff's Office."[79] The officers were directed to cease living with the other's spouse, and warned that a failure to comply would be considered equivalent to a vol-

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[70] *Id.* at 857.

[71] *Id.*

[72] *Id.*

[73] *Id.* at 848. At the summary judgment stage, the judge does not evaluate whether the facts alleged are true, but whether, taken as true, present a genuine issue of material fact to proceed to trial. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 249 (1986).

[74] *Perez*, 882 F.3d at 855.

[75] *See Seegmiller*, 528 F.3d. 762; *see also Coker*, 858 F.3d. 304.

[76] *Coker*, 858 F.3d at 306 (citing *Garcetti*, 547 U.S. at 426).

[77] *Id.* at 305.

[78] *Id.*

[79] *Id.*

untary termination.[80] The officers filed suit shortly after their termination.[81]

The Fifth Circuit found that, despite the expansion of rights involving personal sexual choices recognized in *Lawrence*, no decisions existed suggesting that public employees have a right to "associate" with another's spouse.[82] Further, *Lawrence* does not call for policy changes in the context of public employment generally.[83] Sexual decisions by law enforcement officers are not comparable to those made by private individuals.[84] Since the officers' conduct could damage the reputation and credibility of the Sheriff's Office, and could potentially be used against the department in litigation, the court found that the order to cease living with the other's spouse and subsequent termination for failing to comply did not violate the officers' constitutional rights.[85]

Based on similar reasoning, in *Seegmiller v. LaVerkin City*, the Tenth Circuit determined that a police department's decision to reprimand an officer for her private, off-duty sexual activity was not unconstitutional, because it was reasonably related to the department's interests.[86] Officer Sharon Johnson engaged in a brief affair with an officer from a different department while at a training conference.[87] Although an investigation revealed that the affair was consensual, Johnson received a verbal reprimand from the City Manager.[88] The content of the reprimand indicated that Johnson failed to comply with a provision of the law enforcement ethics code that required officers to "keep [their] private lives unsullied as an example to all and [to] behave in a manner that does not bring discredit to [the officer] or [the] agency."[89] Further, the City Manager's reprimand warned Johnson to "avoid the appearance of impropriety" and cautioned that additional violations would result in additional discipline and/or termination.[90]

Shortly after these incidents, Johnson resigned from her position with the LaVerkin City Police Department, believing that her credibility was significantly compromised as a result of the City's actions.[91] Johnson thereafter sued the City and the City Manager for "infring[ing] on

[80] *Id.* at 306.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *See id.*
[85] *Id.* at 306–07.
[86] *Seegmiller*, 528 F.3d at 764.
[87] *Id.* at 765.
[88] *Id.*
[89] *Id.* at 765–66 (alteration in original) (quoting Aplt App. Vol II, at 337).
[90] *Id.* at 766 (quoting depo. p. 82).
[91] *Id.*

her fundamental liberty interest in sexual privacy," in violation of her Due Process rights under the Fourteenth Amendment.[92]

According to the Tenth Circuit, the Supreme Court has never recognized a broadly defined right to sexual privacy.[93] The court noted, however, that the Supreme Court has acknowledged that interests in marital privacy and bodily integrity are fundamental rights.[94] Following in the footsteps of *Williams v. Attorney General of Alabama*, the court read the *Lawrence* decision as declining to recognize either a fundamental right to sexual privacy or a "general right to engage in private sexual conduct."[95]

Because the court held that Johnson had not established a fundamental right in this case, it subjected the City's policy to the more lenient rational basis review, which would require Johnson to show that the purported action was not rationally related to a legitimate government purpose.[96] The court concluded that the LaVerkin City law enforcement code could have been reasonably related to the City's interest in "further[ing] internal discipline or the public's respect for its police officers and the department they represent."[97] As such, the City's encroachment on Johnson's privacy interest was not unconstitutional.[98]

The Ninth Circuit defended its departure from the Fifth and Tenth Circuits' rationale by asserting that (a) *Thorne* is controlling in the Ninth Circuit, and (b) "the Fifth and Tenth Circuits fail to appreciate the impact of *Lawrence* . . . on the jurisprudence of the constitutional right to sexual autonomy."[99] First, as illustrated in *Thorne*, the State's actions must be analyzed under "heightened scrutiny" because the actions impact Perez's "constitutionally protected privacy and associational interests."[100] However, the court noted that such an intrusion could not "survive any level of scrutiny" under the circumstances of this case.[101] Therefore, in order to receive the appropriate treatment, the right to engage in private sexual

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[92] *Id.* at 769.

[93] *Id.* at 770.

[94] *Id.* at 771 (citing Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that the Due Process protection of "liberty" includes the right to marital privacy)).

[95] *Id.* (citing Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1236 (11th Cir. 2004) (stating that the Supreme Court resisted the "opportunity to recognize a fundamental right to sexual privacy" when it was "expressly invited . . . to do so.")).

[96] *Seegmiller*, 528 F.3d at 771. A legitimate purpose is one that is plausibly connected to the police power of the states. *See generally* Don Welch, *Legitimate Government Purposes and State Enforcement of Morality*, 1993 U. ILL. L. REV. 67, 68 (1993). The states' police powers include the regulation of its citizens' health, welfare, safety and morals. Barnes v. Glen Theatre, 501 U.S. 560, 569 (1991).

[97] *Seegmiller*, 528 F.3d. at 772.

[98] *Id.*

[99] *Perez*, 882 F.3d at 855-56.

[100] *Id*.

[101] *Id.* at 855.

activity free from government interference must either be fundamental, or else be specifically subject to the type of "heightened scrutiny" described in *Thorne*.[102]

Following the court's disposition on February 9, 2018, a member of the court petitioned for en banc rehearing sua sponte,[103] and on March 15, 2018, the court instructed the parties to submit briefs as to whether the matter should be reheard.[104] Before he was able to issue a final mandate, Judge Reinhardt, the author of the 2018 opinion, passed away.[105]

C. THE NINTH CIRCUIT SUBSEQUENTLY CHANGES COURSE, AND AFFIRMS THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT.

1. The Precedent Does Not Clearly Establish Whether Private Conduct Can Be Relied Upon in an Adverse Employment Decision.

The court's 2019 replacement and currently binding opinion relied on the revised phone-usage reprimand issued to Perez after she was terminated, and concluded that Perez's extramarital relationship did, in fact, affect her on-the-job performance.[106] The court determined that Perez was not terminated because of department disapproval of her extramarital affair, but because of her excessive cell phone use in connection with that affair.[107] Further, the Ninth Circuit interpreted *Thorne* as "explicitly reject[ing] a per se rule that a police department can never consider its employees' sexual relations."[108] In reaching this conclusion, the Ninth Circuit relied on its decisions in *Fugate v. Phoenix Civil Service Board* and *Fleisher v. City of Signal Hill*.[109]

In *Fugate*, two officers were terminated from—and later reinstated to—their positions with the City of Phoenix Police Department, after an

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[102] *Thorne*, 726 F.2d at 470; *Perez*, 882 F.3d at 855.

[103] *Perez*, 926 F.3d at 525.

[104] Perez v. Roseville, No. 15-16430, 2018 U.S. App. LEXIS 6544 at *1 (9th Cir. 2018).

[105] *Perez*, 926 F.3d at 525–26. The Ninth Circuit has previously held that an opinion can be amended or withdrawn at any point before the mandate has issued. *Carver*, 558 F.3d 869. Because the initial Perez opinion "was only part way through its finalization process," the court has the authority to withdraw the opinion, and issue a replacement. *Perez*, 926 F.3d at 525 (quoting Carver, 558 F.3d at 878). However, Judge Reinhardt himself opined that, in the interest of "maintaining the stability and legitimacy of the court's decisions," a new majority that disagrees with a court decision should only seek to correct that decision through the en banc process. *Carver*, 558 F.3d at 880–81 (Reinhardt, J., concurring).

[106] *Perez*, 926 F.3d at 522–23.

[107] *See id.* at 522.

[108] *Id.* at 520 (citing *Thorne*, 726 F.2d at 470).

[109] *Perez*, 926 F.3d at 521-22.

investigation revealed that they had both engaged in sexual relationships with sex workers while on duty.[110] The relationships were not private, and one sex worker also received city money as a paid informant.[111] The court held that the officers' constitutional rights to privacy and intimate association had not been violated because *Thorne*'s protections did not extend to conduct that was neither private nor separate from the officers' on-the-job performance.[112]

Fleisher involved a probationary officer who was terminated in part because of private sexual activity that amounted to criminal sexual misconduct.[113] Fleisher, when he was 19, engaged in a sexual relationship with a 15-year-old, as a member of the police department's "Explorer Program."[114] Fleisher was later hired as a probationary police cadet, and was then terminated after an investigation revealed the sexual encounters.[115] The City of Signal Hill argued, and the court concluded, that Fleisher was barred from recovery, because his constitutional rights to privacy and free association did not protect illegal sexual conduct.[116]

Taking into consideration *Thorne*, *Fugate*, and *Fleisher*, the court held that the "precedents are not so clear that every reasonable official would understand that" considering Perez's extramarital affair as part of her termination decision would violate her constitutional privacy rights, when that relationship led to "inappropriate personal cell phone use while on the job."[117] Because the precedents are unclear, the court found that the officers were entitled to qualified immunity on Perez's privacy violation claim.[118]

2. The Court is Within Its Rights to Substitute a Different Opinion.

The General Orders for the Ninth Circuit provide that if a judge becomes unavailable while a matter is under submission, and the remaining two judges are not in agreement as to the outcome of the matter,[119]

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[110] Fugate v. Phx. Civil Serv. Bd., 791 F.2d 736, 737 (9th Cir. 1986).

[111] *Id.*

[112] *Id.* at 741.

[113] Fleisher v. Signal Hill, 829 F.2d 1491, 1492–93, 1496 (9th Cir. 1987).

[114] *Id*.

[115] *Id.* at 1493.

[116] *Id.* at 1496, 1500.

[117] *Perez*, 926 F.3d at 522.

[118] *Id.* at 514.

[119] Judge Tashima filed a concurring opinion in the 2018 matter, stating that he agreed with the summary judgment reversal, but disagreed with the majority's reasoning. *Perez*, 882 F.3d at 861–62 (Tashima, J., concurring). In the 2019 opinion affirming the grant of summary judgment, Judge Tashima aligned with Judge Ikuta, appointed in Judge Reinhardt's place, thereby creating a new majority. *Compare* Perez v. Roseville, 926 F.3d *with* 882 F.3d. at 861-65 (Tashima, J., concurring).

the Clerk of the Court shall assign a replacement judge to decide the matter as a quorum.[120] Under the precedent established in *Carver v. Lehman*, the court held that "[u]ntil the mandate has issued, opinions can be, and regularly are, amended or withdrawn."[121] Because no mandate had issued on the original decision, and a judge had requested an en banc rehearing sua sponte, the court was within its authority to withdraw the initial opinion, and to substitute a new one.[122]

Incidentally, Judge Reinhardt himself filed a concurring opinion in *Carver*, in which he agreed that the remaining judges were within their authority to withdraw and replace the previous opinion.[123] Despite its clear authority, Judge Reinhardt posited that it was "unwise for a court, once it has published an opinion on a constitutional question, to change its mind for so fortuitous and subjective a reason."[124] The en banc[125] procedure should be the primary avenue for correcting a decision that the court believes should be reassessed.[126]

3. Judge Molloy Dissents: the En Banc Process Is the Proper Vehicle for Reconsidering a Published Opinion.

Judge Molloy dissented to the 2019 *Perez* opinion on the grounds that (1) the majority in the 2018 opinion correctly resolved the matter, and (2) substituting a different judge when the author of a published opinion passes away is inappropriate in this case.[127]

The second of these reasons is particularly problematic for Judge Molloy, because the en banc rehearing is available specifically "to correct the application of law by a three-judge panel of the Circuit."[128] On a panel of three judges, two constitute a quorum and are able to decide an appeal, provided that they agree.[129] In this case, Judge Molloy joined in the majority opinion with Judge Reinhardt in 2018, and Judge Reinhardt's vote on the matter was published before his death.[130] Further, General Order 3.2(h) does not apply, because "[once] the case is decided

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[120] U.S. Ct. App. 9th Cir., Gen. Order. 3.2(h).

[121] *Perez*, 926 F.3d at 525 (quoting *Carver*, 558 F.3d) (internal quotations omitted).

[122] *Id.* at 525–26.

[123] *Carver*, 558 F.3d at 881 (Reinhardt, J., concurring).

[124] *Id.* (Reinhardt, J., concurring).

[125] Litigants to an appeal or procedure may suggest that the matter be heard "en banc"—that is, by all active judges of the court. W. Pac. R. R. Corp. v. W. Pac. R. R. Co., 345 U.S. 247, 261 (1953). The court may also propose an en banc proceeding "sua sponte"—on its own motion. *See* W. Pac. R. R. Corp. v. W. Pac. R. R. Co., 345 U.S. 247, 262 (1953).

[126] *Perez*, 926 F.3d at 525 (citing *Carver*, 558 F.3d at 881 (Reinhardt, J., concurring)).

[127] *Id.* at 526 (Molloy, J., dissenting).

[128] *Id.* (Molloy, J., dissenting).

[129] *Id.* at 527 (Molloy, J., dissenting) (citing Yovino v. Rizo, 139 S. Ct. 706, 709 (2019)).

[130] *Id.* at 526–27 (Molloy, J., dissenting).

by a quorum of the panel judges it is no longer under submission," and General Order 3.2(h) only applies to matters that are "under submission."[131] For this reason, the *Perez* case was completely decided in 2018.[132] If the opinion is incorrect, it should proceed to a rehearing en banc, and the parties must be provided with the opportunity to be heard at that proceeding.[133]

II. PROHIBITING GOVERNMENTAL INTRUSION INTO EMPLOYEES' SEXUAL PRIVACY

The Constitution is credited as conferring upon citizens a general "right to be let alone."[134] The Court has gradually expanded on this right by acknowledging that there are zones of individual privacy that should be free from government interference,[135] and, more specifically, that "choices central to personal dignity and autonomy[ ] are central to the liberty protected by the Fourteenth Amendment."[136] This "emerging awareness" culminated in *Lawrence* with the Court's acknowledgement that the right to be let alone extends to all private, consensual, sexual conduct.[137] The original *Perez* opinion furthers this awareness by urging caution "not to let the State use its power as an employer to encroach excessively or unnecessarily upon the areas of private life . . . where an individual's dignity interest in autonomy is at its apex."[138]

Although *Lawrence* symbolizes a freedom from governmental influence with regard to individual autonomy generally, it set the stage for the recognition of those rights in the sphere of public employment specifically.[139] A government actor cannot undermine individual liberties merely because it is acting as an employer as opposed to acting as a governing body. The cornerstone of this recognition turns on the notion that government employers can no longer be permitted to take adverse employment action against an employee who "does not live up to the employer's conception of morality in how she lives her private and personal life (especially in matters pertaining to sex)."[140] If a government

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[131] *Id.* at 527 (Molloy, J., dissenting).

[132] *Id.* at 528 (9th Cir. 2019) (Molloy, J., dissenting).

[133] *Id.* at 527-28 (9th Cir. 2019) (Molloy, J., dissenting).

[134] Omstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[135] Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

[136] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

[137] *See Lawrence*, 539 U.S. at 572.

[138] *Perez*, 882 F.3d at 847.

[139] *See* Paul M. Secunda, *The (Neglected) Importance of Being Lawrence: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85, 89 (2006).

[140] *Id.* at 89–90.

employer must interfere in the personal off-duty conduct of the individual employee, the employer must be required to show a substantial interest in doing so.[141] That is, the government's interest must be related to the employment relationship in order to justify its intrusion into the employee's private life. The employer's own conception of morality is simply not sufficient to meet this standard.[142]

A contrary analysis suggests that the principles in *Lawrence* do not affect other historically outlawed private conduct, such as adultery.[143] This view maintains that the circumstances in *Lawrence* did not involve "persons who might be injured,"[144] and adultery has the potential of harming innocent spouses and children.[145] To be sure, many states still criminalize adultery, although it is rarely enforced.[146] However, to suggest that *Lawrence* does not apply to other private sexual activities that are contrary to the Nation's history and tradition is to, once again, misinterpret the overall holding in *Lawrence.* As the Court noted in *Lawrence*, history and tradition are merely a starting point, and the evolution of laws and traditions "show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[147] This language suggests that the Court intended a broad interpretation of *Lawrence*, and that the principles acknowledged do not apply exclusively to homosexual sodomy, as opponents may suggest.[148] Rather, the decision in *Lawrence* promotes a more general right of the individual to make intimate decisions free from government interference.[149] While even the broadest interpretation of *Lawrence* does not exempt all sexual decision-making from government interference, it does require the government to meet a heightened standard of review when it seeks to limit those decisions.[150]

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[141] *Id.* at 118.

[142] *Id.* at 126.

[143] Matthew W. Green Jr., *Lawrence: An Unlikely Catalyst for Massive Disruption in the Sphere of Government Employee Privacy and Intimate Association Claims,* 29 BERKELEY J. EMP. & LAB. L. 311, 338 (2008).

[144] *Lawrence*, 539 U.S. at 578.

[145] Matthew W. Green Jr., *Lawrence: An Unlikely Catalyst for Massive Disruption in the Sphere of Government Employee Privacy and Intimate Association Claims,* 29 BERKELEY J. EMP. & LAB. L. 311, 339 (2008).

[146] Jolie Lee, *In Which States is Cheating on Your Spouse Illegal?*, DETROIT FREE PRESS, (Apr. 17, 2014, 4:48 PM), https://www.freep.com/story/life/family/2014/04/17/in-which-states-is-cheating-on-your-spouse-illegal/28936155/.

[147] *Lawrence*, 539 U.S. at 571–72.

[148] *See Lawrence*, 539 U.S. at 586 (Scalia, J. dissenting) ("[N]owhere does the court declare that homosexual sodomy is a fundamental right under the due process clause" (internal quotations omitted)).

[149] *See generally*, *Lawrence*, 539 U.S. 558.

[150] *See generally, id*.

As the original decision in *Perez* acknowledged, *Lawrence* established a right of all adults to engage in consensual sexual activity, in whatever form that might take.[151] This means that "the State may not stigmatize private sexual conduct simply because the majority has 'traditionally viewed a particular practice,' [including] extramarital sex, 'as immoral.'"[152] As the *Perez* court concluded in its initial ruling, a government actor may not use its position as an employer to escape its responsibility to respect an individual's personal autonomy rights.[153]

III. THE NINTH CIRCUIT'S SECOND OPINION MISAPPLIES RELEVANT FACTS, AND MISINTERPRETS RECENT PRECEDENT.

The Ninth Circuit's 2019 decision is problematic for a number of reasons. First, it fails to consider the impact of the supervising officers' disapproving statements about the affair.[154] The first memorandum issued to Perez and Begley specifically discussed the unprofessionalism of their affair and its unfavorable reflection on the police department.[155] Further, Hahn, Moore, and Walstad all testified as to their personal feelings about the affair.[156] These testimonies suggest that the officers could have been motivated to terminate Perez, at least in part, because of their disapproval of her affair.[157]

Secondly, the Ninth Circuit's 2019 opinion affords no weight to the suspicious timing of Perez's reprimand for violating the department's phone policies.[158] The phone policy reprimand, which the court points to as the ultimate justification for Perez's termination, was issued nearly a week after her termination.[159] The original reprimand, which cited the unprofessional nature of Perez's sexual relationship, was thereafter removed from her file.[160] The "shifting justifications for [Perez's] termination" present, at the very least, a questionable issue of fact as to the true reason for Perez's termination.[161]

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[151] *See* P*erez*, 882 F.3d at 856 (citing *Lawrence*, 539 U.S. at 578) ("the liberty protected by the Due Process Clause must extend *equally* to *all* intimate sexual conduct between consenting adults").

[152] *Id.* (quoting *Lawrence*, 539 U.S. at 578).

[153] *See id.*

[154] *See id.* at 851–53.

[155] *Id.* at 853.

[156] *Id.* at 852–53.

[157] *See id.*

[158] *See Perez*, 926 F.3d at 517–18.

[159] *Id.* at 518.

[160] *Id.*

[161] *Perez*, 882 F.3d at 854.

Finally, by considering its decisions in *Fugate* and *Fleisher*, in conjunction with its conclusions in *Thorne*, the court finds that the officers could not have been expected to know that terminating Perez because of her extramarital affair would violate Perez's constitutional rights.[162] However, *Fugate* and *Fleisher* were distinguished from *Thorne*,[163] and are likewise distinguishable from *Perez*.[164] Perez neither conducted an on-duty sexual relationship, nor engaged in criminal sexual misconduct.[165] While the Ninth Circuit concluded in its 2019 opinion that Perez was ultimately terminated for excessive cell phone use in connection with her affair, Chief Hahn specifically stated that her cell phone use was not a violation warranting termination.[166] Moreover, as the Ninth Circuit originally concluded, there is insufficient evidence to suggest that the "affair had any meaningful impact upon [Perez's] job performance."[167] *Thorne* is therefore directly applicable here, and establishes that a government employer cannot base termination decisions on an employee's off-duty sexual conduct, when such conduct does not impact her on-the-job performance.[168]

Furthermore, as Judge Molloy acknowledged in his dissenting opinion, "the substitution of a judge who legitimately disagrees with the original opinion should not change the outcome" of the case.[169] The Ninth Circuit's 2019 opinion offers a different interpretation of the facts, which at the very least, suggests a triable issue sufficient to defeat summary judgment.[170] By avoiding the privacy and associational questions in-

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[162] *Perez*, 926 F.3d at 522.

[163] *Compare Thorne*, 726 F.2d at 471 (holding that a employer may not rely on an employee's off-duty, private conduct in withholding employment, when such conduct does not impact her on-the-job performance or violate a specific department policy), *with Fugate*, 791 F.2d at 741 (holding that while *Thorne* protected sexual behavior occurring off-duty, it does not protect officers' privacy when such behavior occurs "on-the-job"), *and Fleisher*, 829 F.2d at 1499 (holding that the *Thorne* protections do not apply to actions that are specifically identified by the employer as being grounds for termination).

[164] *Compare Perez*, 882 F.3d at 857 n.10 (holding that neither adverse action, nor termination may be sought against an employee based on her off-duty, private sexual conduct when such conduct does not affect her job performance or violate a narrowly-tailored regulation), *with Fugate*, 791 F.2d at 741 (holding that privacy protections for an employee's off-duty conduct do not apply when the employee engages in sexual conduct while on-duty), *and Fleisher*, 829 F.2d at 1499 (holding that an employee's privacy rights are not violated when he is terminated for engaging in sexual conduct that is specifically prohibited by the department's established policies).

[165] *See Perez*, 2015 U.S. Dist. LEXIS 80060, at *29–30.

[166] *Perez*, 926 F.3d at 518.

[167] *Perez*, 882 F.3d at 854–55.

[168] *Thorne*, 726 F.2d at 471.

[169] *Perez*, 926 F.3d at 526 (Molloy, J. dissenting).

[170] *See Perez*, 882 F.3d at 858.

volved in this case, the Ninth Circuit misses an opportunity to clarify an issue that has not been definitively resolved since *Lawrence.*[171]

IV. The Ninth Circuit's Conclusions in its First Opinion Appropriately Apply Controlling Precedent and Appropriately Interpret the Facts of the Case.

Contrary to the Ninth Circuit's conclusions in its 2019 opinion, the question here is not whether a government employer can ever consider an employee's sexual activity when making employment decisions.[172] Rather, this case asks whether the employer can consider the employee's off-duty conduct, when it does not substantially affect her job performance.[173]

In its initial opinion, the Ninth Circuit interpreted *Lawrence* to recognize that "intimate sexual conduct represents an aspect of substantive liberty protected by the Due Process Clause."[174] Because Perez's commanding officers stated that they morally disapproved of the affair, and considering that the Department's proffered reasons for Perez's termination[175] came in quick succession after the internal affairs investigation, there was sufficient evidence to suggest that the termination was uncon-

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[171] *See generally, Perez*, 882 F.3d 843; *Seegmiller*, 528 F.3d 762; *Coker*, 858 F.3d 304.

[172] *See Perez*, 926 F.3d at 520.

[173] *See Perez*, 882 F.3d at 848.

[174] *Id.* at 856 (citing Lawrence, 539 U.S. at 564). Although Perez's other claims are not the subject of this Note, they are illustrative of her plight as a public employee, and perhaps worthy of further research. First, while Perez conceded that her termination was based on her affair with another officer (*see* Perez, 926 F.3d at 515), her observations of sex discrimination by the Department were plausible. Specifically, Perez noted that Begley, who was equally engaged in an extramarital affair with a fellow officer, was neither terminated because of the affair, nor reprimanded as a result of a "heated exchange" with his superiors. Plaintiff-Appellant Janelle Perez's Opening Brief at 22, Perez, 926 F.3d 511 (No. 15-16430). Conversely, Perez was both terminated at least in part for the affair, and retroactively reprimanded for having a "bad attitude" with a supervisor. *Id.* at 22.

Second, the court concluded that, even if Perez's due process rights were violated with the disclosure of the disciplinary action against her to Begley's wife, the Department was entitled to qualified immunity, as there was no clearly set standard for determining a sufficient nexus between the public revelation and the termination. *Perez*, 926 F.3d at 524. In an earlier case, the court found there was not a sufficient nexus when a stigmatizing statement was released 19 days after the employee's termination. *Id.* at 524 (citing Tibbetts v. Kulongoski, 567 F.3d 529, 538 (9th Cir. 2009)). The court concluded that the same standard should apply to this case, given that the disclosure to Begley's wife occurred 19 days before Perez's termination. *Id*. This is arguably an incorrect application, as a disclosure of stigmatizing information after the employee's termination could have a significantly different effect on the termination decision than would the same disclosure occurring before the termination. In absence of a "bright line rule[,]" there is no clear guidance on how to evaluate similar facts going forward. *Id*.

[175] The Department cited the following as reasons for Perez's termination: (1) she did not get along with other female officers; (2) the Department received a complaint about her from a domestic violence victim; and (3) she had a "bad attitude[.]" *Perez*, 882 F.3d at 853 (9th Cir. 2018).

stitutionally motivated.[176] Further, the fact that the Department withdrew its reprimand for "Unsatisfactory Work Performance" and "Conduct Unbecoming" and replaced it with a reprimand for "Use of Communication Devices" only after Perez had been terminated, despite noting that Perez's cell-phone use did not "warrant[ ] termination,"[177] raises questions regarding the true motive for the Department's actions.

The *Lawrence* Court found that individuals have a right to engage in private sexual conduct without intrusion by the government.[178] Nowhere in the *Lawrence* opinion does the Court specify that this principle applies to a government actor only when it is acting as a sovereign. Nor does the *Lawrence* opinion only apply to homosexual conduct.[179] Because of these omissions, the Ninth Circuit inferred that a state actor cannot hide behind the guise of "employer" in order to stigmatize a particular sexual activity based exclusively on its own traditional views of morality.[180]

Even if the right to engage in private sexual conduct is not fundamental, and therefore not entitled to a heightened degree of scrutiny, the Ninth Circuit concluded early on that government intrusion into an employee's privacy and associational rights when not relevant to her on-the-job performance could not withstand "*any* level of scrutiny."[181] Thus, a government employer's invasion of an individual's rights to privacy and free association can only be appropriate upon a showing that the employee's conduct has had an adverse effect on his or her job performance, or violates a narrowly–tailored, constitutionally-sound departmental policy.[182]

It is certainly important that a police department maintain order within the department, as well as the confidence of the public it serves. However, the right to engage in private, sexual conduct free of government intervention is arguably more important, regardless of whether the government is acting as a sovereign or as an employer. Furthermore, employment with law enforcement does not minimize an employee's right to personal autonomy.[183] Because the state cannot "demean [an individual's] existence" by penalizing their private sexual conduct,[184] a government employer must show "more than a de minimis adverse impact on

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[176] *Id.*

[177] *Id.* at 850.

[178] *Lawrence*, 539 U.S. at 578.

[179] *See id*.

[180] *See Perez*, 882 F.3d at 856.

[181] *Thorne*, 726 F.2d at 471 (emphasis added).

[182] *See Perez*, 882 F.3d at 856.

[183] *See, e.g.,* Steve Hartsoe, *ACLU Challenges N.C. Cohabitation Law*, WASH. POST (May 10, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/05/09/AR2005050901091.html.

[184] *Lawrence*, 539 U.S. at 578.

the employer's work place" to justify an unwanted interference.[185] As the initial *Perez* opinion suggests, "[c]onduct unbecoming an officer" is not a legitimate reason to permit the State's intrusion on an individual's rights to privacy and free association.[186]

V. THE INITIAL *PEREZ* TEST SHOULD BE USED AS A MODEL FOR FUTURE CASES.

It is not surprising that the government is generally prohibited from conditioning a government benefit on the surrender of a constitutional right.[187] However, the government employer stands in the unique position of controlling the terms and conditions of employment.[188] Moreover, the government employer has an interest in providing an efficient and responsive government service.[189] Nonetheless, discipline or termination of a government employee solely on the basis of moral disapproval of their off-duty conduct is constitutionally impermissible.[190]

The *Perez* and *Thorne* decisions account for this by providing a workable standard for analyzing similar situations going forward.[191] To withstand heightened scrutiny, the state actor must first identify a legitimate interest: while maintaining an effective government service may be a legitimate interest, moral disapproval of private conduct is not.[192] Second, the policy must be narrowly-tailored to achieve that interest: the government must show that the employee's conduct either interferes with her on-the-job performance or violates a constitutionally valid department regulation.[193]

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[185] Paul M. Secunda, *The (Neglected) Importance of Being Lawrence: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85, 124 (2006).

[186] *Perez*, 882 F.3d at 856. *See also Lawrence*, 539 U.S. at 578.

[187] *See* Perry v. Sindermann, 408 U.S. 593, 597 (1972) (holding that if a university's decision not to renew a teacher's contract was based upon the teachers exercise of his free speech rights, such a decision would violate the Due Process clause).

[188] *See* Paul M. Secunda, *The (Neglected) Importance of Being Lawrence: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85, 97 (2006).

[189] *See* Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996) (holding that a government may not rescind or decline to renew an at-will contract with an independent contractor in retaliation for exercising his free speech rights).

[190] *Perez*, 882 F.3d at 848.

[191] *Id.* at 857–58 (citing *Thorne*, 726 F.2d at 471.

[192] Paul M. Secunda, *The (Neglected) Importance of Being Lawrence: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85, 132 n.237 (2006).

[193] *Perez*, 882 F.3d at 857-858 (citing *Thorne*, 726 F.2d at 471).

Incidentally, there are circumstances when government interference with an employee's personal autonomy rights would be justified.[194] Generally, these circumstances would involve some "detriment to the employer's public image, the inability of the worker to interact with her coemployees, or the employee's simple inability to carry out the essential functions of her position as a result of her private conduct."[195] For example, some government employers have regulations in place that would meet the standard set forth by *Perez*, meaning that an employer could base a personnel decision on an employee's private sexual activity.[196] Such a decision, however, would not be overtly based upon the government's moral disapproval of the employees' conduct. Rather, the government's decision would be a response to an actual or potential negative impact to the work environment.

For example, some employers have specific departmental policies against nepotism,[197] which provide for comparable reassignment in the event that a personal relationship exists within certain employment relationships.[198] If the City of Roseville had a similar provision in place, it would not have violated Perez's privacy and associational interests by transferring her to another police department. Similarly, California government employees are prohibited from engaging in certain conduct, including using the prestige of the agency for the employee's private advantage; misusing state time or resources; and misusing confidential information.[199] In this regard, if Perez actually engaged in sexual activity while on duty, the department would have been permitted to terminate her without violating her sexual autonomy rights. Dereliction of duty is a legitimate reason to dismiss an employee; moral disapproval of their sexual decisions is not.

These regulations satisfy the *Perez* requirements because they are narrowly–tailored and constitutionally sound.[200] Moreover, neither of

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[194] Paul M. Secunda, *The (Neglected) Importance of Being Lawrence: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85, 124 (2006).

[195] *Id.*

[196] *See, e.g.,* CAL. DEP'T OF HUMAN RES., AGREEMENT BETWEEN THE STATE OF CALIFORNIA AND CAL FIRE LOCAL 2881 COVERING BARGAINING UNIT 8 FIREFIGHTERS, 23 (2017), http://calhr.ca.gov/labor-relations/Documents/mou-20170101-20210701-bu8.pdf. *Accord* Paul M. Secunda, *The (Neglected) Importance of Being Lawrence: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85, 124 (2006).

[197] *Id.* "Nepotism" is defined as a situation in which one employee uses his or her influence or power to positively or negatively affect another employee because of a personal relationship between them.

[198] *See, e.g., id.*

[199] CAL. GOV. CODE § 19990 (2018).

[200] *See generally Perez*, 882 F.3d at 857–58 (citing *Thorne*, 726 F.2d at 471).

these examples involves a subjective, purely moral limit on the employee's off-duty conduct, such as a requirement not to engage in "immoral or indecent conduct,"[201] or to "keep [one's] private life unsullied."[202]

VI. APPLICATION OF THE *PEREZ* TEST MAY HAVE CAUSED THE FIFTH AND TENTH CIRCUITS TO DECIDE DIFFERENTLY.

The courts in *Seegmiller* and *Coker* misapplied the principles announced in *Lawrence* when they concluded that the asserted rights were anything less than personal rights to sexual autonomy, and were thus not fundamental. Although the police departments may have ultimately been able to show that their work-related interests were sufficient to survive heightened scrutiny, analyzing such rights under a rational basis review was not appropriate.

Application of the *Perez* standard to the *Seegmiller* case would likely have resulted in a favorable decision for the police department. Like California, Utah also expressly prohibits government employees from using state resources for private gain.[203] While the *Perez* standard recognizes that Officer Johnson had a constitutional right to make personal intimate decisions,[204] it does not support a conclusion that she had a right to use department resources to her own advantage. By engaging in an extramarital affair while at a department-sponsored event, the department could have determined that Officer Johnson was in violation of a narrowly–tailored department regulation.

Conversely, the decision in *Coker* would likely have favored officers, if the court applied the *Perez* test.[205] Despite the Fifth Circuit's determination that the officers did not "have constitutional rights to 'associate' with [the] other's spouse," there was no evidence that the officers' decisions to engage in private, consensual, sexual conduct affected their respective on-the-job performances.[206] Furthermore, the Sheriff's Department Code of Conduct was neither narrowly–tailored, nor constitutionally valid, as it merely prohibited subjectively "immoral" conduct.[207]

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[201] *Coker*, 858 F.3d at 305.

[202] *Seegmiller*, 528 F.3d at 772.

[203] UTAH ADMIN. CODE r. 477-9-3 (2018).

[204] *Perez*, 882 F.3d at 856 (citing *Thorne*, 726 F.2d at 471).

[205] *See generally* Perez, 882 F.3d at 857-58 (citing *Thorne*, 726 F.2d at 471).

[206] *Coker*, 858 F.3d at 306.

[207] *Id.* at 305.

CONCLUSION

The jurisprudence regarding personal autonomy shows that individuals have a right to make decisions about their private and personal lives free from unwanted government intrusion.[208] Some circuit courts are resistant to the broad application of sexual autonomy rights identified in *Lawrence v. Texas*.[209] Those courts maintain that *Lawrence* was not intended to extend an unfettered right to sexual privacy;[210] and even if it did, that right was certainly not meant to apply to public employment.[211] This is not a proper understanding of the *Lawrence* decision.

As the Ninth Circuit initially acknowledged in *Perez v. Roseville*, *Lawrence* stood for the notion that the Constitution protects individual autonomy in all areas of sexual decision-making.[212] It is not a proper application of the law to conclude that a government actor, acting as an employer, does not have to abide by the same constitutional protections that guide the government actor acting as a sovereign. In *Perez*, the Ninth Circuit recognized that government employees are nonetheless citizens, and are entitled to protection of those rights guaranteed by the Constitution.[213]

The Ninth Circuit's second decision in *Perez* is problematic because it misinterprets the facts and controlling precedent in determining that the Roseville Police Department did not violate Perez's constitutional privacy rights.[214] Thus, the Ninth Circuit's first opinion should have remained in place.[215]

While a government employer has an interest in maintaining an efficient government service, the subjective morality of the employer does not outweigh the employee's liberty interest in making personal, off-duty decisions without government interference.[216] For these reasons, courts

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[208] *See, e.g.,* Lawrence, 539 U.S. 558 (2003) (right to engage in private sexual conduct); Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965) (right of married couples to purchase contraceptives); Eisenstadt v. Baird, 405 U.S. 438, 453–55 (1972) (right of all couples to purchase contraceptives); Loving v. Virginia, 388 U.S. 1, 12 (1967) (right to marry, regardless of the race of the respective individuals); Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015) (right to marry extends to same sex couples); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (right to terminate a pregnancy prior to viability).

[209] *See Seegmiller*, 528 F.3d at 771. *See also Coker*, 858 F.3d at 306.

[210] *Seegmiller*, 528 F.3d at 771.

[211] *Coker*, 858 F.3d at 306.

[212] *Perez*, 882 F.3d at 856.

[213] *See generally id.*

[214] *Compare Perez*, 926 F.3d 511 (9th Cir. 2019) *with Perez*, 882 F.3d 843 (9th Cir. 2018).

[215] *See Perez*, 926 F.3d at 526 (Molloy, J., dissenting).

[216] Paul M. Secunda, *The (Neglected) Importance of Being Lawrence: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85, 126 (2006).

should adopt the *Perez* standard, which provides that an employee may only be subject to adverse employment action for their off-duty conduct when such conduct substantially interferes with their on-the-job performance, or violates a narrowly–tailored, constitutionally valid department policy.[217] This test appropriately balances the government's interest in effective service against the employee's interest in individual autonomy. Applying this standard, courts in other jurisdictions would have decided similar cases different

An individual does not relinquish their constitutionally-protected personal autonomy rights when they accept the benefit of public service. Nor is a state actor permitted to compromise individual liberties, merely because it is acting as an employer. The public employee remains a citizen, and the State cannot be allowed to use its position as an employer to subject her to its own perceptions about morality.

[217] *Perez*, 882 F.3d at 855–56 (citing *Thorne*, 726 F.2d at 471).