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PREFACE

Welcome to Volume 51 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 rationales and effects of its rulings, along with the possible implications these decisions pose for future law. The Notes in this edition highlight pivotal and recent decisions issued by the Ninth Circuit, each exploring a different area of law.

Statutory immunity from the "speaking torts" for Internet service providers is a pressing contemporary dialogue, as is just how far collective bargaining agreements in the NFL can be stretched: this year's student-written Notes explore these critical issues and how they have played out in Ninth Circuit jurisprudence. Similarly, the status of workers who fuel the "Sharing Economy" and the damages that ripple from predatory lending targeting African-American and Latinx families are rich topics that resonate, and our student-written Case Summaries explore their ramifications.

We would like to express our heartfelt gratitude to so many instrumental people: Dean Eric C. Christiansen, who has been an advocate for the journal and has provided us with his continued intellectual and creative support; Academic Dean Mark Yates for sharing his stellar guidance and expertise to the *Golden Gate University Law Review*; Nicholas Joy, for his flawless editorial and *Bluebook* assistance; the inimitable Heather Varanini, for her continued support of our writers; and Professor Jennifer Babcock for her expert guidance and congenial strength in her role as *Golden Gate University Law Review's* Faculty Advisor. Finally, we offer our sincerest thanks to each author for their Note or Case Summary, as these works represent an apex of their intellectual development and creative florescence.

As the Editor-in-Chief and Managing Editor for the 2020-2021 year, we have been continually inspired by many aspects of the Ninth Circuit, from its judges and jurisprudence to its history and heritage. We have also been encouraged and energized by the hard work, dedication, and growth of the 2020-2021 *Golden Gate University Law Review* Staff Writers, Associate Editors, and Executive Board Members who worked relentlessly to make this edition possible. A law review is a model of synergy, the result of deep collaboration feuded by passion. It is our distinct privilege to present this edition of the *Golden Gate University*

Law Review Ninth Circuit Survey. We hope you enjoy the thought and writing it showcases.

Michael Angelo Tata, Ph.D.
Editor-in-Chief

Allyson M. McCain
Managing Editor

GOLDEN GATE UNIVERSITY LAW REVIEW

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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. 18, 2020); *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. 20, 2020).

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 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.

udge 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.

SENIOR 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.

SENIOR 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. Judge Wardlaw became the first female Hispanic appointee to a federal appeals court.

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.

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.

SENIOR 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 appointment 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.

SENIOR 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.

SENIOR 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 appoint-

ment 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.

SENIOR 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.

SENIOR 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 University, 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.

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 Miller maintains his chambers in Seattle, Washington.

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.

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Judge Bade maintains her chambers in Phoenix, Arizona.

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 Collins maintains his chambers in Pasadena, California.

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 Lee maintains his chambers in San Diego, California.

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 clerkships, 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 Bress maintains his chambers in San Francisco, California.

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.

Judge Hunsaker maintains her chambers in Portland, Oregon.

JUDGE PATRICK J. BUMATAY

President Trump nominated Judge Patrick Joseph Bumatay to the Ninth Circuit on October 15, 2019 and the Senate confirmed his nomination on December 10, 2019. He received his B.A. from Yale University in 2000 and his J.D. from Harvard Law School in 2006.

He clerked for the Hon. Timothy M. Tymkovich, U.S. Court of Appeals for the Tenth Circuit, from 2006-2007, acted as Special Assistant and Counsel for the Office of Legal Policy, U.S. Department of Justice, from 2007-2008, was Counsel to the Associate Attorney General, U.S. Department of Justice, from 2008-2009, and clerked for the Hon. Sandra L. Townes, U.S. District Court for the Eastern District of New York, from 2009-2010. He went on to become Assistant U.S. attorney for the Southern District of California from 2012-2019, Counsel to the Deputy Attorney General in 2017, Senior Counsel to the Deputy Attorney General from 2017-2018, and Counselor to the Attorney General for 2018-2019.

Judge Bumatay maintains his chambers in San Diego, California.

JUDGE LAWRENCE JAMES CHRISTOPHER VANDYKE

President Trump nominated Judge VanDyke to the Ninth Circuit on October 15, 2019. The Senate confirmed his nomination on December 11, 2019.

At Montana State University, Judge VanDyke received both his B.S.E. in 1997 and his M.C.E.M in 2000. He went on to complete his B.Th. from the Bear Valley Bible Institute in 2002 and his J.D. from Harvard Law School in 2005.

From 2007-2012, he clerked for the Hon. Janice Rogers Brown, U.S. Court of Appeals for the District of Columbia Circuit. He became Assistant Solicitor General for the State of Texas in 2012 and subsequently acted as both Solicitor General for the State of Montana from 2013-2014 and Solicitor General for the State of Nevada, from 2015-2019. In 2019, he became Deputy Assistant Attorney General for the U.S. Department of Justice, Environment and Natural Resources Division.

Judge VanDyke maintains his chambers in Reno, Nevada.

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Rittmann v. Amazon.com, Inc.: Ninth Circuit Rules Amazon's Drivers Fall Within the Federal Arbitration Act's "Transportation Worker Exemption"

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CASE SUMMARY

RITTMANN V. AMAZON.COM, INC.: NINTH CIRCUIT RULES AMAZON'S DRIVERS FALL WITHIN THE FEDERAL ARBITRATION ACT'S "TRANSPORTATION WORKER EXEMPTION"

*ISABELLA BORGES**

INTRODUCTION

Amazon is among a large list of corporations that have long tried to enforce mandatory arbitration against delivery drivers who file suit in their respective jurisdictions.[1] In recent years, delivery drivers have decided to fight back against private arbitration and to have their legal battles heard in court.[2] In these cases, delivery drivers argue that they are

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[1] *See, e.g.,* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) (holding that employees entering into contracts with employers providing for individualized arbitration proceedings to resolve employment disputes between parties were not entitled to litigate Fair Labor Standards Act or related state-law claims through class or collective actions in federal court); New Prime Inc. v. Oliveira, 139 S. Ct. 532 (2019) (holding that "contracts of employment" refer to agreements to perform work and also that Section 1 of the FAA is not solely limited to only employer-employee contracts); Rittmann v. Amazon.com, Inc., 971 F.3d 904, 908 (9th Cir. 2020) (holding that delivery drivers engaged in transportation of goods in interstate commerce even when they did not cross state lines are included in the exemption of Section 1 of the FAA).

[2] *See, e.g.,* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018); New Prime Inc. v. Oliveira, 139 S. Ct. 532 (2019); Rittmann v. Amazon.com, Inc., 971 F.3d 904, 908 (9th Cir. 2020).

exempt from arbitration under the Federal Arbitration Act ("FAA") because they are engaged in interstate commerce.[3]

Section 1 of the FAA exempts from arbitration "contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[4] Further, section 2 of the FAA governs whether the Act applies in the first place and broadly relates to "contract[s] evidencing a transaction involving commerce."[5]

In a recent Ninth Circuit decision, the court established that delivery drivers are exempt from mandatory arbitration, allowing drivers to keep their lawsuits in court.[6] In addition, the Ninth Circuit holding makes dismantling class or collective actions more problematic for transportation, logistics and gig-economy[7] companies.[8] The Ninth Circuit decision in *Rittmann v. Amazon* aligns with the recent First Circuit decision in *Waithaka v. Amazon.com, Inc.*, wherein the court more liberally defined what it means to be a worker "engaged in interstate commerce" according to the FAA.[9] This designation established by both the Ninth and First Circuits allows for drivers to pursue their legal battles in court rather than being forced into private arbitration.[10]

These circuit court decisions stemmed from the Supreme Court's ruling in *New Prime v. Oliveira*, where the Court stated that transportation workers engaged in interstate commerce, including those classified as independent contractors, are exempt from the FAA.[11] In fact, this Supreme Court ruling opened the door for delivery drivers to fight being forced into private arbitration.[12] Additionally, this 2019 decision by the Supreme Court contrasted with a string of its previous decisions, including *Epic Systems Corporation v. Lewis*, where the court favored arbitration agreements.[13]

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[3] *See, e.g.,* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018); New Prime Inc. v. Oliveira, 139 S. Ct. 532 (2019); Rittmann v. Amazon.com, Inc., 971 F.3d 904, 908 (9th Cir. 2020). *See also* 9 U.S.C. § 1 *et seq*.

[4] *See* 9 U.S.C. § 1.

[5] *See* 9 U.S.C. § 2.

[6] *See Rittmann*, 971 F.3d at 910.

[7] The gig economy refers to "a labor market characterized by the prevalence of short-term contracts or freelance work as opposed to permanent jobs." *Gig Economy*, OXFORD ENGLISH DICTIONARY (2d ed. 2004).

[8] *See Rittmann*, 971 F.3d at 910.

[9] *See* Waithaka v. Amazon.com, Inc., 966 F.3d 10, 19-20 (1st Cir. 2020).

[10] *See Rittmann*, 971 F.3d at 910; *see also Waithaka*, 966 F.3d at 19-20.

[11] *New Prime*, 139 S. Ct. at 539 (2019).

[12] *Id.*

[13] *Lewis*, 138 S. Ct. at 1621.

I. BACKGROUND

A. FACTUAL BACKGROUND

In 2016, Plaintiffs Bernadean Rittmann ("Rittmann"), Freddie Carroll ("Carroll"), Julia Wehmeyer ("Wehmeyer"), and Raef Lawson ("Lawson") (collectively "Plaintiffs") contracted with Amazon Logistics, Inc. to provide delivery services for AmFlex.[14] Amazon Logistics, Inc. is a subsidiary of Amazon.com, Inc. ("Amazon"), a globally popular online retailer that sells its own products and provides fulfillment services for third-party sellers who purvey their products on Amazon's website.[15]

Typically, Amazon has contracted with and shipped products using larger third-party delivery providers such as FedEx and UPS.[16] However, due to the recent influx of orders by consumers, Amazon has supplemented those larger delivery services by contracting with local delivery providers through its AmFlex program.[17] The AmFlex program is available in certain metropolitan areas within the United States, and allows for Amazon to contract with individuals to make "last mile" deliveries of products from the Amazon warehouse to the products' destinations.[18] To make these deliveries, individuals use the AmFlex smart phone application and their own modes of transportation, including personal vehicles, bicycles, or even public transportation.[19] AmFlex participants pick up assigned packages from an Amazon warehouse and drive on a route assigned by the mobile application to deliver packages.[20] Occasionally, AmFlex providers cross state lines to make deliveries, but typically deliveries take place intrastate.[21] When the assigned shifts end, AmFlex participants return to the Amazon warehouse to drop off any undelivered packages.[22]

To sign up for the AmFlex program, individual participants must agree to the AmFlex Independent Contractor Terms of Service ("TOS") in the mobile phone application.[23] The TOS includes an arbitration clause which is coupled with a more specific provision in Section 11.[24] Section 11 of the TOS provides that "to the extent permitted by law, the

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[14] *Rittmann*, 971 F.3d at 907.
[15] *Id*.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.* at 907-08.
[24] *Id.* at 908.

parties agree that any dispute resolution proceedings will be conducted only on an individual basis and not on a class or collective basis."[25] In addition, the TOS states that it is governed by the Washington state law with the exception of Section 11, which is governed by the FAA.[26] Plaintiffs Rittmann, Carroll, and Wehmeyer opted out of arbitration when signing up for the AmFlex program.[27] Lawson, however, did not opt out, but nevertheless continued to make deliveries in the greater Los Angeles area.[28]

B. PROCEDURAL BACKGROUND

In 2016, Plaintiffs Rittmann, Carroll, and Wehmeyer filed a proposed collective and class action[29] lawsuit alleging that Amazon misclassifies AmFlex users as independent contractors rather than employees.[30] In 2017, plaintiffs filed a Second Amended Complaint that added Lawson as a plaintiff.[31] In the Second Amended Complaint, plaintiffs alleged that Amazon violated the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201, *et seq.*, the California Labor Code, and Washington state and Seattle municipal wage and hour laws.[32] The plaintiffs sought to bring their FLSA claims as a nationwide collective action, and their state claims as state-wide class actions.[33]

After filing the Second Amended Complaint, Amazon moved to compel Lawson's purported agreement to arbitration.[34] The district court stayed the proceedings pending the resolution of two Supreme Court cases and one Ninth Circuit case.[35] Subsequent to the Supreme Court's

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[25] *Id.* (emphasis omitted).

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] A class action is a procedural tool in which a large group of similarly situated *plaintiffs* may file a lawsuit based on common claims together as a class rather than as individuals. Comparatively, collective actions allow the aggregation of claims by similarly situated *individuals*. Collective actions are similar to class actions in that they simplify litigation and encourage efficiency. However, collective actions are limited to employment claims under both the Fair Labor Standards Act and the Age Discrimination in Employment Act. *See* Federal Rules of Civil Procedure Rule 23; *see also* Fair Labor Standards Act § 216(b) *and* Age Discrimination in Employment Act 29 U.S.C. §§ 621-634.

[30] *Rittmann*, 971 F. 3d at 908.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id. See, e.g.,* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) (holding that employees entering into contracts with employers providing for individualized arbitration proceedings to resolve employment disputes between parties were not entitled to litigate Fair Labor Standards Act or related state-law claims through class or collective actions in federal court); New Prime Inc. v.

decision in *New Prime*, both parties supplemented their briefing on the motion to compel.[36]

The district court denied Amazon's motion to compel.[37] The court found that the plaintiffs fell within the FAA's transportation worker exemption.[38] This exemption excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" from the FAA's arbitration enforcement provisions.[39] Moreover, the court considered whether the arbitration provision set forth in Section 11 was otherwise valid and enforceable.[40] Pointing to the language of the TOS's governing law provision, the court determined that the FAA did not govern Section 11 because of the transportation worker exemption and the fact that the parties did not intend Washington law to apply.[41] In light of this rationale, the court decided that it was not clear whether Washington or Federal law would apply to the provision, or whether the parties intended to arbitrate disputes in the event the FAA was not applicable.[42] The district court held that there was not a valid agreement to arbitrate and denied Amazon's motion to compel.[43] The district court found that the drivers are transportation workers engaged in interstate commerce who are exempt under the FAA.[44] Amazon appealed, and the district court stayed proceedings pending the appeal.[45]

II. ANALYSIS

Amazon appealed to the Ninth Circuit Court of Appeals, which affirmed the district court in a 2-1 decision.[46] The Ninth Circuit began its analysis by determining whether the district court erred in finding that AmFlex delivery providers were exempt from the FAA as transportation workers "engaged in foreign or interstate commerce."[47] The court explained that to establish this exemption, they must first interpret the

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Oliveira, 139 S. Ct. 532 (2019) (holding that "contracts of employment" refer to agreements to perform work and that Section 1 of the FAA is not solely limited to employer-employee contracts).

[36] *Rittmann*, 971 F.3d at 908.

[37] *Id.*

[38] *Id.*

[39] *See* 9 U.S.C. § 1; *Rittmann*, 971 F.3d at 908.

[40] *Rittmann*, 971 F.3d at 908.

[41] *Id.* at 908-09.

[42] *Id.* at 909.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* at 907.

[47] *Id.* at 909; *see also* 9 U.S.C. § 1.

meaning of the phrase "engaged in interstate or foreign commerce" as used in Section 1 of the FAA ("Section 1").[48]

A. INTERPRETING THE PHRASE "ENGAGED IN INTERSTATE COMMERCE"

The court began by referencing the Supreme Court's decision in *Circuit City Stores, Inc. v. Adams*, where the Court addressed the scope and application of Section 1.[49] The Court held that Section 1 was narrow when applied to exempting transportation workers from the FAA.[50] The Court explained that it came to this conclusion by interpreting the plain language of the phrase to be narrow and in a manner consistent with the purpose of the FAA.[51] Although the Supreme Court limited the scope of the FAA's exemption to transportation workers, the Ninth Circuit noted that its decision does not address Amazon's specific issue of "whether transportation workers must cross state lines to be considered workers 'engaged in commerce' for the purposes of the exemption's application."[52]

To resolve this issue, the court established the plain meaning of the statutory text by looking to the "ordinary meaning at the time Congress enacted the statute."[53] The court noted that when Congress enacted the FAA, the word "engaged" meant occupied or employed.[54] Further, "commerce" is specifically defined as dealings through trade and traffic between people or states.[55] The court interpreted the combined terms to include "workers employed to transport goods that are shipped across state lines."[56] Additionally, the court noted that the ordinary meaning of the phrase does not necessarily exclude workers who deliver goods which originate out-of-state to an in-state designation as compared with those who exclusively deliver goods within states.[57]

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[48] *Rittmann*, 971 F.3d at 910; *see also* 9 U.S.C. § 1.

[49] *Rittmann*, 971 F.3d at 910; Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

[50] *Circuit City*, 532 U.S. at 118-19.

[51] *Id.* at 118.

[52] *Compare* Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (narrowly holding that contracts of employment of transportation workers are exempt from the FAA under Section 1, although Section 1 does not apply to all contracts of employment generally) *with Rittmann*, 971 F.3d at 910 (holding that delivery drivers engaged in transportation of goods in interstate commerce even when they did not cross state lines are included in the exemption of Section 1 of the FAA).

[53] *Rittmann*, 971 F.3d at 910; *New Prime*, 139 S. Ct. at 539 (alterations adopted) (internal quotation marks omitted) (quoting Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018)).

[54] *Rittmann*, 971 F.3d at 910; *see also Engaged*, WEBSTER'S NEW INTERNATIONAL DICTIONARY (1st ed. 1909).

[55] *Rittmann*, 971 F.3d at 910; *see also Commerce*, BLACK'S LAW DICTIONARY (2d ed. 1910).

[56] *Rittmann*, 971 F.3d at 910.

[57] *Id.*

The court cited to the First Circuit's decision in *Waithaka*, which held that AmFlex delivery providers fell within the Section 1 exemption.[58] The First Circuit followed a similar reasoning as the Ninth Circuit in this decision.[59] Moreover, the court noted that after the Supreme Court's decision in *Circuit City*, other circuit courts did not interpret the definition to require that workers actually cross state lines for the purposes of the Section 1 exemption.[60] The First Circuit followed a similar reasoning as the Ninth Circuit in its decision, and looked to contemporaneous statutes like the Federal Employer's Liability Act (FELA) to determine the correct interpretation.[61]

Amazon argued that the phrase "engaged in commerce" is not parallel to the term "engaged in *foreign or interstate commerce*" in Section 1 of the FAA.[62] In fact, Amazon argued that the court interpret the latter phrase in Section 1 so as not to read words out of the statute.[63] However, the court rejected this argument and explained that "the term 'in commerce' refers to interstate and foreign commerce," which is precisely the type of commerce that Congress has the power to regulate.[64] Further, when interpreting Section 1, the Supreme Court used the phrase "'engaged in commerce' as shorthand for [the exact words in the] statutory text: 'engaged in foreign or interstate commerce.'"[65] Thus, the court interpreted "engaged in commerce" in a more broad fashion so as not to require the crossing of state lines and concluded that Section 1 "exempts transportation workers who are engaged in the movement of goods in interstate commerce, even if they do not cross state lines."[66]

B. SECTION 1 AS IT APPLIES TO AMFLEX DELIVERY WORKERS

The Ninth Circuit explained that in light of its interpretation of the statute and record, it held "that AmFlex delivery providers belong to a class of workers engaged in interstate commerce," thereby falling within Section 1's exemption.[67] The court concluded that the AmFlex program

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[58] *Id.* (citing Waithaka v. Amazon.com, Inc., 966 F.3d 10, 13 (1st Cir. 2020)).

[59] *Compare Rittmann*, 971 F.3d at 910 *with Waithaka*, 966 F.3d at 13-15.

[60] *Rittmann*, 971 F.3d at 911 (quoting Lenz v. Yellow Transp., Inc, 431 F.3d 348, 351-52 (8th Cir 2005) (holding that, in addition, workers who cross state lines only incidentally "do not fall within the scope of § 1's exemption" because "their job duties are 'only tangentially related to [the] movement of goods'").

[61] *Rittmann*, 971 F.3d at 910-13.

[62] *Id.* at 914.

[63] *Id.*

[64] *Id.*

[65] *Id.* (citing *Circuit City*, 532 U.S. at 115, 116, 118).

[66] *Id.* at 915; *see also* U.S. CONST. art. I, §8, cl. 3.

[67] *Rittmann*, 971 F.3d at 915.

did not solely involve delivery of goods that originated in the same state as delivered.[68] Thus, the workers were not exclusively making intrastate deliveries.[69] AmFlex delivery providers are picking up packages from Amazon warehouses which have been transported across state lines.[70] Further, the court explained that these packages contain goods which remain in the stream of interstate commerce until AmFlex workers ultimately deliver them to their destination.[71] The court explained the distinction between interstate and intrastate using poultry.[72] In this respect, the court noted that live poultry coming from out of state "came to rest" when reaching their final destination – slaughterhouses.[73] Once the poultry reached the slaughterhouse, the interstate transactions related to the poultry ended.[74] Thus, because the poultry came to permanent rest at the slaughterhouses, any transactions thereafter "required *new* or *subsequent* transactions" taking place within the respective states.[75] The *Rittmann* court saw this poultry explanation as extremely helpful in distinguishing interstate and intrastate, which in turn did not fall in Amazon's favor.[76]

The Ninth Circuit distinguished cases such as this one from cases involving food delivery services, such as Uber Eats or Postmates.[77] The rulings in cases pertaining to the latter recognize that local food delivery drivers are exactly that: local.[78] They do not engage in the interstate transport of goods.[79] Prepared meals from restaurants do not fall into the classification of goods that are "indisputably part of the stream of commerce."[80] Unlike local food delivery drivers, AmFlex workers deliver goods that Amazon ships across state lines and which Amazon hires to complete the delivery of these goods.[81] The court explained that AmFlex workers are included in the *channels* of interstate commerce.[82] This determination is important because it establishes that AmFlex workers, although most stay within state boundaries for deliveries, are in fact a part

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[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.* at 916-17.
[73] *Id.* at 916.
[74] *Id.*
[75] *Id.* (emphasis added).
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.* (quoting Levin v. Caviar, Inc., 146 F. Supp. 3d 1146, 1153 (N.D. Cal. 2015)) (internal quotation marks omitted).
[81] *Id.* at 917.
[82] *Id.*

of the *channels* of foreign or interstate commerce which makes up the stream of commerce.[83] In support of its decision, the court explained that Amazon's business includes the selling of goods as well as the delivery of those goods, paralleling other businesses such as FedEx and UPS that the court considers to be involved in foreign and interstate commerce.[84] To that end, the court concluded that AmFlex workers are part of the channels of interstate commerce, establishing that they are engaged in interstate commerce.[85]

Therefore, the Ninth circuit affirmed the district court's ruling that AmFlex delivery providers fall within the Section 1 exemption of the FAA, even if those providers do not cross state lines to make deliveries.[86]

III. IMPLICATIONS

Following the Ninth Circuit's opinion, on September 25, 2020 the court denied a petition for rehearing en banc.[87] Amazon argued in its petition for rehearing en banc that the 2-1 decision would result in "extensive future litigation."[88] In addition, the United States Chamber of Commerce filed an amicus brief supporting Amazon's petition for rehearing en banc.[89] The Chamber of Commerce argued that without en banc review, the majority's decision would threaten to eliminate the benefits of arbitration.[90] The Ninth Circuit was clearly not persuaded by Amazon or the Chamber's arguments.[91]

Amazon has not yet petitioned for writ of certiorari in the Supreme Court of the United States but is likely to do so in the near future.[92] A Supreme Court decision could give delivery drivers of this type the abil-

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[83] *Id.*

[84] *Id.* at 918.

[85] *Id.* at 917.

[86] *Id.* at 919.

[87] Rittmann v. Amazon.Com, Inc., No. 1935381, 2020 U.S. App. LEXIS 30695, at *1 (9th Cir. Sep. 25, 2020).

[88] Amanda Ottaway, *9th Cir. Won't Rethink Amazon Loss on Driver Arbitration*, Law360 (Sep. 25, 2020, 10:11 PM), https://www.law360.com/retail/articles/1313960/9th-circ-won-t-rethink-amazon-loss-on-driver-arbitration.

[89] *Id.*

[90] Linda Chiem, *Chamber Asks Full 9th Circ. To Redo Amazon Driver Ruling*, Law 360 (Sep. 15, 2020), https://www.law360.com/articles/1310133/chamber-asks-full-9th-circ-to-redo-amazon-driver-ruling.

[91] Rittmann v. Amazon.Com, Inc., No. 1935381, 2020 U.S. App. LEXIS 30695, at *1 (9th Cir. Sep. 25, 2020).

[92] Ottaway, *supra* note 88, at 9.

ity to pursue wage collective and class actions in courts as opposed to arbitration.[93]

CONCLUSION

In *Rittmann*, the Ninth Circuit's decision affirmed the district court's denial of a motion to compel arbitration and established that AmFlex delivery drivers are exempt from mandatory arbitration.[94] This case confirms that delivery providers, such as those who work for Amazon, do not have to physically cross state lines to qualify for Section 1 exemption under the FAA.[95] If Amazon petitions for certiorari and the Supreme Court denies this petition, the underlying class and collective actions will continue to trial in the district court, where Amazon may face losing a substantial amount of money in damages.

[93] *Id.*
[94] *Rittmann*, 971 F.3d at 907.
[95] Ottaway, *supra* note 88, at 9.

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Wells Fargo v. City of Oakland: A Matter of Proximate Cause

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CASE SUMMARY

WELLS FARGO V. CITY OF OAKLAND: A MATTER OF PROXIMATE CAUSE

*SHAWNA DOUGHMAN**

INTRODUCTION

President Lyndon B. Johnson[1] saw passage of the Fair Housing Act ("FHA")[2] to be a fitting tribute to the Reverend Dr. Martin Luther King, Jr., who had just been assassinated. The United States was in turmoil, much as it is today, with cities burning and people divided.[3] The FHA was first introduced by Democratic senator Walter Mondale.[4] The lobbying efforts of Republican senator Edward Brooke, the first Black senator to be elected by popular vote, and Democratic senator Edward Kennedy finally brought this legislation to fruition[5] as Title VIII of the Civil Rights Act of 1968.[6] Senator Mondale remarked, "in truly integrated

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[1] "President Lyndon B. Johnson established the National Advisory Commission on Civil Disorders (commonly known as the 'Kerner Commission'). The Kerner Commission found that several government-sanctioned practices disadvantaged racial and ethnic minorities' fair access to housing, including rapid urbanization, the flight of white families to suburban neighborhoods, racially restrictive covenants, real estate agents who steered homebuyers into racially homogenous areas, and discriminatory lending practices like redlining and reverse redlining." City of Oakland v. Wells Fargo & Co., 972 F.3d 1112, 1117 (9th Cir. 2020).

[2] The FHA makes it unlawful to discriminate against people in any housing practices because of race, color, religion, sex, familial status or national origin. 42 U.S.C. §§ 3601 *et seq*.

[3] *History of Fair Housing*, HUD.GOV, https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/ history (last visited Oct. 8, 2020).

[4] Eric W.M. Bain, *Race, Disparate Impact and the Federal Housing Administration*, RACE, RACISM AND THE LAW, https://www.racism.org/articles/basic-needs/propertyland/301-housing/1442-another-missed-opportunity?start=1, (last visited Oct. 21, 2020).

[5] *Id.*

[6] 42 U.S.C. §§ 3601 *et. seq*.

neighborhoods, people have been able to live in peace and harmony—and both [Blacks] and whites[7] are richer for the experience."[8]

Although the FHA has been "rightfully lauded as one of the greatest achievements of the civil rights movement,"[9] discriminatory lending practices have continued.[10] These lending practices, called redlining[11] and reverse redlining (also known as predatory lending),[12] have not ceased to devastate individuals, families, neighborhoods and cities.[13] In 2018, the City of Oakland, California ("Oakland"), sued Wells Fargo to address part of what the FHA set out to do: end discrimination in lending.[14] The court quoted senator Mondale, the chief sponsor of the FHA, who cited cities' declining tax bases as a specific injury traced to discrimination in housing.[15] Wells Fargo appealed to the Ninth Circuit, and pursuant to the Supreme Court's decision in *Bank of America Corporation v. City of Miami* ("*Miami I*"),[16] the court held that Oakland must be given a chance to prove that its harm was within the zone of interest affected by Wells Fargo's actions.

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[7] John Daniszewski, *Why we will lowercase white*, AP THE DEFINITIVE SOURCE (July 20, 2020), https://blog.ap.org/announcements/why-we-will-lowercase-white?utm_campaign=SocialFlow&utm_source=twitter&utm_medium=AP_CorpComm.

[8] 114 CONG. REC. 3421, 3422 (Feb. 20, 1968).

[9] City of Oakland v. Wells Fargo & Co., 972 F.3d 1112, 1117 (9th Cir. 2020).

[10] City of Oakland v. Wells Fargo Bank, N.A., No. 15-cv-04321-EMC, 2018 U.S. Dist. LEXIS 100915, at *3 (N.D. Cal. June 15, 2018).

[11] "Redlining is the practice of denying home loans to residents of minority neighborhoods." City of Oakland v. Wells Fargo & Co., 972 F.3d 1112, 1118 (9th Cir. 2020). As part of the government-sponsored Home Owners' Loan Corporation in the 1930s, the government developed color-coded maps with minority neighborhoods marked in red to show those that were the riskiest areas to insure mortgages. Abdallah Fayyad, *The Unfulfilled Promise of Fair Housing*, THE ATLANTIC (Mar. 31, 2018), https://www.theatlantic.com/politics/archive/2018/03/the-unfulfilled-promise-of-fair-housing/557009. Between 1934 and 1962, virtually all loans for housing through this federal program went to white homeowners, resulting in the segregation of today. Abdallah Fayyad, *The Unfulfilled Promise of Fair Housing*, THE ATLANTIC (Mar. 31, 2018), https://www.theatlantic.com/politics/archive/2018/03/the-unfulfilled-promise-of-fair-housing/557009.

[12] "Reverse redlining. . .is the practice of issuing home loans to minority borrowers with significantly higher costs and more onerous terms than those offered to similarly situated White borrowers—also known as 'predatory loans.' Predatory loans include, for example, subprime loans, negative amortization loans, 'No-Doc' loans that require no supporting evidence of a borrower's income, loans with balloon payments, and 'interest only' loans that carry a prepayment penalty." City of Oakland v. Wells Fargo & Co., 972 F.3d 1112, 1118 (9th Cir. 2020).

[13] Abdallah Fayyad, *supra* note 11, at 12.

[14] City of Oakland v. Wells Fargo Bank, N.A., No. 15-cv-04321-EMC, 2018 U.S. Dist. LEXIS100915, at *2-3 (N.D. Cal. June 15, 2018).

[15] *Id.* at *16 (quoting 114 CONG. REC. 2274 (Feb. 6, 1968)).

[16] Bank of America Corp. v. City of Miami ("Miami I"), 137 S. Ct. 1296 (2017).

I. BACKGROUND

A. FACTUAL BACKGROUND

Oakland alleged that Wells Fargo engaged in predatory lending and discriminatory lending practices with Oakland residents, resulting in high rates of foreclosures and harm to Oakland.[17] Oakland claimed that this practice constituted both intentional and disparate-impact discrimination.[18] Based on what Oakland alleged were Wells Fargo's discriminatory behaviors, Oakland claimed three kinds of injuries: (1) decreased property taxes, (2) increased municipal expenditures to maintain foreclosed properties, and (3) neutralized spending Oakland had earmarked for other needs to support fair housing.[19]

Wells Fargo moved to dismiss for failure to state a claim upon which relief could be granted.[20] The main thrust of Wells Fargo's motion was that Oakland could not establish proximate cause.[21] This decision by the Ninth Circuit is pursuant to *Miami I*.[22] In *Miami I*, the Supreme Court considered a similar case in which the city of Miami sued Wells Fargo and Bank of America, alleging that they "intentionally issued riskier mortgages on less favorable terms to African-American and Latino customers than they issued to similarly situated white, non-Latino customers."[23] The Court considered, under the FHA, whether Miami had prudential standing (different from constitutional standing)[24] to bring suit, and whether Bank of America's and Wells Fargo's actions proximately caused Miami's injuries.[25]

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[17] City of Oakland v. Wells Fargo Bank, N.A., No. 15-cv-04321-EMC, 2018 U.S. Dist. LEXIS 100915, at *3 (N.D. Cal. June 15, 2018).

[18] *Id.* at *3.

[19] *Id.*

[20] A Rule 12(b)(6) motion requests dismissal of a case, claiming that even if all the allegations are true, there is still not a claim that can lead to relief. To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the complaint must include facts sufficient to "state a claim to relief that is plausible on its face." Bell Atl., Corp. v. Twombly, 550 U.S. 544, 570 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009).

[21] City of Oakland v. Wells Fargo Bank, N.A., No. 15-cv-04321-EMC, 2018 U.S. Dist. LEXIS 100915, at *3 (N.D. Cal. June 15, 2018).

[22] *Id.* at *3 (citing Bank of America Corp. v. City of Miami, 137 S. Ct. 1296 (2017)).

[23] *Miami I*, 137 S. Ct. at 1301.

[24] "To satisfy the Constitution's restriction of this Court's jurisdiction to 'Cases' and 'Controversies,' Art. III, § 2, a plaintiff must demonstrate constitutional standing. To do so, the plaintiff must show an 'injury in fact' that is 'fairly traceable' to the defendant's conduct and 'that is likely to be redressed by a favorable judicial decision.'" Bank of America Corp. v. City of Miami, 137 S. Ct. 1296, 1302 (2017) (quoting Spokeo v. Robins, 136 S. Ct. 1540, 1547 (2016)).

[25] City of Oakland v. Wells Fargo Bank, N.A., No. 15-cv-04321-EMC, 2018 U.S. Dist. LEXIS 100915, at *3 (N.D. Cal. June 15, 2018). The question of prudential standing concerns "the question whether the interest sought to be protected by the complainant is arguably within the zone

One question that prudential standing asks is whether the person or entity bringing the suit falls within the zone of interests meant to be protected by a statute, here the FHA, thus creating an "aggrieved person" the statute is meant to protect.[26] Proximate cause is a concept that asks whether an injury is sufficiently close in time and space to a given action, such that it is legally appropriate to attribute the injury to that action.[27] The *Miami I* Court relied on the analysis in *Lexmark International, Inc. v. Static Control Components, Inc.*, where it held "[p]roximate-cause analysis is controlled by the nature of the statutory cause of action. The question it presents is whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits."[28]

Oakland claimed Wells Fargo discriminated against Oakland residents through facially neutral practices. Though facially neutral, these practices resulted in unequal access to loans, loan terms, and information in minority communities, carried out by employees with too little guidance and too many improper incentives to sell to minority borrowers.[29] Oakland alleged that Wells Fargo's practices resulted in more expensive, less straightforward loans for Black and Latino borrowers, referred to as high cost/high risk loans (HCHR).[30]

Oakland relied on regression analyses,[31] mathematical techniques it used to isolate the effects of predatory lending on Oakland neighborhoods.[32] The analyses showed Black borrowers were 2.583 times more

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of interests to be protected or regulated by the statute or constitutional guarantee in question." Ass'n. of Data Processing Serv. Orgs, Inc. v. Camp, 397 U.S. 150, 153 (1970).

[26] The FHA provides that an "aggrieved person may commence a civil action in an appropriate United States district court or State court. . .to obtain appropriate relief with respect to [a] discriminatory housing practice[.]" 42 U.S.C. § 3613(a)(1)(A). An aggrieved person is further defined as any person who "claims to have been injured by a discriminatory housing practice." 42 U.S.C. § 3602(i). "We hold that the City's claimed injuries fall within the zone of interests the FHA arguably protects. Hence, the City is an 'aggrieved person' able to bring suit under the statute." *Miami I*, 137 S. Ct. at 1301.

[27] Proximate cause is "[a] cause that is legally sufficient to result in liability." *Proximate Cause*, BLACK'S LAW DICTIONARY (10th ed. 2014). Proximate cause typically requires an injury to be a reasonably foreseeable result of a given action. *See generally* Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928).

[28] Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1390 (2014) (holding that a replacement part maker had standing to sue a printer and cartridge company who misled customers. Prudential standing was granted as the maker was found to be within the zone of interests under 15 U.S.C. § 1125).

[29] City of Oakland v. Wells Fargo Bank, N.A., No. 15-cv-04321-EMC, 2018 U.S. Dist. LEXIS 100915, at *5 (N.D. Cal. June 15, 2018).

[30] *Id.* at *6.

[31] Regression analysis is "the use of mathematical and statistical techniques to estimate one variable from another. . ." *Regression Analysis*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/regression%20analysis#:~:text=save%20Word-,Definition%20of%20regression%20analysis,regression%20lines%20to%20empirical%20data (last visited October 8, 2020).

[32] *City of Oakland*, 972 F.3d at 1120.

likely than white borrowers to receive a HCHR loan.[33] Latino borrowers were 3.312 times more likely to receive a HCHR than a white borrower.[34] The regression analyses relied on by Oakland controlled for such independent factors as credit score but did not take into account other variables such as job loss, medical hardship, or divorce, cited as critical "life events" by Wells Fargo.[35]

As a defense, Wells Fargo argued that these life events are to blame for increased foreclosures.[36] However, the court countered that by making this argument Wells Fargo was implying "that minority borrowers are somehow more likely than white borrowers to get divorced, suffer from medical hardships, or lose their jobs."[37] HCHR loans are more expensive and riskier than typical loans, which makes them more likely to result in a default on the loan and a foreclosed property.[38] The court did not agree with Well Fargo's claim that the life events caused the default, but rather held that the higher incidence of HCHR loans in minority neighborhoods caused more foreclosures.[39]

Oakland claimed Wells Fargo injured the city in three ways. First, the foreclosed properties, as well as related short sales and vacancies, led to lower property values, which in turn led to lower property-tax revenue for the city.[40] Second, the city claimed a corresponding increase in "vagrancy, criminal activity, fire hazards, and threats to public health and safety."[41] These dangers caused the city unnecessary expenditures and exacerbated already lowering property values, again affecting tax revenues.[42] Finally, Wells Fargo's practices disproportionately affected city minorities, which "impair[ed] the City's goals of racial integration and non-discrimination in housing, and adversely impact[ed] the City's numerous programs in pursuit of those goals, neutralizing spending on those programs."[43] However, as to the third claim, Oakland did not rely on regression analyses or other statistical tools for support.[44]

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[33] City of Oakland v. Wells Fargo Bank, N.A. No. 15-cv-04321-EMC, 2018 U.S. Dist. LEXIS 100915, at *6 (N.D. Cal. June 15, 2018).

[34] *Id.* at *6.

[35] *City of Oakland*, 972 F.3d at 1134

[36] *Id.*

[37] *Id.*

[38] City of Oakland v. Wells Fargo Bank, N.A., No. 15-cv-04321-EMC, 2018 U.S. Dist. LEXIS 100915, at *6-7 (N.D. Cal. June 15, 2018).

[39] *Id.*

[40] *Id.* at *7.

[41] *Id.*

[42] *Id.*

[43] *Id.* at *8 (internal quotation marks omitted).

[44] *City of Oakland*, 972 F.3d at 1121.

B. PROCEDURAL BACKGROUND

Oakland sued Wells Fargo in the United States District Court for the Northern District of California.[45] In addition to monetary damages, Oakland further sought to enjoin Wells Fargo from the predatory practices it allegedly employed against Black and Latino borrowers.[46]

While the case was pending, the Supreme Court granted certiorari in *Miami I*.[47] Because of the overt similarity between the two cases, the district court stayed the proceedings to wait for a ruling from the Supreme Court.[48] In *Miami I*, the Supreme Court held that a plaintiff must establish proximate cause by more compelling reasons than that the aforementioned injuries "foreseeably flowed from the alleged statutory violation."[49] The lower court in *Miami I* determined that the city proved its financial injuries were a foreseeable result of the banks' practices, but the Supreme Court held that foreseeability alone was not sufficient to prove proximate cause.[50] The Court held that, although "[t]he housing market is interconnected with economic and social life," Congress did not intend to provide a remedy for "any foreseeable result of an FHA violation."[51] The Court left for "lower courts [to] define. . .the contours of proximate cause under the FHA."[52] Additionally, the lower courts would need to "decide how that standard applies to the City's claims for lost property-tax revenue and increased municipal expenses."[53]

The district court instructed Oakland to amend its complaint consistent with the decision in *Miami I*.[54] The Northern District of California denied Wells Fargo's motion to dismiss regarding Oakland's claim for decreased property taxes.[55] The court also allowed claims for the second injury (increased municipal expenditures to maintain foreclosed properties), but only for injunctive and declaratory relief, declining without prejudice Oakland's attempt to seek damages.[56] Lastly, the court dismissed without prejudice Oakland's claim regarding neutralized spending for other needs to support fair housing. The court viewed the claim as

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[45] *Id.*

[46] *Id.*

[47] *See* Bank of America Corp. v. City of Miami, 137 S. Ct. 1296 (2017).

[48] *City of Oakland*, 972 F.3d at 1121.

[49] *Miami I*, 137 S. Ct. at 1301.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *City of Oakland*, 972 F.3d at 1121.

[55] *Id.* at 1117.

[56] *Id.*

threadbare, without "precisely ascertain[ing]" how and to what extent Wells Fargo's conduct impacted Oakland's municipal expense output.[57]

Wells Fargo appealed the case to the Ninth Circuit.[58] The Ninth Circuit affirmed in part and dismissed in part the findings of the district court.[59] The court affirmed the district court's "denial of Wells Fargo's motion to dismiss as to Oakland's claims for lost property-tax revenues and the district court's grant of Wells Fargo's motion to dismiss as to Oakland's claims for increased municipal expenses."[60] However, the court reversed the "district court's denial of Wells Fargo's motion to dismiss as to Oakland's claims seeking injunctive and declaratory relief" and remanded the claim.[61]

II. ANALYSIS

The Supreme Court identified two prongs for analysis by lower courts: (1) the definition of the "contours of proximate cause under the FHA," and (2) the decision of "how that standard applies to the City's claim for lost property-tax revenues and increased municipal expenses."[62]

A. THE CONTOURS OF PROXIMATE CAUSE UNDER THE FHA

Proximate cause analysis requires "some direct relation between the injury asserted and the injurious conduct alleged."[63] To prove proximate cause, the Court suggests looking to "the first step" between injury and conduct.[64] This process requires an analysis of two sub-components: (1) an assessment of the "nature of the statutory cause of action,"[65] and (2) determining "what is administratively possible and convenient."[66]

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[57] *Id.* at 1136.

[58] City of Oakland v. Wells Fargo & Co., 972 F.3d 1112 (9th Cir. 2020).

[59] *Id.* at 1117.

[60] *Id.*

[61] *Id.*

[62] *Miami I*, 137 S. Ct. at 1306.

[63] *Id.* at 1306 (quoting Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 268 (1992)).

[64] *Miami I*, 137 S. Ct. at 1306 (quoting Hemi Group, LLC v. City of New York, 559 U.S. 1, 10 (2010)).

[65] *Id.* (quoting Lexmark Int'l Inc. v. Static Control Components, Inc. 134 S. Ct. 1377, 1390 (2014)).

[66] *Id.* (quoting Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 268 (1992)).

1. The Nature of the Statutory Cause of Action

The Ninth Circuit analyzed the FHA's text and legislative history to determine the intent of Congress in its enactment, and whether the injuries to a city were likely to be considered sufficiently close to a bank's unlawful practices to establish proximate cause.[67] The FHA text reveals a broad inclusion intent.[68] The law's broad purpose is to "provide, within constitutional limitations, for fair housing throughout the United States."[69]

The Ninth Circuit concluded that the FHA is "widely considered one of the most capacious civil rights statutes, in large part due to its broad language."[70] The FHA prohibits any form of discrimination in the sale, rental, construction, improvement, maintenance, advertisement, terms, conditions, notices, representations, or services of any form of real estate.[71] Indeed, senator Mondale said that continued housing discrimination would "lead to the destruction of urban centers by loss of jobs and businesses to the suburbs, a declining tax base, and the ruin brought on by absentee ownership of property."[72] The Ninth Circuit found this "far-reaching language" to be evidence of a broad and inclusive interpretation regarding Congress's intent to eliminate discrimination in real estate.[73]

The legislative history is similarly sweeping. The Ninth Circuit observed the Supreme Court's prior reliance on *Trafficante v. Metropolitan Life Insurance Company* as an indication of the FHA's desired breadth.[74] *Trafficante* held that tenants in an apartment building who were not discriminated against could still sue their landlord under the FHA for depriving them of diversity because the landlord discriminated against minority prospective tenants.[75] *Trafficante* indicated that while discriminatory practices directly impact minority groups, those who are "not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered."[76] The "whole community" is the victim of discriminatory practices under the FHA.[77] The court quoted *Trafficante*, agreeing that the FHA allows claims from parties "act[ing] not only on

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[67] *City of Oakland*, 972 F.3d at 1122.

[68] *Id.* at 1124.

[69] 42 U.S.C. § 3601.

[70] *City of Oakland*, 972 F.3d at 1124.

[71] 42 U.S.C. § 3604.

[72] 114 CONG. REC. 3421, 3422 (Feb. 20, 1968).

[73] *City of Oakland*, 972 F.3d at 1124.

[74] *City of Oakland*, 972 F.3d at 1124 (citing Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209, 2011-12 (1972)).

[75] *Trafficante*, 409 U.S. at 209, 211-12.

[76] *Id.* at 210.

[77] *Id.* at 211.

their own behalf but also as private attorneys general in vindicating a policy that Congress considered to be of the highest priority."[78]

The Ninth Circuit's review of the congressional record suggested a strong preference for broad interpretation of the FHA, including the impact of discriminatory housing practices on cities.[79] The court quoted senator Brooke, one of the co-sponsors of the FHA, who called out cities' roles in fighting the fallout from segregation as they "find themselves less and less able to cope with their problems."[80] Senator Mondale, the principal author of the FHA, "specifically and repeatedly referenced cities' 'declining tax base' as one of the large-scale injuries that the FHA was designed to mitigate."[81] The Ninth Circuit thus found Congress's intended interpretation of the FHA to be "broad and inclusive enough to encompass less direct, aggregate, and city-wide injuries."[82]

2. Administrative Feasibility

The court cites *Holmes v. Securities Investor Protection Corporation* for the administrative feasibility prong, and acknowledges that this prong is critical to determining if an alleged harm holds "some direct relation" between the injury asserted and the injurious conduct alleged.[83] In *Holmes*, the Securities Investor Protection Corporation (SIPC) alleged that Holmes had conspired in a fraudulent stock manipulation scheme that disabled SIPC's ability to meet obligations to its customers.[84] The Court held that proximate cause was required, insisting on a direct relationship between conduct alleged and harm asserted.[85]

The Ninth Circuit recognized three factors laid out by the *Holmes* Court: (1) whether the violation caused a plaintiff's injuries, as opposed to other independent factors; (2) whether it is possible to clearly identify each plaintiff's injuries to avoid multiple recoveries; and (3) "whether

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[78] *City of Oakland*, 972 F.3d at 1124 (quoting Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209, 211-12 (1972)). Per Cal. Civ. Pro. § 1021.5, private attorneys general who successfully defend an important right affecting the public interest will be awarded attorneys' fees.

[79] *City of Oakland*, 972 F.3d at 1127 (quoting N. Haven Bd. Of Educ. v. Bell, 456 U.S. 512, 526-527 (1982) (explaining that "remarks. . .of the sponsor of the language ultimately enacted[ ] are an authoritative guide to the statute's construction") (also quoting Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976) ("As a statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute").

[80] *City of Oakland*, 972 F.3d at 1124 (citing 114 CONG. REC. 2988 (Feb. 20, 1968)).

[81] *Id.* at 1126 (citing 114 CONG. REC. 2274 (Feb. 20, 1968)).

[82] *Id.* at 1124.

[83] *Id.* at 1128 (quoting Holmes v. Sec. Inv'r. Prot. Corp. 503 U.S. 258, 268 (1992)).

[84] *Holmes*, 503 U.S. at 269.

[85] *Id.* at 268.

allowing recovery for the indirect injury is unjustified by the general interest in deterring injurious conduct."[86]

First, the court held that Oakland plausibly alleged that its regression analyses are capable of illustrating exactly which injuries are attributable to Wells Fargo's conduct.[87] The court held these analyses were sufficient to "calculate exactly which lost property-tax revenues are attributable to Wells Fargo's wrongdoing."[88] The court was satisfied that the analyses would be "sophisticated, reliable, and scientifically rigorous" enough to allow a case to proceed.[89]

Second, there would be no duplication of recoveries because Oakland and individual borrowers are seeking different claims.[90] Oakland alone can pursue recovery for city-wide injuries, while only the individual borrowers can seek redress for their actual injuries.[91] The city is the only viable party that can claim injury due to reduced property-tax rates or increased municipal expenses.[92]

Thirdly, the court found that Wells Fargo's alleged practices harm "different parties in different ways."[93] The injury claimed by Oakland is entirely different than that of a person suing for his or her individual injuries and thus the parties would not be competing for the same recovery.[94] The court held that all three *Holmes* factors were satisfied and that it would be administratively feasible for the district court to administer Oakland's injuries.[95]

B. THE APPLICATION OF THE PROXIMATE CAUSE STANDARD TO OAKLAND'S CLAIMS

The Ninth Circuit held that Oakland's claim for reduced property-tax revenues as stated in the complaint satisfied the FHA's proximate cause requirement, but its claim for increased municipal expenses did not.[96] While the injury is not directly related, the court held that it was closely related to the FHA-prohibited conduct.[97]

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[86] *City of Oakland*, 972 F.3d at 1123 (quoting *Holmes*, 503 U.S. at 269-70) (internal quotation marks omitted).

[87] *City of Oakland*, 972 F.3d at 1128.

[88] *Id.* at 1128.

[89] *Id.* at 1128-29.

[90] *Id.* at 1129.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.* at 1130.

[96] *Id.*

[97] *Id.*

Wells Fargo incorrectly claimed that a plaintiff must always allege an injury that is the "immediate result" of a violation.[98] In *Lexmark*, the Supreme Court unanimously held that while it is the "general tendency" to not go beyond the first step, if an "intervening link of injury" is found, then a party may be granted an opportunity to prove proximate cause.[99] Consequently, the Ninth Circuit acknowledged that if the Supreme Court meant for the "first step" analysis to preclude *all* intervening steps in proximate cause analyses, it would not have deferred to the lower courts.[100]

The Supreme Court has repeatedly held that the FHA protects indirectly injured parties.[101] The Court's analysis of *Lexmark* allows for a wider inclusion of proximate cause, holding that if intervening steps did not result in discontinuity, they might not break the causal chain.[102] The court held that these cases established proximate-cause principles based on continuity that directly apply here.[103] The court held that if Oakland's regression analyses successfully show that its injury was sufficiently isolated from the injuries of the individual borrowers, yet flows continuously from Wells Fargo's conduct, the same principles from the non-FHA cases would apply.[104]

In *Lexmark*, an antitrust case, the Court relied on the Lanham Act that "permitted 'any person who believes that he or she is likely to be damaged by a defendant's false advertising' to sue."[105] Static Control alleged that the false advertising by a printer cartridge manufacturer led to customers not using Static Control's product, which resulted in a loss of business.[106] The Court held that the harm alleged was "sufficiently close" to the prohibited conduct such that Static Control could plead its

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[98] *Id.*

[99] Lexmark Intern., Inc. v. Static Control Components, Inc., 572 U.S. 118, 140 (2014).

[100] *City of Oakland*, 972 F.3d at 1131; *see also Miami I*, 137 S. Ct. at 1306.

[101] *City of Oakland*, 972 F.3d at 1131; *see, e.g.,* Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 100-09 (1979) (holding a municipality had standing to sue realtors for discrimination, despite no direct discrimination against the municipality); *Trafficante*, 409 U.S. at 212 (holding that tenants may sue landlord for discriminating against prospective tenants, despite not suffering discrimination personally); Havens Realty Corp. v. Coleman, 455 U.S. 363, 378-79 (1982) (permitting an organization for fair housing to sue for harm against itself and its members).

[102] *City of Oakland*, 972 F.3d at 1131-2 (citing Lexmark Intern., Inc. v. Static Control Components, Inc., 572 U.S. 118, 121, 134 (2014) (holding that printer and cartridge company who misled customers was still responsible to the indirectly impacted cartridge-refurbishing company); Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 653-58 (2008) (holding that auction bidders had standing to sue co-bidders who filed fraudulent paperwork which increased the co-bidders' chance of winning the auction).

[103] *City of Oakland,* 972 F.3d at 1132.

[104] *Id.* at 1132-33.

[105] *Miami I*, 137 S. Ct. at 1306 (quoting *Lexmark*, 572 U.S. at 134).

[106] *Lexmark*, 572 U.S. at 122-23 (2014).

case.[107] As under *Iqbal*, the Court would allow parties to bring cases based on plausible claims that their evidence would be found to prove proximate cause.[108]

Wells Fargo attempted to distinguish *Lexmark* from its application here because the number of individual borrowers in this case who can seek damages on their own exceeds that in *Lexmark*.[109] However, the court noted that individual borrowers frequently lack the resources to sue, and will also often be time-barred, as the consequences of predatory lending ofttimes surface after the statute of limitations has run out.[110] The court pointed out that individual borrowers who have not yet suffered the consequences of predatory lending might not realize the coming danger of foreclosure, something that a city is in a better position to observe.[111]

The court held that Oakland's alleged injury—its decrease in property-tax revenues—was directly and continuously related to Wells Fargo's discriminatory lending practices.[112] Conversely, the same cannot be said of Oakland's claim regarding increased municipal expenses.[113] The court held that Oakland did not properly demonstrate which increases in its municipal expenses were attributable to Wells Fargo's allegedly predatory conduct.[114]

III. IMPLICATIONS OF THIS DECISION

As the Supreme Court instructed in *Miami I*,[115] the Ninth Circuit analyzed proximate cause in relation to this distinct case.[116] The text and legislative history of the FHA have established a clear preference for a broad interpretation as to who qualifies to sue as an "aggrieved person," providing a wide berth for showing causal connection.[117] Through this decision, the Ninth Circuit attempts to widen that berth.[118] By holding that cities have standing to sue for injuries directly and continuously re-

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[107] *Id.* at 133.

[108] "While legal conclusions can provide the complaint's framework, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 556 U.S. 662, 664 (2009).

[109] *City of Oakland*, 972 F.3d at 1133.

[110] *Id.*

[111] *Id.*

[112] *Id.* at 1135.

[113] *Id.* at 1136.

[114] *Id.*

[115] *Miami I*, 137 S. Ct. at 1306.

[116] *City of Oakland*, 972 F.3d at 1122-36.

[117] *Id.* at 1124.

[118] *See generally* City of Oakland v. Wells Fargo & Co., 972 F.3d 1112 (9th Cir. 2020).

lated to FHA violations, the Ninth Circuit has extended the opportunity for relief to parties who would not otherwise have a cause of action. By extending the proximate cause relationship past the "first step," the court held that cities—likely in a better position to sue than individual borrowers—have the proper judicial means to thwart predatory lending.

CONCLUSION

While predatory practices by banks have been responsible for much of the discrimination and segregation in American cities, the Ninth Circuit's holding provides a way for cities to hold the banks accountable. As banks are held liable for their predatory practices, they will likely change their lending methods. When minorities are no longer unfairly targeted through predatory lending, at least part of the Fair Housing Act will have accomplished its goal, realizing some of the potential and vision of Dr. Martin Luther King's dream: "I have a dream that one day this nation will rise up and live out the true meaning of its creed: 'We hold these truths to be self-evident, that all men are created equal.'"[119]

[119] Martin Luther King, *"I Have a Dream" Address Delivered at the March on Washington for Jobs and Freedom*, STANFORD: THE MARTIN LUTHER KING, JR. RESEARCH AND EDUCATION INSTITUTE (Aug. 28, 1963), https://kinginstitute.stanford.edu/king-papers/documents/i-have-dream-address-delivered-march-washington-jobs-and-freedom.

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Dent v. NFL LMRA 301 Preemption – The Ninth Circuit Court of Appeals Throws a Penalty Flag on the NFL

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NOTE

DENT V. NFL LMRA 301 PREEMPTION – THE NINTH CIRCUIT COURT OF APPEALS THROWS A PENALTY FLAG ON THE NFL

*JUSTIN C. TRIMACHI**

INTRODUCTION

The National Football League's ("NFL") logo is a shield with white stars on a blue background on top and a white field with red lettering below. This logo evokes the United States flag, a symbol meant to inspire a sense of civic responsibility and patriotism.[1] In recent years the NFL has strived to be identified with those ideals.[2] One of the NFL's biggest stumbling blocks in achieving this goal has been the way the league handles player health issues.[3] In 2009 concerns over injuries led the House Judiciary Committee to hold hearings.[4] Ironically, recent decisions from the Eighth and Eleventh Circuit Courts of Appeal shielded the NFL from its responsibilities regarding medical decisions under state law.[5] Those courts ruled that Section 301 of the Labor Management Re-

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[1] *See* Flag of USA, https://statesymbolsusa.org/symbol-official-item/national-us/state-flag/american-flag (last visited Sep. 13, 2020).

[2] Brittainy Newman, *The N.F.L. Wears Patriotism on Its Sleeve. And Its Head. And Its Feet*, N.Y. TIMES (Jan. 6, 2020), https://www.nytimes.com/2020/01/03/sports/football/nfl-patriotism.html.

[3] Evan Grossman, *Latest CTE Findings Just Another Blow to NFL's Dubious History with Head Injuries*, DAILY NEWS (Jul. 30, 2017, 12:08 AM), https://www.nydailynews.com/sports/football/cte-findings-blow-nfl-bad-history-head-injuries-article-1.3368484.

[4] Alan Schwarz, *N.F.L. Scolded Over Injuries to Its Players*, N.Y. TIMES (Oct. 8, 2009), https://www.nytimes.com/2009/10/29/sports/football/29hearing.html.

[5] Atwater v. NFL Players Ass'n, 626 F.3d 1170 (11th Cir. 2010); Williams v. NFL, 582 F.3d 863 (8th Cir. 2009).

lations Act ("LMRA 301") preempted[6] NFL players' state-law tort claims because resolution of the claims would require interpretation of the terms of a Collective Bargaining Agreement ("CBA").[7] Both rulings denied justice to the players who help make the NFL a profitable venture: one which generated approximately $15 billion during the 2018-2019 season.[8] The mythology created by the NFL every game day is that the men on the field are warriors, heroes, and gladiators at the peak of physical perfection. Unfortunately, once the cheers fade and retirement looms, some players are left broken financially, physically, or both.[9]

Recently former players reveal an allegedly toxic culture that has perpetrated over the years, with injuries being improperly treated leading to long term negative effects.[10] The players claim that this improper treatment took the form of negligently prescribed opioids and painkillers.[11] Doctors supposedly handed these powerful drugs out to players in unmarked envelopes.[12] While trusting the doctors and taking these medications, the players were unaware of the long term ramifications.[13]

Richard Dent is a former defensive end[14] for the Chicago Bears.[15] He was voted MVP[16] of Super Bowl XX in 1986, racking up three tackles, one and a half sacks, and two forced fumbles.[17] His 2011 induction

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[6] The Supremacy Clause in Article VI of the United States Constitution declares that federal law is the "supreme Law of the Land." *Article VI*, CORNELL LAW LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/constitution/articlevi. When federal and state law conflict federal law supersedes, or preempts, state law. *Preemption*. CORNELL LAW LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/preemption. When a court finds that LMRA 301 preempts a state-law claim, the courts will apply federal law based on federal labor policy. *See* Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 455 (1957), *See also* Local 174 v. Lucas Flour Co., 369 U.S. 95, 103-104 (1962).

[7] *Atwater*, 626 F.3d at 1170; *Williams*, 582 F.3d at 863.

[8] Gerry Smith & Bloomberg, *NFL Bullish About $25 Billion Revenue Goal Ahead of Super Bowl*, FORTUNE (Feb. 2, 2019, 10:04 AM), https://fortune.com/2019/02/02/nfl-super-bowl-ad-revenue/.

[9] Ken Belson, *For N.F.L. Retirees, Opioids Bring More Pain*, N.Y. TIMES (Feb. 2, 2019), https://www.nytimes.com/2019/02/02/sports/nfl-opioids-.html.

[10] *Id*.

[11] *Id*.

[12] *Id*.

[13] *See id*.

[14] This position is a highly versatile role in football requiring size, speed, and skill. Ty Schalter, *Why Defensive End is the 2nd-Most Important Position in the NFL*, BLEACHER REPORT (July 2, 2020), https://bleacherreport.com/articles/1251690-why-defensive-end-is-the-second-most-important-position-in-the-nfl.

[15] *Richard Dent,* PRO FOOTBALL HALL OF FAME, https://www.profootballhof.com/players/richard-dent/ (last visited Sep. 14, 2020).

[16] Neil Greenberg, *How the Super Bowl MVP is Chosen*, WASHINGTON POST, (Feb. 2, 2020, 1:49 PM), https://www.washingtonpost.com/sports/2020/02/02/how-super-bowl-mvp-is-chosen/.

[17] PRO FOOTBALL HALL OF FAME, *supra* note 15. (When Dent retired in 1997, his 137.5 career sack total was surpassed only by Reggie White and Bruce Smith, two legends of the game). A fumble is when a team loses control of the football which results in the other team taking possession.

into the Pro Football Hall of Fame cemented his legacy.[18] Dent now has an enlarged heart and nerve damage in his foot, resulting from his use of painkillers during his career.[19] According to Dent, painkillers and opioids distributed by the NFL fueled his and other players' ability to stay on the field and perform at a high level.[20] Dent and other star players are one of the main reasons why fans keep watching, a viewership which fills the NFL's coffers by keeping ad revenues high.[21] Players perform athletic feats that, at times, border on the superhuman. In 2014 Dent and other players brought allegations in federal court that NFL doctors negligently distributed medications.[22]

In *Dent v. NFL*, the Court of Appeals for the Ninth Circuit ("Ninth Circuit") determined that LMRA 301 did not preempt retired players' state law tort claims because it was unnecessary to interpret the CBA to resolve the claims.[23] This finding conflicted with holdings by both the Eight Circuit Court of Appeals ("Eighth Circuit") in *Williams v. NFL*[24] and the Eleventh Circuit Court of Appeals ("Eleventh Circuit") in *Atwater v. NFL Players Association*.[25] In *Dent*, the Ninth Circuit applied a two-pronged test to determine if resolution of a state law tort claim required interpretation of a CBA.[26]

The test used by the Ninth Circuit defined interpretation in depth,[27] unlike the tests used by the other circuit courts in *Williams* and *Atwater*. This key difference is likely why the Eight and Eleventh Circuit Courts reached a different result than the Ninth Circuit. The test applied by the Ninth Circuit should become the standard used by all federal courts going forward for all LMRA 301 preemption analysis for two reasons. First, application of the Ninth Circuit's test to the decisions in *Williams* and *Atwater* will show that when interpretation is properly defined it

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See Nat'l Football League, *NFL Rulebook* (2020) 4, https://operations.nfl.com/media/4349/2020-nfl-rulebook.pdf. A sack is a special type of tackle in which the quarterback is tackled behind the line of scrimmage. This results in a loss of forward progress in advancing the football. *See Are You Ready for Some Football (Words)?*, MERRIAM-WEBSTER, https://www.merriam-webster.com/words-at-play/football-super-bowl-words/sack.

[18] *Id*.

[19] Second Amended Complaint at 7, Dent v. NFL, No. 14-02324-WHA (N.D. Cal. Dec. 17, 2014), ECF No. 65.

[20] *See id*. at 6.

[21] Shawn M. Carter, *NFL Commercial Score Big in 2019, pulling in $5B in revenue*, FOX BUSINESS (Jan 21, 2020), https://www.foxbusiness.com/sports/nfl-commercials-score-big-in-2019-pulling-in-5-billion-in-revenue.

[22] *See* Second Amended Complaint, *supra* note 19, at 27.

[23] Dent v. NFL, 902 F.3d 1109, 1126 (9th Cir. 2018).

[24] Williams v. NFL, 582 F.3d 863, 868 (8th Cir. 2009).

[25] Atwater v. NFL Players Ass'n, 626 F.3d 1170, 1177 (11th Cir. 2010).

[26] *Dent*, 902 F.3d at 1116.

[27] *Id*.

leads to a more consistent adjudication of LMRA 301 preemption. Second, the Ninth Circuit's test in *Dent* is more comprehensive, based on the Supreme Court's LMRA 301 jurisprudence, than those used by the Eighth Circuit and Eleventh Circuit.

Part I of this Note will discuss the procedural history of the case, the Ninth Circuit's application of the two-pronged test to determine if LMRA 301 preempted the players' state-law claims, the facts of *Dent v. NFL*, and finally a brief history of the NFL and its usage of CBAs. Part II will give a brief overview of the Supreme Court's development of LMRA 301 jurisprudence as well as its rulings on when LMRA 301 should preempt state-law tort claims. Part III will discuss the decisions by the Eighth Circuit in *Williams* and by the Eleventh Circuit in *Atwater*. Part IV of this Note will discuss why the Ninth Circuit's test should be adopted throughout the federal court system to analyze whether LMRA 301 preempts state-law claims.

I. RICHARD DENT SUITS UP ONE LAST TIME TO TACKLE THE NFL

This section will discuss the procedural history of the case followed by the Ninth Circuit's LMRA 301 analysis. Then the factual background of Dent's claims will be provided, followed by a brief historical discussion of Collective Bargaining Agreements[28] by the NFL to negotiate with its players.

A. PROCEDURAL HISTORY – THE NFL BLOCKS DENT AND THE NINTH CIRCUIT THROWS A PENALTY FLAG

In 2014, Dent filed a class action suit to represent a class of more than 500 former players (collectively, the "Plaintiffs") in the District Court for the Northern District of California ("ND Court of CA").[29] The Plaintiffs filed their complaint alleging the NFL violated state and federal laws by distributing controlled substances and prescription drugs, both negligently and on purpose.[30]

The Plaintiffs claimed that the NFL, in violation of federal drug laws, breached its duty of care and negligently supplied them with

[28] A collective bargaining agreement is a written legal contract between an employer and a union representing the employees. *What is a Collective Bargaining Agreement*, SHRM, https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/collectivebargainingagreement.aspx (last visited Sept. 14, 2020).

[29] *See* Complaint at 2, Dent v. NFL, No. 14-02324-WHA (N.D. Cal. Dec. 17, 2014), ECF No. 1; s*ee also* Second Amended Complaint, Dent v. NFL, No. 14-02324-WHA (N.D. Cal. Dec. 17, 2014), ECF No. 65.

[30] Complaint, *infra* note 31 at 78-79.

opioids and other pain medications.[31] Further, the Plaintiffs maintained that instead of properly treating injuries, NFL doctors encouraged the Players to take the pills before, during, and after games to manage the pain.[32] The Plaintiffs filed several claims, including negligence per se under California state law.[33] In response, the NFL filed a motion to dismiss, arguing that LMRA 301 preempted the Plaintiffs' state-law tort claims.[34] The ND Court of CA agreed and granted the motion.[35] Judge Alsup ruled that he would need to construe, consult, and apply provisions of the CBA surrounding the NFL's oversight of individual team physicians.[36] For this reason he held that LMRA 301 preempted the negligence claim.[37] The Plaintiffs appealed, and the Ninth Circuit granted *de novo* review.[38]

B. The Ninth Circuit Ruled That LMRA 301 Did Not Preempt Dent's Claims Because No Interpretation Of The CBA Was Required

In *Dent*, The Ninth Circuit laid out a two-step process for analyzing whether or not LMRA 301 preempted a state-law claim.[39] First, the court would determine whether the cause of action involved "rights conferred upon an employee by virtue of state law, not by a CBA."[40] If the right solely existed as a result of the CBA, the court would deem the claim preempted with no further analysis.[41]

Second, the court must determine if interpretation of the CBA was required and assess "whether litigating the state law claim nonetheless requires interpretation of a CBA, such that resolving the entire claim in court threatens the proper role of grievance and arbitration."[42] If the court determined that resolution of the claim required interpretation of

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[31] *See id*. at 6.

[32] *See id*.

[33] *Id*. at 65-86.

[34] *See* Defendant National Football League's Notice of Motion and Motion to Dismiss Second Amended Complaint at 15, Dent v. NFL, No. 14-02324-WHA (N.D. Cal. Dec. 17, 2014), ECF No. 72.

[35] Order re. Motions to Dismiss and Requests for Judicial Notice at 22, Dent v. NFL, No. 14-02324-WHA (N.D. Cal. Dec. 17, 2014), ECF No. 106.

[36] *See* Dent v. NFL, No. C 14-02324 WHA, 2014 U.S. Dist. LEXIS 174448 at *22-24, (N.D. Cal. Dec. 17, 2014).

[37] *Id*. at *36.

[38] Dent v. NFL, 902 F.3d 1109, 1116 (9th Cir. 2018).

[39] *Id*.

[40] *Id* (quoting Burnside v. Kiewit Pac. Corp., 491 F.3d 1053, 1059 (9th Cir. 2007)).

[41] *Id*.

[42] *Id.* (quoting Alaska Airlines Inc. v. Schurke, 898 F.3d 904, 921 (9th Cir. 2018) (en banc)).

the CBA then LMRA 301 would preempt the claim.[43] The Ninth Circuit's analysis was largely focused on the negligence per se[44] claim, but the players also filed claims of negligent misrepresentation, fraud, loss of consortium, fraudulent concealment, and negligent hiring and retention.[45]

The Plaintiffs' original complaint filed with the ND Court of CA claimed that the NFL violated federal and California law by providing and administering controlled substances without (1) warnings of long-term risks and side-effects, (2) proper labeling, or (3) written prescriptions.[46] The Ninth Circuit first assessed if the Plaintiffs right to proper medical care was granted solely by the CBAs.[47] The Court determined that nothing in the CBA required the NFL to provide medical care to the Plaintiffs.[48] The Court stated that the Plaintiffs were not claiming that the NFL violated the CBA, but rather state and federal law.[49] Based on this the Ninth Circuit determined that the right did not solely arise from the CBA.[50] The Ninth Circuit then analyzed each element of the Plaintiffs' negligence claim to determine if interpretation of the CBA was required to resolve the Plaintiffs' claim.[51]

First, the Ninth Circuit determined that no duty was established by statute or the CBA regarding distribution of pain medication from doctors to the Plaintiffs.[52] The Court instead found that a binding duty was inherent in the distribution of opioids and painkillers.[53] Next, Judge Tallman found that harm was foreseeable from the overuse or misuse of controlled substances.[54] He stated that carelessness in handling such substances is both "illegal and morally blameworthy."[55]

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[43] *Id.* (citing Burnside v. Kiewit Pac. Corp., 491 F.3d 1053, 1059 (9th Cir. 2007)).

[44] Negligence per se in California is defined by four elements: (1) the defendant violated a statute, ordinance, or regulation; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence the nature of which the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted. Alcala v. Vazmar Corp, 167 Cal. App. 4th 747, 755 (Cal. Ct. App. 2d 2008).

[45] *Dent*, 902 F.3d at 1115.

[46] Second Amended Complaint at 81-83, Dent v. NFL, No. 14-02324-WHA (N.D. Cal. Dec. 17, 2014), ECF No. 65.

[47] *Dent*, 902 F.3d at 1118.

[48] *Id*.

[49] *See* Second Amended Complaint, *infra* note 50 at 81-83.

[50] *Dent*, 902 F.3d at 1118.

[51] *Id*.

[52] *Id*. at 1119.

[53] *See id*.

[54] *Id*.

[55] *Id*.

Finally, the Ninth Circuit determined the responsible distribution of prescription drugs did not unduly burden the NFL.[56] For this reason, if the NFL was distributing controlled substances to the Plaintiffs, it had a duty to do so with reasonable care.[57] This duty arose from the general character of that activity, and not the Collective Bargaining Agreement ("CBA").[58] Therefore Judge Tallman determined that a court need only compare the conduct of the NFL to the requirements of state and federal law.[59] This comparison would determine if the Plaintiffs' harm was foreseeable and if the NFL breached its duty of care in distributing prescription drugs.[60]

Regarding causation, the Ninth Circuit found that it was purely a question of fact whether the NFL failed in its duty to safely prescribe painkillers and opioids.[61] Therefore no interpretation of the CBA was necessary to assess the alleged violation of the statutes by the NFL.[62] The Ninth Circuit then distinguished the current case from *Williams*, where the Eighth Circuit ruled it could not resolve the plaintiffs' negligence claims without evaluating the CBA's drug policy.[63] In contrast with that decision, the Ninth Circuit found that the NFL's duty to responsibly distribute drugs was completely independent of the CBA.[64] Therefore, no interpretation was necessary and LMRA 301 did not preempt the claims.[65] The Ninth Circuit remanded the case to the ND Court of CA to hear the claim on its merits.[66]

C. FACTUAL BACKGROUND OF *DENT*

Dent and the Plaintiffs alleged that while playing in the NFL, they were given an abundance of various medications and opioids by NFL doctors.[67] The Plaintiffs claimed that NFL doctors distributed these drugs to keep the star players on the field to maintain ad revenues and ticket sales.[68] The Plaintiffs also asserted that NFL doctors accomplished this by masking their pain with drugs and improperly treating any underlying

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[56] *See id*.
[57] *Id*.
[58] *Id*.
[59] *Id*. at 1120.
[60] *See id*.
[61] *Id*. at 1119-20.
[62] *Id*.
[63] *Id* at 1120.
[64] *Id*.
[65] *Id*.
[66] *Id*. at 1126.
[67] Second Amended Complaint at 6, Dent v. NFL, No. 14-02324-WHA (N.D. Cal. Dec. 17, 2014), ECF No. 65.
[68] *See id*. at 74.

injuries.[69] The Plaintiffs also stated the NFL increased their risk of injury by shortening the offseason and adding more games to the schedule.[70]

The plaintiffs maintained that written prescriptions rarely accompanied the drugs.[71] Instead, they were handed various pills in manila envelopes with no labeling or instructions.[72] The Plaintiffs stated that the NFL failed to warn them that the continued use of such strong medications could result in negative side effects, long term health issues, or addiction.[73] Additionally, many players took these drugs, without a prescription or instruction, for an extended period of time.[74] This negligent distribution of opioids and other painkillers, according to the Plaintiffs, led to orthopedic injuries, heart problems, severe physical ailments, and drug addiction.[75]

D. A Brief History Of The NFL and Its Use of Collective Bargaining Agreements

The NFL was founded in 1920[76] and operates as an unincorporated association of individually owned football teams.[77] The NFL "promotes, organizes, and regulates professional football in the United States."[78] Players are not employees of the NFL because they sign contracts with the individual teams.[79] A group of players, led by Creighton Miller, the first general manager for the Cleveland Browns, founded the National Football League Players Association ("NFLPA") in 1956.[80] The NFLPA's purpose was to provide a counterbalance to the power of the NFL by improving pay and working conditions for the players.[81] Since 1968, a series of Collective Bargaining Agreements has defined the relationship among the NFL, its member teams, and NFL players.[82]

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[69] *Id*. at 6.

[70] *See id*. at 3-4.

[71] *Id*. at 53.

[72] *Id*.

[73] *Id*. at 13-14.

[74] *Id*. at 7-13.

[75] *Id*.

[76] *National Football League*, Britannica, https://www.britannica.com/topic/National-Football-League (last visited Oct. 3, 2020).

[77] Williams v. NFL, 582 F.3d 863, 868 (8th Cir. 2009).

[78] *Id*.

[79] *Dent*, 902 F.3d at 1114.

[80] *1956: The Beginning*, NFLPA, https://nflpa.com/about/history/1956-the-beginning (last visited Sep. 12, 2020).

[81] *See id*.

[82] *See Dent*, 902 F.3d at 1114.

II. THE SUPREME COURT'S JURISPRUDENCE ON LMRA 301 PREEMPTION AND ITS RELATIONSHIP TO STATE-LAW TORT CLAIMS

This section will discuss how the Supreme Court ("SCOTUS") decided which law should apply when resolving LMRA 301 disputes. It will then discuss the framework created by SCOTUS to determine when LMRA 301 preempts state-law tort claims. Finally, this section will review SCOTUS' holdings that to refer or look to the terms of a CBA is not interpretation for the purposes of LMRA 301 analysis.

In 1957 the lower federal courts were split regarding their role under LMRA 301.[83] LMRA 301 provides that any United States District Court may hear suit involving a contract dispute between an employer and a labor organization.[84] Such a suit does not require a party to meet either the amount in controversy or diversity of citizenship requirements.[85] In *Textile Workers Union of Am. v. Lincoln Mills of Alabama*, SCOTUS granted certiorari to determine the role of the courts in relation to LMRA 301.[86]

In *Textile Workers,* a union requested arbitration with the company to resolve a dispute concerning workloads and work assignments.[87] The employer refused arbitration so the union brought suit to compel arbitration.[88] SCOTUS noted that LMRA 301 had the purpose of maintaining industrial peace.[89] Justice Douglas highlighted that Congress intended to assign enforcement of CBAs on behalf of or against labor organizations to the federal courts.[90] SCOTUS held that federal law must be applied to resolve CBA disputes under LMRA 301.[91] The federal courts would be responsible to create that law utilizing the policy of national labor laws.[92] SCOTUS applied this holding to state courts as well in *Local 174 v. Lucas Flour Co*.[93]

At issue in *Lucas* was a strike by a labor union to force a company to rehire an employee.[94] As a result the company sued, claiming damages

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[83] Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 449 (1957).

[84] Labor Management Relations (Taft-Hartley) Act, LMRA 301(a), 29 U.S.C. §185(a) (2020).

[85] *See id*.

[86] *Textile Workers*, 353 U.S. at 449.

[87] *Id*.

[88] *Id*.

[89] *Id*. at 455.

[90] *Id*.

[91] *Id*. at 456.

[92] *Id*. at 457.

[93] Local 174 v. Lucas Flour Co., 369 U.S. 95, 102 (1962).

[94] *Id*. at 97.

for business losses that resulted from the strike.[95] The Supreme Court of Washington held that the strike violated the CBA because of a provision that required both parties to resolve disputes through arbitration.[96] SCOTUS agreed even though the CBA did not contain an explicit no-strike clause.[97] Despite affirming the state court's ruling, Justice Stewart found that the application of state law was improper.[98] He determined that federal law must be applied to any claim brought in state court regarding an alleged violation of a CBA.[99] He reasoned that this served the dual purpose of simplifying the agreements' interpretation and avoiding prolonged disputes.[100] In *Allis-Chambers Corp. v. Lueck*, SCOTUS held that LMRA 301 preempts any rights conferred by state law that do not exist independently of a CBA.[101]

The dispute in *Lueck* arose when a union worker filed a tort suit in Wisconsin State Court.[102] The worker claimed that both his employer and the insurance company improperly handled his payments resulting from a disability claim.[103] However, the employee did not follow the grievance and arbitration process defined by the terms of the CBA.[104] SCOTUS found that LMRA 301 preempted a state-law tort claim if evaluation of that claim was so enmeshed with the terms of a labor contract.[105] SCOTUS reversed the Wisconsin Supreme Court's ruling in Lueck's favor because Lueck's right was solely provided by the CBA.[106] Justice Blackmun also noted that SCOTUS did not hold that LMRA 301 would preempt all state-law claims that had a connection to the terms of a CBA.[107] He further explained that for LMRA 301 to preempt a state-law tort claim, the claim's resolution must substantially depend on an analysis of the terms of a CBA.[108] SCOTUS later granted certiorari in *Lingle v. Norge Div. of Magic Chef* to resolve a circuit split and expanded on the ruling in *Lueck*.[109]

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[95] *Id*.

[96] *Id*. at 97-98.

[97] *Id*. at 105.

[98] *Id*. at 103.

[99] *Id*. at 103.

[100] *Id*. at 104.

[101] Allis-Chambers Corp. v. Lueck, 471 U.S. 202, 213 (1985).

[102] *Id*.

[103] *Id*. at 205.

[104] *See id*. at 206.

[105] *Id*. at 213.

[106] *See id*. at 220.

[107] *See id*.

[108] *Id*.

[109] Lingle v. Norge Div. of Magic Chef, 486 U.S. 399, 403 (7th Cir. 1988) (ruling that to resolve a retaliatory discharge claim required interpretation of a CBA because it would require the

In *Lingle*, an employee claimed that her employer wrongfully discharged her in retaliation for filing a workers' compensation claim for her injuries.[110] SCOTUS reversed the lower court's ruling in favor of the employer because the remedy for the state-law claim was independent of the CBA since a purely factual inquiry could resolve the claim.[111]

Justice Stevens stated that a CBA's protection may provide a remedy for conduct that simultaneously violates state law.[112] However, he found that such an occurrence would not make the existence of a state-law violation dependent on the terms of the CBA.[113] He also determined that a claim is independent of a CBA, for the purposes of LMRA 301 preemption analysis, if a purely factual inquiry independent of the terms of the CBA will resolve the claim.[114] He then concluded that LMRA 301 preemption merely establishes federal law as the basis for interpreting CBAs.[115] Justice Stevens finally noted that resolution of a state-law claim, through either the terms of a CBA or rights granted by state law, could rely on the same set of facts for analysis.[116] However, he found that that this was not enough to find that such a claim is substantially dependent on a CBA for the purposes of LMRA 301 preemption analysis.[117] In *Livadas v. Bradshaw*, SCOTUS laid the foundation for the Ninth Circuit's definition of "interpretation."[118]

At issue in *Livadas* was whether the California Division of Labor Standards Enforcement ("Division") could adjudicate a dispute between Livadas and her employer.[119] The Division claimed that it could not because Livadas was subject to a CBA between the union and the employer.[120] Further, the Division claimed § 229 of the California Labor Code ("Code")[121] prohibited it from resolving the claim.[122] The Division stated it would have to look to and apply the CBA to determine to estab-

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same analysis of the facts, standing in contrast to similar cases in the Second, Tenth, and Third Circuits).

[110] *Id.* at 401.

[111] *Id*. at 407.

[112] *See id*. at 412-13.

[113] *See id*. at 413.

[114] *See id*. at 407.

[115] *Id*. at 409.

[116] *Id*. at 409-410.

[117] *See id*. at 410.

[118] Livadas v. Bradshaw, 512 U.S. 107 (1994).

[119] *Id*. at 112.

[120] *Id*. at 113.

[121] Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement. Cal. Lab. Code § 229.

[122] *Id*.

lish what rate Livadas should be paid under § 203[123] of the Code.[124] SCOTUS ruled that the Division could not decide on its own to unilaterally reject arbitration claims without a LMRA 301 preemption analysis.[125] Therefore the ruling of the lower court was reversed in favor of Livadas.[126] Justice Souter reasoned that a simple need to look to the terms of a CBA is not interpretation for the purposes of LMRA 301 preemption analysis.[127] Drawing on the decisions in *Lucas, Lueck, Lingle,* and *Livadas*, the Ninth Circuit developed its two-pronged test, with its expanded definition of interpretation, and then applied that test to the claims in *Dent*.[128] The Ninth Circuit held that LMRA 301 did not preempt the plaintiffs' claims because no interpretation of a CBA was required.[129] The Ninth Circuit noted that its decision contrasted with recent holdings by both the Eighth Circuit and Eleventh Circuit on whether LMRA 301 preempted the plaintiffs' state-law claims.[130]

III. *DENT'S* HOLDING CLASHES WITH DECISIONS BY THE EIGHTH AND ELEVENTH CIRCUIT COURTS OF APPEAL

This section will look at two cases similar to *Dent* involving NFL players. The first, *Williams v. NFL,*[131] was decided by the Eight Circuit. The second, *Atwater v. NFL Players Ass'n*,[132] was decided by the Eleventh Circuit. In both *Atwater* and *Williams,* the court held that LMRA 301 preempted the state-law tort claims and ruled in favor of the defendants.

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[123] [I]f an employer willfully fails to pay, without abatement or reduction . . . any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced. Cal. Lab. Code § 203.

[124] *Livadas*, 512 U.S. at 112-13.

[125] *See id*. at 134.

[126] *Id*. at 135.

[127] *See id*. at 125 (determining that any need to merely "look to" or "refer" to the CBA was not necessary to resolve the dispute).

[128] Dent v. NFL, 902 F.3d 1109, 1116 (9th Cir. 2018).

[129] *Id*.

[130] *Id*. at 1124.

[131] Williams v. NFL, 582 F.3d 863 (8th Cir. 2009).

[132] Atwater v. NFL Players Ass'n, 626 F.3d 1170 (11th Cir. 2010).

A. The Eighth Circuit Holds That LMRA 301 Preempted NFL Players' State-Law Tort Claims Because Interpretation Of A CBA Was Necessary to Resolve the Plaintiffs' Claims

In *Williams v. NFL*, the Eighth Circuit considered if LMRA 301 preempted the plaintiffs' Minnesota common law claims, which included negligence and misrepresentation.[133] Central to the case was the Policy on Anabolic Steroids and Related Substances ("Policy"), incorporated in the NFL Collective Bargaining Agreement 2006-2012.[134] The Policy included language regarding banned substances and testing policies.[135] The plaintiffs were warned that the risk of taking supplements was theirs, and were told they were ultimately responsible for what went into their bodies.[136] In 2006, several players tested positive for bumetanide, which is a banned substance under the policy.[137] An investigation linked the results to a supplement called StarCaps.[138] NFL teams, along with the plaintiffs' agents, received memos with warnings and new policies regarding StarCaps.[139] However, the NFL did not directly notify the plaintiffs.[140] These memos did not state that StarCaps contained bumetanide or any other banned substances, or that the Policy banned StarCaps.[141]

The plaintiffs tested positive in 2008 for bumetanide and the NFL suspended them for four games without pay.[142] During an arbitration hearing, the plaintiffs admitted they were aware of the warnings regarding supplements, the supplement hotline, and the rule from the Policy that each player is responsible for what goes into his body.[143] Regardless, the plaintiffs claimed that the NFL's failure to notify them specifically about the bumetanide in StarCaps should have excused their positive test results.[144] The plaintiffs filed suit in Minnesota District Court for the Fourth District on December 3, 2008, alleging various violations of Minnesota common law including: breach of fiduciary duty, fraud, negligent misrepresentation, negligence, and vicarious liability.[145] The Eighth Cir-

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[133] *Williams*, 582 F.3d at 868.
[134] *Id*.
[135] *Id*. at 868-69.
[136] *Id*. at 869. The Policy emphasized this warning in capital letters.
[137] *Id*.
[138] *Id*.
[139] *Id*. at 869-70.
[140] *See id*.
[141] *Id*. at 870.
[142] *Id*.
[143] *Id*. at 871.
[144] *Id*.
[145] *Id*. at 872 n.7.

cuit upheld the district court's ruling that LMRA 301 preempted the suit's state-law tort claims.[146]

The Eighth Circuit applied a two-pronged test to determine if LMRA 301 preempted the plaintiffs' state-law tort claims.[147] LMRA 301 would preempt those claims if the "claims: (1) [were] premised on duties created by the relevant CBA such that they are 'based on' the agreement, or (2) require interpretation of the CBA such that they [were] 'dependent upon an analysis' of the agreement."[148]

Judge Shepherd gave two reasons for LMRA 301 preemption of the plaintiffs' negligence, breach of fiduciary duty, and gross negligence claims.[149] First, it was necessary to examine and determine the parties' relationship and expectations established by the CBA and the Policy.[150] Second, the claims were "inextricably intertwined with consideration of the terms of the Policy."[151] Similarly, he found that federal law preempted the plaintiffs other state-law tort claims because it would not be possible to resolve the claims without interpretation of the CBA and the Policy.[152] Judge Shepherd primarily relied on the language assigning the plaintiffs' responsibility to control what went into their bodies.[153] This reasoning mirrored *Atwater*, where the Eleventh Circuit assigned responsibility to the players for managing their finances.[154]

B. THE ELEVENTH CIRCUIT HOLDS THAT LMRA 301 PREEMPTED NFL PLAYERS' STATE-LAW TORT CLAIMS BECAUSE INTERPRETATION OF A CBA WAS NECESSARY TO RESOLVE THE PLAINTIFFS' CLAIMS

In *Atwater v. NFL Players Association*, the plaintiffs alleged negligence and misrepresentation under Georgia state law by the National Football League and the National Football League Players Association ("NFLPA"). Specifically, the plaintiffs cited defendants' failure to properly vet Kirk Wright and Nelson "Keith" Bond, who operated the International Management Association ("IMA"), for participation in the Financial Advisors Program ("Program").[155] The plaintiffs claimed the defendant's failure led to Wright's theft of almost $20 million from the

[146] *Id*. at 868.
[147] *Id*. at 881.
[148] *Id*. at 881 (citing Bogan v. GMC, 500 F.3d 828, 832 (8th Cir. 2007)).
[149] *See id*.
[150] *Id*.
[151] *Id*.
[152] *Id*.
[153] *See id*. at 882.
[154] *See* Atwater v. NFL Players Ass'n, 626 F.3d 1170, 1183 (11th Cir. 2010).
[155] *See id*. at 1174.

plaintiffs' accounts.[156] The Eleventh Circuit used the following test to assess whether LMRA 301 preempted the plaintiffs' claims: "If the state-law claim either arises out of a CBA or is dependent upon the meaning of a CBA, 'the application of state law . . . is preempted and federal labor-law principles . . . must be employed to resolve the dispute.' "[157]

The defendants argued that LMRA 301 preempted the plaintiffs' claims because they substantially depended on an interpretation of section 12 of the CBA, which established and defined the Career Planning Program ("CPP").[158] The CPP, according to the CBA, would provide information to the players on how to handle their personal finances, but it would not assume responsibility for those finances.[159] The defendants argued that because they both provided this warning and conducted background checks in compliance with the CPP they were not liable for Wright's actions.[160]

The plaintiffs alleged that the NFLPA failed to exercise reasonable care while performing due diligence background checks on Wright, Bond, and IMA.[161] The plaintiffs maintained that the NFLPA failed by (1) not evaluating IMA's application properly, and (2) inadequately monitoring IMA's compliance with the Program.[162] Judge Ebel determined that the defendant's duties were created by the CBA's mandate given to the defendants to create the CPP and "provid[e] information to players on handling their personal finances."[163] To support this conclusion, he cited undisputed evidence that fulfilled the NFLPA's obligations to provide information on handling personal finances to the players.[164] This evidence consisted of statements from the NFLPA's general counsel that the Program was part of the CPP mandated by the CBA.[165]

The plaintiffs disputed this evidence linking the Program and the CPP in three ways: (1) by introducing statements from the NFLPA to the Securities and Exchange Commission when discussing the Program, (2) by citing the NFLPA's failure to mention the CPP when approving the program, and (3) by pointing to the lack of evidence of the existence of

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[156] *See id*.

[157] *Id*. at 1176-77 (quoting *Lingle v. Norge Div. of Magic Chef, Inc.,* 486 U.S. 399, 406 (1988)).

[158] *Id*. at 1174.

[159] *Id*. at 1174-75.

[160] *See id*. at 1175.

[161] First Amended Complaint at 27, Atwater v. NFL Players Ass'n, No. 1:06-CV-1510-JEC (N.D. Ga., Mar. 26, 2009), ECF No. 10.

[162] *Id*.

[163] *Atwater*, 626 F.3d at 1179 (citing Motion for Summary Judgement at 80, Atwater v. NFL Players Ass'n, No. 1:06-CV-1510-JEC (N.D. Ga., Mar. 26, 2009), ECF No. 180).

[164] *See id*. at 1179-80.

[165] *Id*. at 1180.

the CPP.[166] The plaintiffs also claimed that the NFL failed in its duty to provide proper background checks and to act reasonably and competently in providing background information about the advisors.[167] The plaintiffs argued that they reasonably relied on the Program as a fully-insured and validated financial investment option.[168]

The Eleventh Circuit was unpersuaded and ruled that any claims of negligence required interpretation of the personal finance provision of the CBA to determine the scope of any duty owed by the NFL.[169] Regarding the other state-law claims, the court would likewise need to interpret the personal finance provision of the CBA.[170] For these reasons, the Eleventh Circuit ruled that LMRA 301 preempted the plaintiffs' state-law claims and granted summary judgment to both defendants.[171] These holdings reflected the decision in Williams, where the Eight Circuit determined it would have to interpret the CBA's language assigning responsibility to the players for substances found in their bodies.[172] The decisions in *Williams* and *Atwater* reveal the need for a consistent, robust test for LMRA 301 preemption analysis. Such a test must include the Supreme Court's definition of what constitutes CBA interpretation for the purposes of LMRA 301 preemption analysis. This will help ensure that a tenuous reliance on the terms of a CBA will not preempt rights granted to employees by state law. The Ninth Circuit provided such a test in *Dent*.[173]

IV. THE NINTH CIRCUIT'S TEST SHOULD BE ADOPTED THROUGHOUT THE FEDERAL COURT SYSTEM

In *Dent*, the Ninth Circuit used a two-pronged test to analyze whether LMRA 301 preempted the plaintiffs' state-law tort claims.[174] First it determined if the right claimed existed by virtue of state law or arose solely as a result of a CBA.[175] If the right was conferred by a CBA, then LMRA 301 preempted the claim with no further analysis needed.[176] Second, if the right is determined to be independent of a CBA, the court

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[166] *Id*. at 1180.

[167] First Amended Complaint at 30, Atwater v. NFL Players Ass'n, No. 1:06-CV-1510-JEC (N.D. Ga., Mar. 26, 2009), ECF No. 10.

[168] *See Atwater*, 626 F.3d at 1182-83.

[169] *Id*. at 1182.

[170] *Id*. at 1182-84.

[171] *Id*. at 1185.

[172] *See* Williams v. NFL, 582 F.3d 863, 882 (8th Cir. 2009).

[173] *Dent*, 902 F.3d at 1116.

[174] *Id*. at 1116.

[175] *Id*. (quoting Burnside v. Kiewit Pac. Corp., 491 F.3d 1053, 1059 (9th Cir. 2007)).

[176] *Id*.

must analyze if resolution of the claim requires interpretation of a CBA to avoid threatening the proper role of grievance and arbitration.[177]

Judge Tallman explained that LMRA 301 preempts a claim that requires interpretation of a CBA.[178] He also noted that interpretation is construed narrowly; it means something more than considering, referring to, or applying the language of a CBA.[179] Finally he stated that the need for a purely factual inquiry that does not rely on the meaning of any CBA provision is not cause for LMRA 301 preemption.[180]

The discussion below will show that the Ninth Circuit's test for LMRA 301 preemption fully integrates the Supreme Court's LMRA jurisprudence in *Lucas Flour*, *Lingle*, *Livadas*, and *Lueck*. Applying the Ninth Circuit's test to the facts presented in *Williams* and *Atwater* will show that the claims could have been resolved without interpretation of a CBA. Finally, contrasting the Ninth Circuit's test with those used by the Eighth Circuit in *Williams* and the Eleventh Circuit in *Atwater* will show that it is a more holistic representation of the Supreme Court's LMRA 301 preemption jurisprudence. For these reasons, the federal court system should adopt the Ninth Circuit's test.

A. Applying The Ninth Circuit's Test To *Williams* And *Atwater* Shows That Justice Could Have Been Obtained For The Plaintiffs Without Interpretation Of A Cba

1. Applying the Ninth Circuit Test to Williams v. NFL

In *Williams*, the Eighth Circuit held that LMRA 301 preempted the Plaintiffs' state-law claims of negligence, gross negligence, and breach of fiduciary duty.[181] However, if the Eighth Circuit had applied the Ninth Circuit's two-pronged test, the outcome of the case would likely have been different. First, the claims did not arise solely from the CBA, nor was an interpretation of the CBA necessary to resolve the claims.

The Ninth Circuit's test states that a court must first determine if the plaintiffs' rights arose solely from the CBA or were conferred under state law.[182] The Eighth Circuit ruled that any duty owed by the NFL or its doctors required an examination of the legal relationship between the

[177] *Id*. (quoting Alaska Airlines Inc. v. Schurke, 898 F.3d 904, 921 (9th Cir. 2018)).
[178] *Id*. (quoting Burnside v. Kiewit Pac. Corp., 491 F.3d 1053, 1059 (9th Cir. 2007)).
[179] *Id*. (quoting Alaska Airlines Inc. v. Schurke, 898 F.3d 904, 921 (9th Cir. 2018)).
[180] *Id*. (quoting Burnside v. Kiewit Pac. Corp., 491 F.3d 1053, 1072 (9th Cir. 2007)).
[181] Williams v. NFL, 582 F.3d 863, 881 (8th Cir. 2009).
[182] Dent v. NFL, 902 F.3d 1109, 1116 (9th Cir. 2018).

parties established by the CBA.[183] The court explained that the claims were "inextricably intertwined with consideration of the terms of the CBA's Policy on Anabolic Steroids and Related Substances ("Policy")."[184] However, since Minnesota requires its doctors to obtain a license to practice medicine, and to keep their license or avoid censure, doctors are required to meet specific standards under state law whether or not the patient is a party to a CBA.[185] Therefore, the doctors' duty was assigned independently of the CBA. The NFL employed the doctors involved, thus under the doctrine of *respondeat superior*[186] the NFL was responsible for their actions. For these reasons, the rights granted to the plaintiffs did not solely arise from the CBA. If a right is independent of a CBA, a court must determine if an interpretation of the CBA is necessary to resolve the claims.[187] Interpretation means more than to consider, refer to, or apply.[188]

The Eighth Circuit relied on the fact that the Policy, incorporated into the CBA, contained language that directed the plaintiffs to a hotline to obtain information about supplements and advised them they were solely responsible for what went into their bodies.[189] However, the court's analysis was flawed because merely referring to language in a CBA that does not meet the standard of interpretation defined by the Supreme Court and later adopted by the Ninth Circuit. It would have been possible to read the Policy language and analyze any duties assigned to doctors or plaintiffs using Minnesota common law through a purely factual inquiry to determine if the plaintiffs' tort claims were valid.

LMRA 301 preemption requires more than a casual reference to the language of a CBA that is simply understood.[190] The phrase "at your own risk" is similar to the phrase caveat emptor ("let the buyer beware"), both of which are understood and taken at face value. Similarly, the language from the Policy "you and you alone are still responsible for what

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[183] *See Williams*, 582 F.3d at 881.

[184] *Id*. at 881 (citing Bogan v. Gen. Motors Corp., 500 F.3d 828, 832 (8th Cir. 2007)) (internal quotations omitted).

[185] *See* MINN. STAT. § 147.001 (2019).

[186] "Latin – Let the chief answer. A superior is responsible for any acts of omission or commission by a person of less responsibility to him." *What is Respondeat Superior*?, L. DICTIONARY, https://thelawdictionary.org/respondeat-superior/ (last visited Aug. 12, 2020).

[187] *Dent*, 902 F.3d at 1116 (9th Cir. 2018) (citing Alaska Airlines Inc. v. Schurke., 898 F.3d 904, 921 (9th Cir. 2018) (en banc)).

[188] *Id*.

[189] *Williams*, 582 F.3d 863 at 869.

[190] *See Dent*, 902 F.3d at 1116 (9th Cir. 2018) (citing Alaska Airlines Inc. v. Schurke, 898 F.3d 904, 921 (9th Cir. 2018) (en banc)).

goes into your body"[191] is also straightforward. An in-depth analysis of these statements is unnecessary because a purely factual inquiry could be conducted to determine any duty owed. Such an inquiry could draw on testimony regarding the parties' intentions, as well as the memos and communication from the NFL to the plaintiffs.

The plaintiffs' rights existed by virtue of Minnesota common law and did not solely arise from a CBA. Additionally, interpretation of the Policy and the CBA's language was not necessary to resolve their state-law claims. For these reasons, under the test used in *Dent*, LMRA 301 should not have preempted the state-law claims at issue in *Williams*. An application of the same test should also have produced a different outcome in *Atwater v. NFL*, because resolution of the plaintiffs' claims did not require interpretation of a CBA.[192]

2. *Applying the Ninth Circuit Test to* Atwater v. NFL Players Association

In *Atwater*, the Eleventh Circuit held that LMRA 301 preempted the plaintiffs' state-law claims. The court reasoned resolution of the claims substantially depended on an interpretation of the Collective Bargaining Agreement ("CBA") between the parties.[193] However, an application of the *Dent* test will show that LMRA 301 should not have preempted the plaintiffs' state-law claims. The court relied on section 12 of the CBA,[194] which mandated the creation of the Career Planning Program ("CPP") and provided the warning that players had sole responsibility for their finances.[195]

The scope of any duty owed by the defendants did not arise solely from the CBA because section 12 of the CPP did not explicitly create the Financial Advisors Program ("Program").[196] None of the terms found in section 12 addressed the requirements for admission, background checks for advisors wishing to participate, or ensuring compliance with the Program.[197] Section 12 contained language assigning responsibility to the players for their finances, but it did not assign responsibility for the advi-

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[191] *Williams*, 582 F.3d at 869.

[192] *See* Atwater v. NFL Players Ass'n, 626 F.3d 1170, 1174 (11th Cir. 2010).

[193] *Id*.

[194] *Id*. at 1175 ("The parties will use best efforts to establish an in depth, comprehensive Career Planning Program. The purpose of the program will be to help players enhance their career in the NFL and make a smooth transition to a second career. The program will also provide information to players on handling their personal finances, it being understood that players shall be solely responsible for their personal finances").

[195] *Id*. at 1174.

[196] *Id*. at 1175.

[197] *Id*.

sors' selection or oversight.[198] This is in sharp contrast to the Policy in Williams that warned players that they were responsible for the contents of the supplements they chose to take.[199]

The NFLPA's general counsel stated that the Program was part of the CPP mandated by the CBA and satisfied the requirement to provide players with information on how to handle their finances.[200] This statement is not enough to definitively show that the NFLPA's duty solely arose from the CBA. Simply giving a person information on how to *handle* finances does not relieve a duty to sufficiently *investigate* a financial advisor to ensure their trustworthiness.

The NFL then relied on its acknowledgment that it performed background checks as part of the CBA-mandated CPP.[201] The Eleventh Circuit held that any duty the NFL may have owed to establish negligence,[202] misrepresentation,[203] or breach of fiduciary duty[204] was due to the CBA's provision regarding personal finances. However, compliance with the CPP does not negate any duty owed under Georgia state law. Therefore, any duty owed by the defendants did not exist solely from the terms of the CBA. The second part of the Ninth Circuit's test, with its in-depth definition of interpretation, would likely have directed the court to hold that LMRA 301 did not preempt the plaintiffs' claims. The Eleventh Circuit stated it would have to consider and consult the CBA to determine if the defendants' breached any duty owed by the defendants to determine negligence.[205] However, under the test used in *Dent*, merely considering or consulting the language of a CBA is not interpretation.[206]

Regarding the misrepresentation claim, the court stated it would have to interpret the CPP and CBA's language to ascertain whether the players reasonably relied on the alleged misrepresentations.[207] The court once again referenced the CPP's disclaimer regarding the players' sole responsibility for their finances.[208] It even referenced Georgia law regarding disclaimers,[209] which was not necessary given that the purpose of preemption analysis is not to litigate the merits of a claim but to en-

[198] *Id*.
[199] Williams v. NFL, 582 F.3d 863, 869 (8th Cir. 2009).
[200] *Id*.
[201] *Id*. at 1182.
[202] *Id*.
[203] *Id*. at 1183.
[204] *Id*. at 1184.
[205] *Id*. at 1181-82.
[206] Dent v. NFL, 902 F.3d 1109, 1117 (9th Cir. 2016).
[207] *Atwater*, 626 F.3d at 1183.
[208] *Id*.
[209] *Id*.

sure the proper law is applied.[210] Also, referencing state law while maintaining that federal law should resolve the claims is inherently illogical, as it is analogous to a football referee referencing the rules of baseball to support a penalty flag. This reasoning in favor of preemption was inappropriate using the Ninth Circuit's test because the mere need to read or reference a disclaimer is not interpretation.[211]

Finally, the Eleventh Circuit's finding that LMRA 301 preempted the players' fiduciary duty claims would likely have been different under the Ninth Circuit's test. The court held that resolution of the claims depended substantially on the interpretation of the CBA's language that "players shall be solely responsible for their personal finances."[212]

A purely factual inquiry, using testimony and documents provided by the parties, could have been conducted to determine if a fiduciary relationship existed between the plaintiffs and defendants. Further, a responsibility for one's own finances does not negate the defendants' responsibility to perform adequate background checks on financial advisors listed by the employer or union. Since all three of the plaintiffs' claims did not arise solely from the CBA, and resolution of those claims did not require interpretation, LMRA 301 should not have preempted the claims in *Atwater*.

It should not be surprising that a different holding would likely result from application of the Ninth Circuit's test to the facts of *Atwater* and *Williams*. The test used in both cases failed to properly incorporate the Supreme Court's standard for interpretation of a CBA for the purpose of determining LMRA 301 preemption.

B. THE NINTH CIRCUIT'S TEST IS MORE COMPLETE THAN THE TESTS USED IN *WILLIAMS* AND *ATWATER* BECAUSE IT RELIES ON THE SUPREME COURT'S DEFINITION OF "INTERPRETATION"

The Supreme Court laid the groundwork for analyzing when LMRA 301 should preempt a state-law claim. The *Lingle* Court addressed a claim's independence based on a purely factual inquiry,[213] and reiterated that federal law is the basis for interpretation of a CBA.[214]

Even if resolution of a claim using either state law or a CBA would address the same set of facts, the state-law claim is independent of the

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[210] *See Livadas*, 512 U.S. at 123-24.

[211] *See Dent*, 902 F.3d at 1116.

[212] *Atwater*, 626 F.3d at 1183.

[213] Lingle v. Norge Div. of Magic Chef, 486 U.S. 399, 407 (1988).

[214] *Id*. at 409.

CBA for the purposes of LMRA 301 preemption if the claim can be resolved without interpreting the CBA.[215] The *Livadas* Court held that a state-law claim is independent of, and therefore not preempted by, a CBA if the claim can be resolved by "look[ing] to" rather than interpreting the CBA.[216] A comparison of the Ninth Circuit test and those used in *Atwater* and *Williams* will show that its definition of interpretation is more complete because it more closely follows the Supreme Court's jurisprudence.

The Eleventh Circuit's test in *Atwater* did not define interpretation, and therefore lacked the thoroughness of the Ninth Circuit's test. This is because it did not completely include the Supreme Court's rulings on the role of interpretation in assessing LMRA 301 preemption. The Eleventh Circuit's test simply stated that if a state-law claim arose from a CBA or was dependent on the meaning of a CBA, then federal labor-law principles must be applied to resolve the dispute.[217] The Eleventh Circuit did not include the qualifier *substantially dependent* in its test, but later used it when ruling that LMRA 301 preempted the plaintiffs' claims.[218] The Eleventh Circuit then stated that it would need to *consider*[219] or *consult*[220] the CBA to resolve the claims presented by the plaintiffs.

To *consider* (or think about)[221] and to *consult* (or refer to)[222] equate to *looking to*[223] a CBA and should not have led to preemption. If a court needs to think about or refer to the terms of a CBA, this is not interpretation for the purposes of LMRA 301 preemption analysis. Since the Eleventh Circuit did not include the definition of *interpretation* used by both the Supreme Court and the Ninth Circuit, it concluded that LMRA 301 preemption was unnecessary. It could be argued that the Eleventh Circuit's later usage of the term *substantially dependent* implies that the test requires more than a look or a reference to a CBA when doing LMRA 301 analysis. However, when dealing with a person's rights and potential abuses, it is better to have an explicit definition of interpretation for

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[215] *Id*.

[216] Livadas v. Bradshaw, 512 U.S. 107, 125 (1994).

[217] Atwater v. NFL Players Ass'n, 626 F.3d 1170, 1176-77 (11th Cir. 2010) (quoting Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 406 (1988)).

[218] *Id*. at 1185.

[219] *Id*. at 1181.

[220] *Id*. at 1182.

[221] The main definition of "consider" is to think carefully about, such as (1) to think of especially with regard to taking some action, or (2) to take into account. *Consider*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/consider (last visited Oct. 4, 2020).

[222] The definition of "consult" is (1) to refer to or (2) to ask the advice or opinion of. *Consult*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/consider (last visited Oct. 4, 2020).

[223] *See Livadas*, 512 U.S. at 125.

LMRA 301 analysis. Without an explicit requirement, sports leagues and other organizations that enter into CBAs with their workers may be able to circumvent rights granted under state law. Since the Eleventh Circuit failed to include this explicit definition, its test is less complete when compared to the test used in *Dent*. The Eighth Circuit's test, while closer to the Ninth Circuit's, also fails to provide an explicit definition of interpretation.

The test used by the Eighth Circuit allowed LMRA 301 to preempt claims based on duties created by a CBA or that required interpretation of the CBA that was dependent upon an analysis of the agreement.[224] The Eighth Circuit's test mentions interpretation but does not define interpretation. This omission could lead to an inefficient and potentially unjust analysis because it allows a court to casually reference the language of a CBA and rule that LMRA 301 preempts state-law claims. The Eighth Circuit's main argument for preemption was a need to *examine* the CBA's language to determine the duty owed by the NFL and its doctors.[225] Even if it was necessary to *examine* the language of the CBA, the test used by the Eighth Circuit still falls short of the standard laid out by the Supreme Court. Examination of the terms of a CBA to find any duty owed would be the same as *referring* to or *looking* to the terms of the CBA, which is not interpretation according to the Supreme Court's definition.

Similar to the test used in *Atwater*, the Eighth Circuit's test could be read as impliedly incorporating the Supreme Court's definition of interpretation that requires a court to do more than to *look to* the terms of a CBA. However, any implicit incorporation will fall short because an explicit requirement provides a firmer foundation for analysis. Without an explicit requirement defining interpretation, a court can superficially refer to the terms of a CBA without truly determining if resolution of the claim substantially depends on the CBA. This can deny justice to plaintiffs seeking to resolve their claims using state law.

Some may criticize the Ninth Circuit's definition for being too explicit and leaving little room for courts to exercise judicial discretion. However, labor relations are an area of the law where precision is especially important due to the potential impact on the economy.[226] Additionally, workers could be more vulnerable if they do not have the proper legal recourse to pursue claims. Failure to use a test that relies com-

[224] Williams v. NFL, 582 F.3d 863, 881 (8th Cir. 2009) (citing Bogan v. GMC, 500 F.3d 828, 832 (8th Cir. 2007)).

[225] *Id*.

[226] *See* Katia Dmitrieva, *GM strike hits broader economy, skewing recession-forecast data*, LOS ANGELES TIMES (Oct. 11, 2019), https://www.latimes.com/business/autos/story/2019-10-11/gm-strike-hits-broader-economy-skewing-recession-forecast-data.

pletely on the Supreme Court's definition of interpretation could allow the NFL and other industries to violate state law as long as they are abiding by the provisions of a CBA. Such behavior could threaten worker protection and industrial harmony. The Ninth Circuit's test, with its in-depth definition of "interpretation" based on the Supreme Court's jurisprudence, provides a more precise framework for analysis than the Eighth and Eleventh Circuit Courts' tests.

CONCLUSION

The physical and financial hardships suffered by Richard Dent and the plaintiffs in *Williams* and *Atwater* show a need for robust LMRA 301 preemption analysis. Plaintiffs should be afforded the opportunity to resolve claims that arise from state law and not solely from the terms of a CBA. The Ninth Circuit Court of Appeals' test, if adopted throughout the federal court system, would meet this need. Application of this test to the facts of *Williams* and *Atwater* showed that it was possible to resolve the claims without an interpretation of the relevant Collective Bargaining Agreements. LMRA 301 preemption was therefore unwarranted in those cases. The test is also an integrated approach based on the Supreme Court's jurisprudence compared to the tests used by the Eighth Circuit and Eleventh Circuit. The *Dent* test surpasses those used in *Williams* and *Atwater* because it includes an in-depth definition of interpretation based on the rulings in *Lucas, Lueck, Lingle,* and *Livadas*. For these reasons the Ninth Circuit's two-pronged test for LMRA 301 preemption analysis, as stated in Dent v. NFL, should be adopted throughout the federal court system. This would help achieve Congress's initial goal of promoting industrial harmony in adopting LMRA 301. Finally, it would also ensure that athletes in all major sports leagues can play with confidence, knowing that the courts are ready to throw a penalty flag when necessary.

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Dyroff v. Ultimate Software Group, Inc.: A Reminder of the Broad Scope of § 230 Immunity

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NOTE

DYROFF V. ULTIMATE SOFTWARE GROUP, INC.: A REMINDER OF THE BROAD SCOPE OF § 230 IMMUNITY

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"Nothing vast enters into the life of mortals without a curse."[1]

INTRODUCTION

The Internet[2] is one of the most ubiquitous and accessible methods of modern communication.[3] Today, Internet users access, create, and edit online content.[4] Like newspapers, Internet content consists of a combination of information and speech. However, unlike other forms of communication, such as broadcast media,[5] the Internet receives greater speech

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[1] Sophocles, ANTIGONE (442 B.C.E).

[2] The capitalized form *Internet* is more commonly used in U.S. publications. The *Internet* is defined as "an electronic communications network that connects computer networks and organizational computer facilities around the world." (*Internet*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/Internet (last visited Oct. 19, 2020)).

[3] Emily Elert, *How the Internet Has Spread Around the World,* POPSCI (Dec. 11, 2012) https://www.popsci.com/science/article/2012-12/widening-world-web-internet-infographic/.

[4] Blumenthal v. Drudge, 992 F. Supp. 44, 48, n.7 (1998) ("[T]he users of Internet information are also its producers").

[5] *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 868 ("[S]pecial justifications for regulation of . . . broadcast media . . . are not applicable to other speakers").

protection under the First Amendment.[6] Content regulation and speech moderation on the Internet remains controversial.[7]

Historically, Congress's regulation of the Internet proved unsuccessful. In 1996, Congress enacted the Communications Decency Act ("CDA"),[8] which banned obscene material accessible to minors over any telecommunications device, including the Internet.[9] In 1997, in *Reno v. American Civil Liberties Union,* the United States Supreme Court held many of the CDA's provisions as a vague[10] and overbroad[11] form of content-based[12] speech suppression in violation of the First Amendment.[13] Congress responded by enacting the Child Online Protection Act ("COPA"),[14] a narrower regulation that punishes indecent material displayed online with a commercial purpose.[15] Similarly, in *Ashcroft v. American Civil Liberties Union*, the Supreme Court protected speech on the Internet by affirming a preliminary injunction against COPA enforcement, finding less restrictive and potentially more efficient alternative methods of regulation.[16] Together, *Reno* and *Ashcroft* demonstrate the judiciary's reservation to impose content-based restrictions on Internet

[6] *See* U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); *see generally* Reno, 521 U.S. at 885 (Because Congress has a significant "interest in fostering the growth of the Internet[,] . . . [t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship").

[7] *See* David L. Hudson Jr., *Free speech or censorship? Social media litigation is a hot legal battleground,* ABA J. (Apr. 1, 2019), http://www.abajournal.com/magazine/article/social-clashes-digital-free-speech.

[8] 47 U.S.C § 223.

[9] 47 U.S.C § 223(a)(1), (d)(1).

[10] "A law is unconstitutionally vague [under the First Amendment] if it fails to provide a reasonable opportunity to know what conduct is prohibited or is so indefinite as to allow arbitrary and discriminatory enforcement." Tuscan Woman's Clinic v. Eden, 379 F.3d 531, 555 (9th Cir. 2004). However, "perfect clarity is not required even when a law regulates protected speech." Cal. Teacher's Ass'n v. Bd. of Educ., 271 F.3d 1141, 1150 (9th Cir. 2001) (citing Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989)).

[11] "A law is overbroad under the First Amendment if it 'reaches a substantial number of impermissible applications' relative to the law's legitimate sweep." Shickel v. Dilger, 925 F.3d 858 (6th Cir. 2019) (quoting East Brooks Books, Inc. v. Shelby Cty., 588 F.3d 360, 366 (6th Cir. 2009)).

[12] "A content-based regulation is one that is 'based upon either the content or the subject matter of the speech." Consolidated Edison Co. of New York, Inc. v. Pub. Serv. Comm'n of New York, 447 U.S. 530, 536 (1980) (citing Ward v. Rick Against Racism, 491 U.S. 781, 791 (1989)); *see* Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 163 (2015) ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech") (citing Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)).

[13] *Reno*, 521 U.S. at 875-76.

[14] 47 U.S.C § 231.

[15] 47 U.S.C § 231(a).

[16] *See* Ashcroft v. Am. Civ. Liberties Union, 535 U.S. 564, 564 (2002) ("[F]ilters are less restrictive means than COPA . . . [as] [t]hey impose selective restrictions on speech at the receiving

speech. However, both cases concerned indecent expression, a constitutionally protected form of speech under the First Amendment.[17] Comparatively, publication of defamation or illegal content falls outside freedom of speech protection under the First Amendment.[18]

While historically within the purview of newspapers, the transition to publication of content online opened the door for an interactive computer service ("ICS")[19] to face similar intermediary liability for posting illegal or defamatory content.[20] The result of imposing intermediary liability on ICSs created a *chilling effect* on Internet speech and disincentivized ICS self-regulation of content provided by third parties.[21] Congress responded by enacting § 230 of the CDA, intending to incentivize ICSs to engage in their own process of regulation and screening.[22]

In return, § 230 provides broad intermediary liability protection to ICSs so that they may engage in content moderation without fear of exposure to liability for offensive or illegal material that slips through.[23] As a result, § 230 provides a significant safeguard to Internet innovation and development.[24] However, varied judicial interpretation of the circumstances required to invoke § 230 immunity has led to inconsistent re-

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end, not universal restrictions at the source . . . [and] filtering software may well be more effective than COPA . . .").

[17] *See Ashcroft*, 535 U.S. at 604 (Stevens, J., dissenting) ("COPA seeks to limit protected speech").

[18] *See generally* New York Times Co. v. Sullivan, 376 U.S. 254, 262 (1964) (defamation is generally understood as a false statement of fact concerning a person that causes some form of harm to the person and his/her reputation); *see* United States v. Williams, 553 U.S. 285, 297 (2008) ("Offers to engage in illegal transactions are categorically excluded from First Amendment protection") (citing Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973)); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

[19] 47 U.S.C. § 230(f)(2) ("The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet . . . ").

[20] *See generally* Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct.) (ICS held accountable for defamatory content posted on its website by anonymous third-party), *superseded by statute*, 47 U.S.C. § 230; Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 141 (S.D.N.Y. 1991) (defendant ICS not liable because it did not know, or have reason to know, of defamatory content on its website); Stratton Oakmont, 1995 WL 323710 at *5-6 (defendant ICS treated as a publisher when it created an editorial staff to monitor and edit website).

[21] Zeran v. America Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997).

[22] *Id.* at 331.

[23] *See Id*. at 330 ("[Section] 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred").

[24] *CDA 230: The Most Important Law Protecting Internet Speech*, Electronic Frontier Found., http://www.eff.org/issues/cda230; *accord* Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 Harv. L. Rev. 2296, 2313 (2014).

sults.[25] Lack of a clear standard places application of § 230 immunity on a sliding scale between the United States Court of Appeals for the Fourth Circuit's decision in *Zeran v. America Online, Inc.*[26] of unconditional immunity[27] and the United States Court of Appeals for the Seventh Circuit's decision in *Chicago Lawyers' Committee For Civil Rights Under the Law, Inc. v. Craigslist, Inc.*[28] of conditional immunity.[29] Historically, the Ninth Circuit followed the holding from *Zeran* and utilized its rationale as foundation for its own test to determine if § 230 immunity applies—the *Barnes Test*.[30]

The Ninth Circuit applied the *Barnes Test* to a § 230 immunity challenge in the recent case of *Dyroff v. Ultimate Software Group*.[31] The plaintiff, Kristanalea Dyroff, sued Ultimate Software Group ("Ultimate Software") for its alleged role in the tragic death of her son, Wesley Greer.[32] The Ninth Circuit found § 230 immunized Ultimate Software's from liability and barred Dyroff's claims.[33]

Although advocates of § 230 praised the decision in *Dyroff* for upholding ICS immunity,[34] the Ninth Circuit's interpretation of automated manipulations of third-party content as *content-neutral* tools will likely broaden the application § 230 immunity in future decisions.[35] The *Dyroff* decision comes despite concern from the media and Congress that § 230

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[25] *See* Jerry Kang, *Communications Law & Policy*, 331, 335-38, 351-54 (4th ed. 2012) (noting a lack of unity among federal courts regarding § 230's scope of enforcement).

[26] Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997).

[27] *Id*. at 330 ("By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service").

[28] Chi. Lawyers' Comm. For Civil Rights Under the Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008).

[29] *Id*. at 669-70.

[30] Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100-01 (9th Cir. 2009) (immunity from liability existing for "(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider").

[31] Dyroff v. Ultimate Software Grp., Inc., 934 F.3d 1093, 1097 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2761 (2020).

[32] *Id*. at 1094.

[33] *Id*. at 1101.

[34] *See* Eric Goldman, *A Significant Section 230 Defense Win in the Ninth Circuit-Dyroff v. Ultimate Software.* TECH. & MARKETING L. BLOG (Aug. 21, 2019), https://blog.ericgoldman.org/archives/2019/08/a-significant-section-230-defense-win-in-the-ninth-circuit-dyroff-v-ultimate-software.htm.

[35] *See* Jeffrey Neuburger, *Ninth Circuit Releases Another Important CDA Section 230 Opinion With Broad Application – Automated Content Recommendation and Notification Tools Do Not Make Social Site the Developer of User Posts.* NAT. L. REV. (Aug. 28, 2019), https://www.natlawreview.com/article/ninth-circuit-releases-another-important-cda-section-230-opinion-broad-application.

might need revision.[36] However, the focus should not necessarily concern revision and amendment, but instead reinforce the original intent of the statute and encourage greater ICS accountability in moderating illegal and unlawful content.[37]

Part I of this Note examines the factual and procedural history of *Dyroff* and discusses the Ninth Circuit's application of § 230 immunity in the case. Part II outlines the history of the CDA and examines how the federal courts have interpreted § 230 immunity leading up to its application in *Dyroff*. Part III discusses judicial interpretation of the scope of § 230 immunity. Lastly, Part IV argues that the Ninth Circuit correctly applied the law in the *Dyroff* decision, but failed to adequately define the term *content-neutral*. Further, by not defining what falls within the scope of *content-neutral*, the Ninth Circuit's holding implicitly immunizes any manipulation of third-party content facilitating communication that does not materially contribute to the content at issue. The broad shield of § 230 immunity, which was necessary for growth and development during the Internet's infancy, is antiquated and should be narrowed by Congress to foster greater accountability to prevent tragedies like *Dyroff* from recurring.

I. *DYROFF V. ULTIMATE SOFTWARE GROUP, INC.*

A. FACTUAL AND PROCEDURAL BACKGROUND

In 2007, Ultimate Software launched a social networking site called the Experience Project.[38] The website consisted of numerous and distinct online communities that were formed by members based on common interests, attributes, or experiences.[39] Users interacted anonymously with each other by posting and answering questions.[40] Experience Project did

[36] *See* Daisuke Wakabayashi, *Legal Shield for Websites Rattles Under Onslaught of Hate Speech.* THE NEW YORK TIMES. (Aug. 6, 2019), https://www.nytimes.com/2019/08/06/technology/section-230-hate-speech.html; *see*, *e.g.*, Eric Goldman, *How SESTA Undermines Section 230's Good Samaritan Provisions*, TECH. & MARKETING L. BLOG (Nov. 7, 2017), http://blog.ericgoldman.org/archives/2017/11/howsesta-undermines-section-230s-good-samaritan-provisions.htm (addressing congressional efforts to amend § 230).

[37] *See*, *e.g.*, Joshua Geltzer, *President and Congress Are Thinking of Changing This Important Internet Law*, SLATE (Feb. 25, 2019), https://slate.com/technology/2019/02/cda-section-230-trump-congress.html ("Sen. Ron Wyden, a co-author of Section 230, has explained that it was intended as both a 'shield' *and* a 'sword' for tech companies, protecting them from liability for vast amounts of content for which they're not assuming responsibility but also empowering them to do what they can to eliminate the worst of that content").

[38] *Dyroff*, 934 F.3d at 1095.

[39] *Id*. at 1094-95 (group topics ranging from "I like dogs," "I have lung cancer," "I'm going to Stanford," to "I Love Heroin").

[40] *Id*. at 1094.

not limit or encourage the type of interactions members engaged in on the site.[41] Experience Project utilized advanced machine-learning algorithms to analyze user data and glean the underlying intent and emotional state of its users.[42] Ultimate Software then sold this information for commercial purposes (directed advertisements) and to steer users to particular groups through its notification and recommendation functions.[43] The recommendation functionality also included an email suite and other push notifications, which alerted users of new content posted to its groups.[44] Experience Project generated revenue through directed advertisements and the sale of tokens that users were required to purchase to post questions to other users in its groups.[45]

In August 2015, Wesley Greer, a recovering heroin addict, conducted a Google search to purchase heroin and was directed to Experience Project.[46] Greer created an account and purchased tokens that enabled him to post questions to other users.[47] He posted to a group titled "where can i score heroin in jacksonville, fl." (*sic*).[48] On August 17, 2015, Experience Project sent Greer an email notifying him that another user posted a response to the "where can i score heroin in jacksonville, fl." (*sic*) group and provided a hyperlink and URL directing his response.[49] The response came from Hugo Margenat-Castro, an Orlando-based drug dealer, who regularly used Experience Project to sell heroin.[50] Greer obtained Castro's phone number through Experience Project, and later bought heroin from Castro.[51] On August 19, 2015, Greer died from fentanyl toxicity, unaware of its presence in the heroin that he purchased from Castro.[52] Castro was later arrested and prosecuted; in March 2017, he plead guilty to selling fentanyl-laced heroin through Experience Project.[53]

In March 2016, Experience Project publicly announced it was shutting down in response to privacy concerns, which stemmed from governmental overreach and insufficient resources to respond to government

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[41] *Id*.

[42] Dyroff v. Ultimate Software Grp., Inc., No. 17-CV-05359-LB, 2017 WL 5665670, at *2 (N.D. Cal. Nov. 26, 2017), *aff'd*, 934 F.3d 1093 (9th Cir. 2019).

[43] *Id*.

[44] *Id*.

[45] *Dyroff*, 934 F.3d at 1095.

[46] Dyroff v. Ultimate Software Grp., Inc., 17-CV-05359-LB, 2017 WL 5665670, at *2 (N.D. Cal. Nov. 26, 2017), *aff'd*, 934 F.3d 1093 (9th Cir. 2019).

[47] *Id.*

[48] *Id*.

[49] *Id*. at *3.

[50] *Id*.

[51] *Id*.

[52] *Id*.

[53] *Dyroff*, 934 F.3d at 1095.

information requests.[54] While Experience Project was active, users shared 67 million experiences, made 15 million connections, and asked 5 million questions.[55]

Kristanalea Dyroff, Greer's mother, brought suit against Ultimate Software asserting seven state claims that predicated liability on Experience Project's use of data mining and machine-learning of its users' posts to recommend and to steer Greer toward heroin-related discussion groups and the drug dealer, who ultimately sold him fentanyl-laced heroin.[56] The district court dismissed all claims, holding Ultimate Software immune under § 230(c)(1) because its recommendation algorithms constituted *content-neutral* tools that facilitated communication, but did not create or develop the content at issue.[57] The district court also found that Experience Project neither had a special relationship with Greer nor created risk through its website functionalities, and therefore owed no duty of care to Greer about another user's illegal activities.[58] Subsequently, in June 2018, Dyroff appealed to the Ninth Circuit.[59]

B. THE NINTH CIRCUIT FINDS ULTIMATE SOFTWARE NOT LIABLE UNDER § 230

On appeal, Dyroff alleged the district court erred in holding § 230 of the CDA immunized Ultimate Software, that the allegations of collusion between Ultimate Software and drug dealers using Experience Project were not plausible, and that Ultimate Software owed no duty of care.[60] However, on August 20, 2019, the Ninth Circuit affirmed the district court's ruling in a published opinion, finding that § 230 barred Dyroff's claims against Ultimate Software.[61]

Under the Ninth Circuit's *Barnes Test* "[i]mmunity from liability exists for '(1) a provider or user of an interactive computer service [("ICS")] (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another

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[54] *Id*.

[55] *Id*.

[56] Dyroff v. Ultimate Software Grp., Inc., 17-CV-05359-LB, 2017 WL 5665670, at *1 (N.D. Cal. Nov. 26, 2017), *aff'd*, 934 F.3d 1093 (9th Cir. 2019) (Dyroff claiming (1) Negligence, (2) Wrongful Death, (3) Premises Liability, (4) Failure to Warn, (5) Civil Conspiracy, (6) Unjust Enrichment, and (7) a violation of the Drug Dealer Liability Act (Cal. Health & Safety Code §§ 11700, *et seq.*) and asserting that Ultimate Software had knowledge or should have had knowledge of illegal drug transaction occurring on its website).

[57] *Id*.

[58] *Id*.

[59] Dyroff v. Ultimate Software Grp., Inc., 934 F.3d 1093 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2761 (2020).

[60] *Id*. at 1096.

[61] *Id*.

information content provider [("ICP")].'"[62] In *Dyroff*, the Ninth Circuit interpreted the term ICS expansively[63] and determined that Ultimate Software was an ICS for the following reasons: its structure was a website;[64] it did not create or publish its own content; and it did not become an ICP[65] through the use of *content-neutral* website functions. Collectively, these findings satisfied *Barnes's* first prong.[66]

The court found *Barnes's* second prong satisfied because Ultimate Software did not create or develop information or content that led to Greer's death, since the posts to the group were made by Greer and Castro.[67] Although Dyroff argued that Experience Project's recommendation algorithms and push notification system constituted creation of content, the court disagreed and reasoned that the website features were "tools meant to facilitate the communication and content of others," but were not actually content.[68]

The court held *Barnes's* third prong satisfied because Ultimate Software had not materially contributed to the content posted on Experience Project leading to Greer's death. The court drew inference from *Fair Housing Council of San Fernando Valley v. Roommates.com*,[69] and identified the following as material contributions arising to the creation of content: mandating posting criteria, suggesting posting content, or clearly making a direct contribution to unlawful and offensive user posts to the content.[70] The court found Experience Project's website functions facilitated user-to-user communication and content, but did not materially contribute to the content itself.[71]

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[62] *Id*. at 1097 (quoting Barnes v. Yahoo! Inc., 570 F.3d 1096, 1100-1101 (9th Cir. 2009)).

[63] *See* Kimzey v. Yelp! Inc., 836 F.3d 1263, 1268 (9th Cir. 2016).

[64] *See Id.* at 1268 (acknowledging that websites are the most common interactive computer service); *see also* Fair Hous. Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157, 1162 (9th Cir 2008) (en banc) ("[t]oday, the most common interactive computer services are websites").

[65] An "ICP" is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. §230(f)(3).

[66] *Dyroff*, 934 F.3d at 1097

[67] *Id*. at 1098-99.

[68] *Id*. at 1098; *See Kimzey*, 836 F.3d at 1098 ("[P]roliferation and dissemination of content does not equal creation or development of content").

[69] Fair Hous. Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157 (9th Cir. 2008) (en banc).

[70] *Id*. at 1098-99; *See also Kimzey*, 836 F.3d at 1269 (Material contribution falls into two categorially distinct actions, those traditional to publishers and those that make displayed content illegal).

[71] *Id.* at 1099 ("[T]he material contribution test makes a '"crucial distinction between, on the one hand, taking actions (traditional to publishers) that are necessary to the display of unwelcome and actionable content and, on the other hand, responsibility for what makes the displayed content illegal or actionable'") (quoting *Kimzey*, 836 F.3d at 1269, n.4).

In addition, the court also considered Dyroff's attempts to circumvent § 230 immunity, which alleged Ultimate Software had actual or constructive knowledge of illegal activity occurring on its website, and owed a duty of care to Greer. Dyroff contended that Ultimate Software knew or should have known of illegal drug transactions occurring between its users, and facilitated transactions through its anonymity features.[72] The court found Dyroff's reliance upon *J.S. v. Village Voice Media Holdings, L.L.C.*[73] unpersuasive because Ultimate Software's anonymity practices, public statements of concern for internet privacy, and the burden of law enforcement information requests were not facts that plausibly suggest collusion with drug dealers.[74] Dyroff's duty of care argument was predicated on a failure to warn theory of misfeasance.[75] Misfeasance occurs when a defendant worsens a plaintiff's position and creates a duty of care where one did not originally exist.[76] The court determined that Ultimate Software did not worsen Greer's position through its recommendation algorithms and push notification features because these website functions were applied to all users.[77] Furthermore, the court held that a website could not function if facilitating communication in a *content-neutral* fashion between users created a duty of care.[78]

II. LEGISLATIVE BACKGROUND OF THE CDA AND § 230 IMMUNITY

From a modern perspective, the Internet of the '90s was an unrecognizable landscape.[79] The new dial-up Internet connected users through bulletin boards;[80] online newspapers were just emerging;[81] Google did not hold the linguistic status of a verb; and the intuitiveness

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[72] *Id*. at 1099-100.

[73] *See generally* J.S. v. Vill. Voice Media Holdings, L.L.C., 184 Wash. 2d 95 (2015) (en banc) (holding that minors sufficiently alleged website operators of Backpage.com facilitated sexual exploitation of children and claims against website were not barred by § 230).

[74] *Dyroff*, 934 F.3d at 1100.

[75] *Id*. at 1100. ("When analyzing duty of care in the context of third-party acts, California courts distinguish between 'misfeasance' and 'nonfeasance'").

[76] Lugtu v. Cal. Highway Patrol, 26 Cal. 4th 703, 716 (2001).

[77] *Dyroff*, 934 F.3d at 1101.

[78] *Id*.; *See, e.g.*, Klayman v. Zuckerberg, 753 F.3d 1354, 1359–60 (D.C. Cir. 2014) (holding no special relationship exists between Facebook and its users).

[79] *See, e.g.*, Nicholas Carlson, *Presenting: This is What the Internet Looked Like in 1996,* BUS. INSIDER AUS. (Apr. 16, 2014), https://www.businessinsider.com.au/the-coolest-web-sites-from-1996-2014-4#-8.

[80] *See* Benj Edwards, *The Lost Civilization of Dial-Up Bulletin Board Systems,* THE ATLANTIC (Nov. 4, 2016), https://www.theatlantic.com/technology/archive/2016/11/the-lost-civilization-of-dial-up-bulletin-board-systems/506465/.

[81] *See* Peter H. Lewis, *The New York Times Introduces a Website*, N.Y. TIMES (Jan. 22, 1996) at D7.

of modern online research capabilities was nonexistent.[82] Within this burgeoning technological environment, Congress could not have foreseen how the modern Internet would develop two decades into the twenty-first century.

Congress did address one development of the Internet of the '90s: online pornography.[83] The CDA, attached to Title V of the Telecommunications Act of 1996,[84] was intended to safeguard children from exposure to indecent online material by criminalizing the knowing transmission of obscene or indecent material to minors and incentivizing telecommunication companies to participate in blocking the explicit material.[85] However, the Supreme Court in *Reno v. ACLU* struck many of the vague and controversial criminal provisions of the CDA as an overbroad form of content-based speech suppression, in violation of the First Amendment.[86] *Reno* and its progeny would later pressure Congress to revisit the CDA to ensure protection of the Internet, and ultimately provide the rationale for the addition of § 230.

A. THE RISE OF § 230 IMMUNITY

In the years preceding § 230's enactment, two Internet liability cases, *Cubby, Inc. v. CompuServe, Inc.*[87] and *Stratton Oakmont, Inc. v. Prodigy Services Co.,*[88] encouraged Congress to define the boundaries of ICS liability. The *Cubby* court held CompuServe, a predecessor to the modern ICS, was subject to the same standard of liability applied to

[82] *See* Megan Sapnar Ankerson, *How Coolness Defined the World Wide Web of the* 1990s, THE ATLANTIC (July 15, 2014), https://www.theatlantic.com/technology/archive/2014/07/how-coolness-defined-the-world-wide-web-of-the-1990s/374443/.

[83] *See* 141 CONG. REC. §1953 (daily ed. Feb. 1, 1995) (statement Sen. Exon, author of the CDA, arguing for his version of the CDA, denouncing pornography on the Internet, and expressing concern that the Internet would become a red-light district).

[84] Pub. L. No. 104-104, §§ 501-09, 551-52, 561, 110 Stat. 56, 133-37, 139-43 (1996) (codified in scattered sections of 47 U.S.C.).

[85] *See* S. REP. No. 104-23, at 59 (1995); *see* 141 CONG. REC. 15,503 (1995) (statement of Sen. Exon, author of the CDA) ("The fundamental purpose of the Communications Decency Act is to provide much needed protection for children"); *see also* Reno v. ACLU, 521 U.S. 844, 860 (1997) (the incentive to participate in blocking explicit material arising from two affirmative defenses, "[o]ne cover[ing] those who take 'good faith, reasonable, effective, and appropriate actions'" to restrict a minor's access to prohibited communications under § 223(e)(5)(A), the other covering "those who restrict access to covered material by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number or code" under § 223(e)(5)(B)).

[86] *See Reno* at 858-60, 874-76 (CDA must pass heightened First Amendment scrutiny because plaintiffs were information content providers).

[87] Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991).

[88] Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute,* 47 U.S.C. § 230(c)(1), *as recognized in* Force v. Facebook, Inc., 934 F.3d 53 (2nd Cir. 2019).

traditional news vendors—"whether [CompuServe] knew or had reason to know of . . . allegedly defamatory [or illegal] statements."[89] Four years later, the *Stratton Oakmont* court declined to apply *Cubby's* liability standard and imposed liability on an Internet service provider who edited third party content.[90] Together *Cubby* and *Stratton Oakmont* had the effect of immunizing online service providers from liability when no action is taken to edit or screen user-generated content and creating liability when actions were taken to moderate content.[91]

The decisions in *Cubby* and *Stratton Oakmont* generated widespread publicity and lobbying by tech companies, which led Congress to consider an appropriate legislative remedy.[92] The addition of § 230 to the CDA explicitly addressed the problematic *Stratton Oakmont* decision.[93] With enactment of § 230, Congress abrogated *Stratton Oakmont's* holding and provided broad immunity to ICSs. Congress reasoned that broad immunity was a more effective means of promoting content moderation than explicitly requiring ICSs to moderate content.[94]

B. STRUCTURAL COMPONENTS OF § 230

Section 230 has two key provisions that address its primary goals—Internet innovation[95] and voluntary content moderation[96]—codified in

[89] *Cubby*, 776 F. Supp. at 140-41.

[90] *Stratton Oakmont*, 1995 N.Y. Misc. LEXIS 229 at *10.

[91] *See* Mary Jane Fine, *Mom Wants AOL to Pay in Child's Sex Ordeal, She Calls Service Liable, Despite Law*, BERGEN REC. (Apr. 19, 1998) at A01.

[92] *See* Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1163 (9th Cir. 2008). Congressman Christopher Cox, who would later become a paid lobbyist for the tech industry, cosponsored § 230 to protect companies "who take[ ] steps to screen indecency and offensive material for their customers." 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

[93] H.R. REP. NO. 104-458, at 174 (1996) (Conf. Rep.) ("One of the specific purposes of this section is to overrule *Stratton Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material").

[94] 141 CONG. REC. H8471-472 (1995) ("[T]here is a tremendous disincentive for online service providers to create family friendly services by detecting and removing objectionable content. These providers face the risk of increased liability where they take reasonable steps to police their systems . . . [§ 230] removes the liability of providers . . . who make a good faith effort to edit the smut from their systems. It also encourages the online services industry to develop new technology, such as blocking software, to empower parents to monitor and control the information their kids can access").

[95] *See* 47 U.S.C. § 230(b)(1) ("[T]o promote the continued development of the Internet and other interactive computer services and other interactive media"); 47 U.S.C. § 230(b)(2) ("[T]o preserve the vibrant and competitive free market that presently exists for the Internet and other computer services, unfettered by Federal or State regulation").

[96] *See* 47 U.S.C. § 230(b)(3) ("[T]o encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services"); 47 U.S.C. § 230(b)(4) ("[T]o remove disin-

§ 230(c)(1) and § 230(c)(2), respectively. Section 230(c)(1) prohibits any provider of an ICS[97] from being treated as the publisher or speaker of any content provided by an ICP.[98] Importantly, an ICS does not lose its § 230 immunity if a good faith effort is made to moderate and remove material that the provider finds objectionable.[99] This provision enables an ICS to set and enforce content standards without becoming subject to liability for the content provided by an ICP.

Section 230's broad immunity is limited by several exceptions. First, an ICS is not immunized when user content violates federal criminal law.[100] Second, there is no immunity for an ICS when its users violate copyright or other intellectual property laws.[101] Third, immunity is inapplicable to violations of federal wiretap laws or provisions of the Electronic Communications Privacy Act of 1986.[102]

III. INTERPRETING THE SCOPE OF § 230

Section 230's straightforward immunity provisions and clear exceptions left room open for judicial interpretation of how immunity should apply to an ICS when faced with a liability suit. The initial decade of § 230 enforcement was marked by sweeping application of immunity. However, the broad protection afforded at the outset would gradually erode to reveal § 230's limits.

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centives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material"); 47 U.S.C. § 230(b)(5) ("[T]o ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer").

[97] An ICS is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2).

[98] 47 U.S.C. § 230(c)(1). An "ICP" is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service" as per 47 U.S.C. §230(f)(3).

[99] 47 U.S.C. § 230(c)(2) ("No provider or user of an interactive computer service shall be held liable on account of- (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1)").

[100] 47 U.S.C. § 230(e)(1) ("Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute").

[101] *See* 47 U.S.C. § 230(e)(2); *see also* 17 U.S.C. § 512 (2010) (providing that the Digital Millennium Copyright Act establishes a notice-and-takedown procedure requiring an ICS to remove copyright infringing material if it receives notice or face liability from the copyright holder for failure to remove the material).

[102] 47 U.S.C. § 230(e)(4).

A. § 230 AND EXPANSIVE IMMUNITY

In 1997, the United States Court of Appeals for the Fourth Circuit issued an opinion in *Zeran v. America Online*,[103] which ushered in an era of court decisions that broadly interpreted the scope of § 230 immunity. *Zeran* concerned an anonymous post on an America Online ("AOL") bulletin board alleging a user was selling offensive t-shirts.[104] The post included the user's home phone number, which resulted angry phone calls and death threats.[105] Subsequently, the user brought a liability suit against AOL for the anonymous poster's defamatory speech.[106]

The Fourth Circuit reasoned that the "plain language" of § 230(c)(1) "creates federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."[107] Accordingly, any "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content—are barred."[108] The *Zeran* opinion was the first instance where a federal appellate court interpreted the scope of § 230, which resulted in courts across the nation quickly adopting its broad reading.[109]

In 2003, the Ninth Circuit applied *Zeran's* broad interpretation of § 230 immunity and extended it to a website that hosted user-generated content in *Carfarano v. Metrosplash.com*.[110] The *Carafano* decision found Matchmaker.com ("Matchmaker"), an online dating service, immune from liability arising from a user's fabricated profile that included photographs of the plaintiff.[111] After the plaintiff received sexually explicit and threatening messages in response to the false profile, plaintiff's counsel requested Matchmaker remove the false profile and the company complied.[112] The plaintiff brought suit for "invasion of privacy, misappropriation of the right of publicity, defamation, and negligence."[113]

The Ninth Circuit found Matchmaker immune under § 230 because "so long as a third party willingly provides the essential published con-

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[103] Zeran v. America Online, 129 F.3d 327 (4th Cir. 1997).

[104] *Id*. at 329.

[105] *Id*.

[106] *Id*. at 329-30.

[107] *Id*. at 330.

[108] *Id*.

[109] *See, e.g.*, Blumenthal v. Drudge, 992 F. Supp. 44, 46 (D.D.C. 1998) ("Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others").

[110] Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003).

[111] *Id*. at 1121.

[112] *Id*. at 1122.

[113] *Id*.

tent, the interactive service provider [(ISP)] receives full immunity regardless of the specific editing or selection process."[114] The decision broadened the scope of § 230 immunity, so that its protections applied even when a website provided the opportunity for third parties to create illegal content.[115]

B. THE SHIELD BEGINS TO CRACK: § 230 IMMUNITY LIMITATIONS

The limitless certainty of § 230 immunity did not endure beyond its infancy. In 2008, the Ninth Circuit issued the *Roommates.com en banc* opinion[116] that marked a stark detour from its routine application of broad § 230 immunity. Roommates.com ("Roommates") connected individuals looking for housing with those who had rooms to rent. As a requirement of the rental process, subscribers created a profile using the website's automated questionnaire, which requested information concerning sexual orientation, gender, and whether children would be living in the rental.[117] Fair Housing Council of San Fernando Valley and the City of San Diego brought suit against Roommates, alleging violation of federal and state housing discrimination laws, which prohibit discrimination based on sexual orientation, gender and family status.[118]

The Ninth Circuit found § 230 did not apply to Roommates because the "CDA does not grant immunity for inducing third parties to express illegal preferences."[119] Because Roommates required subscribers to provide information that violated housing discrimination laws—sexual orientation, gender, and family status—as a condition of accessing its service and provided "a limited set of pre-populated answers, Roommates [became] much more than a passive transmitter of information provided by others; it [became] the developer, at least in part, of that information."[120] The holding affirms that transition from an ICS to an ICP proscribes application of § 230 immunity because the provision

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[114] *Id*. at 1123-24 (Although the *Carafano* decision utilized the terms interactive service provider (ISP) and interactive computer service (ICS) interchangeably, the distinction, for purposes of § 230 immunity, presented no semantic difference. Matchmaker.com was a website, and therefore constituted both an ISP and an ICS).

[115] *See also,* Batzel v. Smith, 333 F.3d 1018, 1020-21 (9th Cir. 2003) (granting § 230 immunity for an ICS operator who took affirmative steps to edit, review, and determine whether to publish the alleged defamatory content on the ICS website and listserv).

[116] Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008) (en banc).

[117] *Id*. at 1161.

[118] *Id*. at 1162.

[119] *Id*. at 1165.

[120] *Id*. at 1166.

"provides immunity only if the interactive computer service [(ICS)] does not 'creat[e] or develop[ ]'" the information 'in whole or in part.'"[121]

The gravamen of the Ninth Circuit's decision in *Roommates.com* concerned its definition of *development*, such that an ICS *develops* third party content "if it contributes materially to the alleged illegality of the conduct."[122] The *Roommates.com* decision received significant attention, with one legal scholar branding it "the most significant deviation from the *Zeran* line of cases"[123] and another predicting that the decision would embolden plaintiffs to capitalize on the opinion's numerous ambiguities and produce inconsistent court decisions.[124] As a result, the once clear test from *Zeran* for distinguishing between an ICS and an ICP became obscured with other courts following suit in proscribing application of § 230 immunity.[125]

In 2009, the Ninth Circuit issued another opinion in the wake of *Roommates.com* denying § 230 immunity to a website. In *Barnes v. Yahoo!, Inc.*, Barnes brought suit against Yahoo for promising to remove a defamatory posting about the plaintiff and failing to do so.[126] Barnes' former boyfriend created false profiles containing nude photographs and open solicitations to engage in sexual intercourse.[127] The former boyfriend used the fake profiles to impersonate Barnes in online chatrooms and provided Barnes' contact information and physical addresses, which resulted in Barnes receiving emails, phone calls, and personal visits with the expectation of sex.[128] Barnes contacted Yahoo requesting removal of the false profiles over the course of several months.[129] During this period, a Yahoo executive verbally confirmed that the profiles would be taken down; however, this did not occur until Barnes filed a lawsuit against Yahoo.[130]

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[121] *Id*. at 1166 (quoting 47 U.S.C. § 230(f)(3)).

[122] *Id*. at 1167-68.

[123] Diane J. Klein & Charles Doskow, *Housingdiscrimination.com?: The Ninth Circuit (Mostly) Puts Out the Welcome Mat for Fair Housing Act Suits Against Roommate-Matching Websites*, 38 GOLDEN GATE L. REV. 329, 377 (2008).

[124] Eric Goldman, *Roommates.com Denied230 Immunity by Ninth Circuit En Banc (With My Comments)*, TECH. & MKTG. L. Blog (Apr. 3, 2008), http://blog.ericgoldman.org/archives/2008/04/roommatescom_de_1.htm.

[125] *See* Doe v. SexSearch.com, 551 F.3d 412 (6th Cir. 2008) (holding that § 230 did not immunize a dating service from civil suit by an adult plaintiff who was arrested after having sexual relations with a fourteen-year-old met on the site when the minor claimed to be eighteen); *see* FTC v. Accusearch Inc., 570 F.3d 1187 (10th Cir. 2009) (holding that § 230 did not immunize defendant website where it converted legally protected records from confidential material to publicly exposed information and therefore "developed" content because it facilitated the transaction).

[126] Barnes v. Yahoo!, Inc., 570 F.3d 1096 (9th Cir. 2009).

[127] *Id*. at 1098.

[128] *Id*.

[129] *Id*. at 1099.

[130] *Id*.

The Ninth Circuit addressed the application of § 230 immunity by evaluating the statutory language of the provision.[131] By coalescing subsections 230(e)(3) and 230(c)(1), the Ninth Circuit determined that § 230 only immunizes against liability when: "(1) a provider or user of an *interactive computer service* [(ICS)] (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another *information content provider* [(ICP)]."[132] This three-pronged test would later be recognized as the *Barnes Test*.

The Ninth Circuit held that § 230 immunized Yahoo against Barnes' negligent removal claim, but not her promissory estoppel claim.[133] The negligent removal claim was found unpersuasive because "removing content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of content it failed to remove[,]" which is exactly what § 230 is intended to prevent.[134] In contrast, the promissory estoppel claim arose from Yahoo's unfulfilled promise, and therefore, § 230 did not apply.[135] Judge O'Scannlain reasoned that "[c]ontract liability here would come not from Yahoo!'s publishing conduct, but from Yahoo!'s manifest intention to be legally obligated to do something, which happens to be removal of material from publication."[136]

The *Barnes* decision affirmed that: (1) "neither this subsection nor any other declares general immunity from liability deriving from third-party content" because "to provid[e] immunity every time a website uses data initially obtained from third parties would eviscerate [the CDA],"[137] and (2) § 230 immunity does not apply if the claims do not relate to the publication of user-generated content.[138]

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[131] *Id*. at 1100.

[132] *Id*.

[133] *Id*. at 1107.

[134] *Id*. at 1103.

[135] *Id*.

[136] *Id*.

[137] *Id*. at 1100 (quoting *Roommates.com*, 521 F.3d at 1100).

[138] *Id*. at 1109 (quoting *Chi. Lawyers' Comm. For Civil Rights*, 519 F.3d at 669) (internal quotation marks omitted); *see*, *e.g., Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016) (holding that § 230 did not immunize a website from a negligent failure to warn claim where plaintiff had a 'special relationship' with the website and alleged the website had actual knowledge that some of its users were engaged in a rape scheme, plaintiff was raped as result of the scheme, and the website failed to warn plaintiff and other users); HomeAway.com, Inc. v. City of Santa Monica, 918 F.3d 676 (9th Cir. 2019) (holding that § 230 did not immunize defendant website from complying with a local short term rental ordinance requiring transactions occurring on defendant's website to involve only licensed properties).

IV. *DYROFF*: THE CORRECT LEGAL OUTCOME AND A BROADENING OF § 230 IMMUNITY

A. THE NINTH CIRCUIT CORRECTLY FINDS ULTIMATE SOFTWARE NOT LIABLE

It would be easy to blame the Ninth Circuit's § 230 jurisprudence and its broad application of immunity for providing Ultimate Software a free pass to walk away from the drug-related tragedy in *Dyroff*, but this would be the incorrect analysis. The *Dyroff* decision is an efficient distillation of existing case law and application of the *Barnes Test*.[139] Much of the rationale in *Dyroff* comes from the Ninth Circuit's prior decisions in *Carafano* and *Roommates.com*. Ultimate Software neither created nor developed its own content, and even if it had, it could have retained immunity so long as it was not the specific content at issue.[140] Similar to *Carafano*, the illegal content of Greer's post did not come from Ultimate Software, but from Greer himself, and the content of the reply post came from Castro, his drug dealer.[141] And unlike in *Roommates.com*, Ultimate Software did not require Greer to create illegal content as condition of using Experience Project.[142] In addition, Ultimate Software's push notification and group recommendation algorithms did not develop or materially contribute to the illegal content in Greer's posts.[143] In contrast to *Roommates.com*, Ultimate Software's algorithmic manipulation of user generated content only facilitated communication and the content of its users. The purpose of the website functions was to accomplish a specific task or action, much like a cog in a machine, and therefore cannot constitute content created or developed by Ultimate Software.

Although Dyroff aimed at pleading around § 230, there was no legal support for her arguments that Ultimate Software colluded with drug dealers and owed Greer a duty of care. Unlike *J.S. v. Village Voice Media Holdings, LLC*, Ultimate Software did not have a specific section for illegal activity that required its own particular posting requirements.[144]

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[139] *See Barnes*, 570 F.3d at 1100-01 ("(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider").

[140] *Carafano*, 339 F.3d at 1124.

[141] *Dyroff*, 17-CV-05359-LB, 2017 WL 5665670, at *3.

[142] *Roommates.com*, 521 F.3d at 1166.

[143] *See id*. at 1175; *see also Kimzey*, 836 F.3d at 1269 n.4 (The material contribution test makes a "crucial distinction between, on the one hand, taking actions (traditional to publishers) that are necessary to the display of unwelcome and actionable content and, on the other hand, responsibility for what makes the displayed content illegal or actionable").

[144] *See* J.S. v. Village Voice Media Holdings, LLC, 184 Wash. 2d 95 (2015) (en banc) (holding that plaintiffs sufficiently alleged website operators helped develop illegal content by requiring

While the Ninth Circuit highlights Ultimate Software's anonymity polices and advocacy of Internet privacy,[145] these are not the strongest reasons to dismiss the collusion argument. Anonymity and privacy are policies equally shared by social media giants like Facebook and dark web markets like Silk Road.[146] A better reason, which the decision points out, is Ultimate Software's burden of law enforcement information requests, which does not plausibly support collusion with drug dealers.[147] Equally, Dyroff's duty of care and failure to warn theories of liability could only have found solid ground if Greer had a *special relationship* with Ultimate Software, and there was actual knowledge of illegal activity.[148] This was not the case for Greer. No special relationship existed between Ultimate Software and Greer because of the anonymity and privacy policies employed, and no facts supported that Ultimate Software had actual knowledge of illegal activity.[149] Further, the website's push notifications and recommendation algorithms did not make Greer worse off than any other user of the website because these functions were applied to all users.[150] This reasoning is consistent with *Carafano*, where § 230 immunity is not lost because the opportunity for creation of illegal and legal content are equally available.[151]

Although the Ninth Circuit correctly applied its § 230 jurisprudence in finding Ultimate Software immune from liability, it did not adequately define the scope of term *content neutral*, resulting in a holding that implicitly immunizes *any* manipulation of third-party content facilitating communication or user content that does not materially contribute to the illegality of content.

B. THE SHIELD BROADENS FOR MANIPULATION OF THIRD-PARTY CONTENT

The term *content-neutral* applies where specific website functions or tools may give rise to unlawful content but do not result in develop-

users to disclose information into its "escort" section that encouraged sexual exploitation of children and therefore were not immune from liability under § 230).

[145] *Dyroff*, 934 F.3d at 1099-100.

[146] *See generally* Aditi Kumar and Eric Rosenbach, *The Truth about the Dark Web*, 53 FIN. & DEV. 22 (2019), https://www.imf.org/external/pubs/ft/fandd/2019/09/pdf/the-truth-about-the-dark-web-kumar.pdf.

[147] *Dyroff*, 934 F.3d at 1099-100.

[148] *See Doe*, 824 F.3d 846 (holding that § 230 did not immunize a website from a negligent failure to warn claim where plaintiff had a 'special relationship' with the website and alleged the website had actual knowledge that some of its users were engaged in a rape scheme, plaintiff was raped as result of the scheme, and the website failed to warn plaintiff and other users).

[149] *Dyroff*, 934 F.3d at 1100.

[150] *Dyroff*, 934 F.3d at 1101.

[151] *Carafano*, 339 F.3d at 1123-24.

ment of content for purposes of § 230 immunity, so long as there is no material contribution by an ICS to the content at issue.[152] For example, an ICS that provides the means of searching within user data, sending email notifications to users, and making grammatical revisions of user posts, retains § 230 immunity so long as those *content-neutral* tools do not materially contribute to the illegality of the content.[153] However, the *Dyroff* decision leaves open the door for varied interpretation of a *content neutral* test by failing to define its scope, particularly in the context of algorithmic manipulation of user data. Other courts have been more explicit in finding algorithmic manipulation of user data *content-neutral* if the ICS handled legal and illegal content identically.[154] Instead, the *Dyroff* decision simply lumps algorithmic manipulation of user content into the *Roommates.com* exception where no liability occurs without material contribution. While *Dyroff* is a convenient and legally tenable decision, it is not particularly helpful for future courts tasked with applying § 230 immunity to algorithmic manipulation of user content.

Additionally, the *Dyroff* decision uses the terms *content neutral tools*, *content-neutral functions*, and *content-neutral fashion* in similar capacities and without distinguishing among them.[155] Whether a *content-neutral* tool, function, and fashion are one in the same is not clear and exacerbates the uncertainty in the context of algorithmic manipulation of user content. Moreover, the court utilized the *content-neutral* language that supported the § 230 defense to rationalize its rejection of Dyroff's duty of care claim.[156] The result of conflating the duty of care claim with the undefined *content-neutral* terminology is an implicit preclusion of any duty of care workaround to § 230, so long as an ICS remains *content-neutral*.[157]

In summary, the Ninth Circuit reached a legally tenable conclusion, but employed semantically problematic terms without adequately defining their meaning or scope. As a consequence, *Dyroff* opens the door to

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[152] *Roommates.com*, 521 F.3d at 1169.

[153] *Id.* (An ICS that provides the means of searching within user data and sending email notifications to users and that makes grammatical revisions of user posts retains § 230 immunity so long as the ICS does not materially contribute to the alleged illegality).

[154] *See* Marshall's Locksmith Service Inc. v. Google, LLC, 925 F.3d 1263, 1271 (2019).

[155] *See Dyroff*, 934 F.3d at 1096-1100 ("Ultimate Software, as the operator of Experience Project, is immune from liability under the CDA because its functions, including recommendations and notifications, were *content-neutral tools* used to facilitate communications . . . Ultimate Software owed Greer no duty of care because Experience Project's features amounted to *content-neutral functions* that did not create a risk of harm. . . No website could function if a duty of care was created when a website facilitates communication, in a *content-neutral fashion*, of its users' content") (emphasis added).

[156] *Dyroff*, 934 F.3d at 1101 ("No website could function if a duty of care was created when a website facilitates communication, in a content-neutral fashion, of its users' content").

[157] *See supra* note 147, at 66.

varied interpretations in future decisions, implicitly forecloses an avenue of recourse against ICSs where a duty of care may have existed, and collectively and perhaps unintentionally broadens § 230's immunity protections.

CONCLUSION

The *Dyroff* decision is a reminder of the broad scope of § 230 immunity. The Ninth Circuit arrived at the correct legal conclusion, but failed to provide an explanation or examples of what does and what does not constitute a *content neutral* tool. The *Dyroff* decision obscures what is *neutral* for purposes of § 230 immunity, and fosters greater opportunity for ICSs to fall under § 230's shield where any non-material algorithmic manipulation of user data enabling user-to-user communication is *content neutral*, regardless of any associated illegality.

Nevertheless, the CDA remains viable and relevant today as a safeguard for First Amendment speech on the Internet. However, current Internet development is staggeringly more sophisticated than when the CDA and § 230 were enacted in 1996. Modern Internet companies employ thousands of humans and artificial intelligence-based methods to moderate offensive and illegal content.[158] The once broad shield designed to foster growth and development of the nascent Internet has become antiquated and requires updating to reflect modern realities. Until Congress revisits the CDA and § 230, decisions like *Dyroff,* although legally correct, are likely to engender varied decisions when undefined terminology is used that unnecessarily broadens application of § 230 immunity. The Internet is no longer a child of the '90s needing congressional helicopter-parenting. It is time for the Internet to be more accountable to its users and work towards preventing tragedies like *Dyroff* by using its existing moderation tools to identify and to prevent facilitating illegal conduct.

[158] *See Social media's struggle with self-censorship*, THE ECONOMIST (Oct. 22, 2020), https://www.economist.com/briefing/2020/10/22/social-medias-struggle-with-self-censorship.