

# BOSTON UNIVERSITY PUBLIC INTEREST LAW JOURNAL

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## ARTICLES

### FIGHTING FRAUD AND SCAMS DURING THE COVID-19 PANDEMIC: REPORTS FROM THE MASSACHUSETTS AGING SERVICES NETWORK

BY ANNA-MARIE TABOR; ELIZBETH DUGAN; AND TAYLOR JANSEN\*

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#### ABSTRACT

*Older Americans reported losing \$5.7 billion to fraud and scams during the COVID-19 pandemic—a number that almost certainly underrepresents the true size of the problem. Agencies serving older adults witnessed in real-time the devastation these scams caused their clients, both financially and psychologically. This Article publishes new research surveying Massachusetts aging services providers about their efforts to address fraud targeted at older people during the pandemic. The results provide a community-based viewpoint on the crisis, shedding new light on the experiences of local providers and the individuals they serve. An overwhelming majority of respondents had learned of a client who fell victim to a financial scam during the pandemic; their narratives conveyed frustration with the vast scope of an issue far exceeding their organizations' limited resources. They described efforts to teach clients how to recognize and avoid scams, yet they also observed how trained participants nonetheless lost money to fraud. They described helping their clients to file police reports, yet they also suggested that law enforcement efforts are not proceeding quickly enough, leaving them to wonder whether reporting may be pointless for many victims. As fraud numbers continue to rise, greater engagement between community aging services providers and other stakeholders – especially law enforcement and financial institutions – will play a critical role in the ongoing fight. A streamlined reporting process would help aging services to connect their clients promptly with law enforcement and financial institutions to reduce money lost, and with counseling and other resources to facilitate financial and emotional recovery. A centralized resource center that provides high-quality, up-to-date, and accessible training materials would ensure that many hundreds of local organizations do not have to reinvent the wheel to educate their clients. While difficult work lies ahead, local aging services providers stand ready to test and deploy emerging strategies, drawing on decades of service to older Americans to address this latest challenge.*

## INTRODUCTION

In 2021, William and Ave Bortz received what they thought was an important email message from the online retailer Amazon about suspicious activity on their account.<sup>1</sup> They did not realize that this was in fact a phishing attack—a fraudulent email intended to lure them into a costly scam. Over the following week, scammers took remote control of their personal computer and coached them through several large wire transfers to foreign bank accounts. Before their daughter finally intervened, the Bortzes, who were in their mid-70s, transferred funds worth almost \$700,000 to the foreign accounts. The money included proceeds from the recent sale of the family home, and the theft left the couple without life savings they had been counting on to support their retirement.

Hundreds of thousands of other older individuals who were scammed during the COVID-19 pandemic shared their own stories with the Internet Crime Complaint Center (IC3) of the Federal Bureau of Investigation (FBI).<sup>2</sup> In 2022 alone, the IC3 received over 88,000 fraud complaints involving people over the age of 60, with losses totaling \$3.1 billion.<sup>3</sup> This dollar amount was 80% greater than the previous record set in 2021.<sup>4</sup>

The sheer volume of money lost represents tremendous hardship to victims and their families. For many older people, the lost funds represent meals forgone, medications skipped, and rent left unpaid. Others lose the nest egg they had been relying on to support themselves through retirement. The FBI's 2022 IC3 data shows that victims over the age of 60 lost on average \$35,101, and more than 5400 victims reported losing over \$100,000.<sup>5</sup>

Beyond these monetary losses, a scam can have devastating psychological consequences.<sup>6</sup> After learning that they have been victimized, older people may

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<sup>1</sup> William and Ave Bortz described their ordeal in a complaint filed in the Superior Court for the State of California, County of San Diego, and subsequently removed to the U.S. District Court for the Southern District of California. *See Bortz v. JPMorgan Chase Bank, NA*, 2022 WL 1489832 (S.D. Ca. May 10, 2022). They alleged violations of California's Elder Abuse Law and Unfair Competition Law, and breach of implied covenant of good faith and fair dealing. *Id.* Their complaint was dismissed, and the Ninth Circuit upheld the dismissal on appeal. *See Bortz v. JP Morgan Chase Bank*, 2023 WL 4700640 (9th Cir 2023). Additional details are recounted in Melissa Mecija, *Elderly Couple Loses Nearly \$700K Online Scam*, ABC 10 NEWS SAN DIEGO (Aug. 26, 2022, 2:02 AM), <https://www.10news.com/news/team-10/elderly-couple-loses-nearly-700k-online-scam> [<https://perma.cc/F3PZ-D6NZ>].

<sup>2</sup> FED. BUREAU OF INVESTIGATION, ELDER FRAUD REPORT 2022 4 (2022), [https://www.ic3.gov/Media/PDF/AnnualReport/2022\\_IC3ElderFraudReport.pdf](https://www.ic3.gov/Media/PDF/AnnualReport/2022_IC3ElderFraudReport.pdf) [<https://perma.cc/B7M3-935E>] [hereinafter "2022 FBI ELDER FRAUD REPORT"].

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 4-5.

<sup>5</sup> *Id.* at 4.

<sup>6</sup> *See* FINRA INV. EDUC. FOUND., NONTRADITIONAL COSTS OF FINANCIAL FRAUD: REPORT OF SURVEY FINDINGS 16-18 (2016), [https://www.finrafoundation.org/sites/finrafoundation/files/nontraditional-costs-financial-fraud\\_0\\_0\\_0.pdf](https://www.finrafoundation.org/sites/finrafoundation/files/nontraditional-costs-financial-fraud_0_0_0.pdf) [<https://perma.cc/WA8U-HFUN>].

feel hurt, embarrassed, angry, depressed, or anxious.<sup>7</sup> They may lose their confidence to evaluate the legitimacy of communications in other contexts, and may socially withdraw.<sup>8</sup> They may fear losing their independence, especially if family members or others take control of their affairs in response to the incident.<sup>9</sup> These concerns may spiral into further isolation and fearfulness, or even poor health outcomes.<sup>10</sup> What starts as a financial crime may become a vicious cycle affecting long-term well-being.<sup>11</sup>

Throughout the pandemic, the country's network of aging services providers stood witness to these scams and sounded the alarm to their clients, service partners, and communities. Founded by Congress with the passage of the Older Americans Act,<sup>12</sup> the U.S. Aging Services Network includes Area Agencies on Aging, municipal Councils on Aging, and other state and local organizations serving a variety of needs.<sup>13</sup> They provide meals, social engagement programs, caregiver support, and other programs that are critical to the health and well-being of their clients, who primarily are individuals over the age of 60.<sup>14</sup>

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<sup>7</sup> See Yuxi Shang et al., *The Psychology of the Internet Fraud Victimization of Older Adults: A Systematic Review*, 13 FRONTIERS IN PSYCH. 912242 (Sept. 5, 2022).

<sup>8</sup> See CONSUMER FIN. PROT. BUREAU, *RECOVERING FROM ELDER FINANCIAL EXPLOITATION: A FRAMEWORK FOR POLICY AND RESEARCH* 1, 40 (2022), [https://files.consumerfinance.gov/f/documents/cfpb\\_recovering-from-elder-financial-exploitation\\_report\\_09-2022.pdf](https://files.consumerfinance.gov/f/documents/cfpb_recovering-from-elder-financial-exploitation_report_09-2022.pdf) [<https://perma.cc/8BKH-WXKV>] [hereinafter "CFPB FRAMEWORK 2022"].

<sup>9</sup> See *id.* at 25-26.

<sup>10</sup> See *id.* Cognitive decline also has been linked to susceptibility to fraud in older adults. See Shang et al., *supra* note 7. An older adult's experience falling victim to a financial fraud may prompt family members to investigate the possibility of dementia or other cognitive impairment. See Tianyi Zhang et al., *Elder Financial Exploitation in the Digital Age*, 51(2) J AM. ACAD. PSYCHIATRY L. 1, 3 (2023).

<sup>11</sup> Another pandemic-era incident reported by AARP illustrates how a brief internet exchange can balloon into an emotional crisis. A 75-year-old woman from the Los Angeles area posted a message on Instagram tagging a television journalist she admired. A scammer who saw this public message impersonated the journalist and lured the woman into a complex and costly scam. The scammers accused her of money laundering and demanded that she pay tens of thousands of dollars to avoid prosecution. The woman lost approximately \$70,000, became suicidal, and checked herself into a hospital, where a psychiatrist explained to her that she had been scammed. Christina Ianzito, *Many Victims Struggle With Mental Health in Scams' Aftermath*, AARP (Dec. 15, 2022) <https://www.aarp.org/money/scams-fraud/info-2022/mental-health-impact.html> [<https://perma.cc/QQ3C-PKRW>].

<sup>12</sup> Older Americans Act of 1965, Pub. L. No. 89-73, § 3021 et seq. (codified at 42 U.S.C. § 3001-3045).

<sup>13</sup> See Aging and Disability Networks, ADMIN. FOR CMTY. LIVING, <https://acl.gov/programs/aging-and-disability-networks> [<https://perma.cc/ST3U-9QUE>] (last modified on Sept. 9, 2024) (describing the various government agencies and other organizations that make up the national Aging Services Network).

<sup>14</sup> See NAT'L ASS'N OF AREA AGENCIES ON AGING, #AAAs AT WORK FOR OLDER ADULTS: A SNAPSHOT OF AREA AGENCY ON AGING RESPONSES TO COVID-19 1, 4 (2020), [https://www.usaging.org/Files/n4a\\_MemberSurveyReport2020\\_Web\\_07July2020.pdf](https://www.usaging.org/Files/n4a_MemberSurveyReport2020_Web_07July2020.pdf)

These agencies adjusted to COVID health threats and social distancing requirements by transitioning to remote service modalities.<sup>15</sup> In many cases, they dramatically transformed programs, adopting new, virtual technologies, and increasing the use of telephonic services.<sup>16</sup> They also gained first-hand knowledge of the challenges facing their clients during the period, including the rise in fraud.<sup>17</sup> They became, by default, first responders to scams, on top of the many other new challenges and responsibilities that they assumed due to COVID.<sup>18</sup>

This Article examines the role of aging services organizations in responding to fraud and scams during the pandemic, reporting the results of a survey of agencies in Massachusetts that serve people over the age of 60. Almost all survey respondents knew of clients who had encountered fraud or scams during the pandemic. Their responses indicated that they were engaged with clients to help them avoid fraud and to assist in reporting incidents. Yet they also expressed their frustration with the challenges of navigating a complex and decentralized anti-fraud system. While they diligently sounded the alarm, they also harbored doubts about whether their message was heard by either their clients or other anti-fraud stakeholders.

Section I of this Article provides a brief overview of fraud and scams against older people, including an explanation of the terminology used and an examination of trends during the COVID pandemic. Section II describes the U.S. Aging Services Network and the many ways that its organizations enhance quality of life for older Americans. The terms “aging services organization” and “aging services provider” as used in this Article include private and public entities that offer a variety of social services, primarily to people over the age of 60.<sup>19</sup> The survey described in this Article included senior centers, Area Agencies on Aging, Aging Services Access Points, and legal services organizations that help older people.<sup>20</sup>

The Article next turns in Section III to the survey conducted by the authors in 2022 to learn how aging services organizations in Massachusetts experienced fraud and scams during the pandemic. The results provide insight regarding best practices during the COVID crisis and the role that these organizations can play in fighting fraud in the future. On the basis of the survey results, Section IV recommends more effective and streamlined integration of local community

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[<https://perma.cc/64K2-67LR>] [hereinafter #AAAS AT WORK]. Since this network was founded, the need for its services has grown as the number of older Americans has increased. Haley B. Gallo & Kathleen H. Wilber, *Transforming Aging Services: Area Agencies on Aging and the COVID-19 Response*, 61 *Gerontologist* 152, 154 (2021).

<sup>15</sup> See #AAAS AT WORK, *supra* note 14, at 4, 11.

<sup>16</sup> See *id.*

<sup>17</sup> See *infra* Section II.

<sup>18</sup> See *infra* Section II.

<sup>19</sup> See *infra* Section II.

<sup>20</sup> See *infra* Section III.

efforts with efforts of other stakeholders, including both financial institutions and state and national law enforcement. Aging services providers will be better equipped to help their clients avoid, recognize, and recover from fraud and scams if they are notified about the latest developments in prevention and enforcement, and if they have access to the most up-to-date information to share with their clients. Banks and enforcement agencies will benefit if they leverage the unique expertise of community-based organizations regarding the needs of the older people. The Article also recommends a streamlined incident reporting system and centrally-created educational and training resources.

## I. AN OVERVIEW OF FRAUD AND SCAMS DURING THE COVID-19 PANDEMIC

### A. *Defining Elder Financial Exploitation*

“Elder financial exploitation”<sup>21</sup> is an umbrella term commonly defined as “illegal or improper use of an older adult’s funds, property, or assets.”<sup>22</sup> Within this larger category, policy makers and scholars typically distinguish these financial crimes by whether the victim knows or does not know the perpetrator.<sup>23</sup> When the victim knows the perpetrator, or the perpetrator is otherwise abusing a position of trust, the activity is typically referred to as “financial abuse.”<sup>24</sup> If

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<sup>21</sup> “Older adults” is used to refer to adults aged 60 and over. This is the definition of “older individuals” in the Older Americans Act of 1965, which created the Aging Services Network. Older Americans Act of 1965, Pub. L. No. 89-73, § 102 (40) (codified at 42 U.S.C. § 3001-3045). In recent years, the use of the term “older adults” has become preferred over “elders” in many contexts, although the term “elder” also continues in use. This Article uses the term “older adults” except where the use of the term “elder” is necessary for accuracy or clarity. For a description of the changing language of aging, see Robert Weisman, *Who Are You Calling Senior? For Older Folks, Some Terms Are Fast Becoming Radioactive*, BOS. GLOBE (Mar. 7, 2019), <https://www.bostonglobe.com/metro/2019/03/07/who-are-you-calling-senior-for-older-folks-some-terms-are-fast-becoming-radioactive/EaCvwK6WJIHbtcoXO63JqO/story.html> [<https://perma.cc/WQB7-4J6T>].

<sup>22</sup> Stephen Deane, ELDER FINANCIAL EXPLOITATION: WHY IT IS A CONCERN, WHAT REGULATORS ARE DOING ABOUT IT, AND LOOKING AHEAD, U.S. SEC. AND EXCH. COMM’N OFF. OF THE INV. ADVOC. 1 (June 2018), <https://www.sec.gov/files/elder-financial-exploitation.pdf> [<https://perma.cc/XHG3-Y6QZ>] [hereinafter “SEC ELDER FINANCIAL EXPLOITATION REPORT”] (quoting U.S. GOV’T ACCOUNTABILITY OFF., GAO 11-208, ELDER JUSTICE: STRONGER FEDERAL LEADERSHIP COULD ENHANCE NATIONAL RESPONSE TO ELDER ABUSE, 4 (2011)).

<sup>23</sup> Marguerite DeLiema, *Elder Fraud and Financial Exploitation: Application of Routine Activity Theory*, 58 GERONTOLOGIST 706, 707 (2016) [hereinafter DeLiema, *Elder Fraud and Financial Exploitation*].

<sup>24</sup> Financial abuse is one of several types of elder abuse, which is defined by the U.S. Centers of Disease Control as “an intentional act or failure to act that causes or creates a risk of harm to an older adult . . . often [] at the hands of a caregiver or a person the elder trusts.” Nat’l Ctr. for Inj. Prevention and Control, *Preventing Elder Abuse*, U.S. CTR. FOR DISEASE CONTROL (2020), <https://www.cdc.gov/violenceprevention/pdf/elder/>.

the victim does not know the perpetrator, then “financial fraud” is the appropriate term.<sup>25</sup> In this Article, we follow the example of several U.S. government agencies and use the term “fraud and scams” to refer to exploitation by a stranger, which is our focus.<sup>26</sup>

The scourge of fraud and scams committed by strangers devastates millions of lives each year.<sup>27</sup> Like William and Ave Bortz, many victims lose large amounts of money, resulting in significant harm to their financial security.<sup>28</sup> Yet relatively smaller monetary losses can also create a financial hardship, particularly for lower-income people who may already be struggling to afford basic necessities.

The psychological impacts are also devastating. Victims often do not appreciate that scams are widespread, sophisticated, and highly effective, instead concluding that falling for a scam is a personal failing and cause for embarrassment and shame.<sup>29</sup> This is illustrated by the results of a 2015 survey of fraud victims in which 47% of participants reported that they agreed with the

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EA\_Factsheet.pdf [https://perma.cc/WM6A-JPXF]. Other types of elder abuse include physical abuse, sexual abuse, emotional or psychological abuse, and neglect, in addition to financial abuse. *Id.*; see also U.S. GOV’T ACCOUNTABILITY OFF., GAO 11 208 4, ELDER JUSTICE: STRONGER FEDERAL LEADERSHIP COULD ENHANCE NATIONAL RESPONSE TO ELDER ABUSE (2011).

<sup>25</sup> *Id.*

<sup>26</sup> See, e.g., CFPB FRAMEWORK 2022, *supra* note 8 (which uses the terms “fraud” and “scams” throughout; *Elder Justice Initiative*, DEP’T OF JUST. <https://www.justice.gov/elderjustice> [https://perma.cc/SF48-NYZQ] (last visited Oct. 25, 2023) (stating that the mission of the Elder Justice Initiative is “to support and coordinate the Department’s enforcement and programmatic efforts to combat elder abuse, neglect and financial fraud and scams that target our nation’s older adults”); Patrick J. Kiger & Sari Harrar, *6 Top Scams to Watch Out for in 2024*, AARP (Dec. 20, 2023), <https://www.aarp.org/money/scams-fraud/info-2023/top-scammer-tactics-2023.html?intcmp=AE-FRDSC-MOR-R2-POS3> [https://perma.cc/HVJ4-R54L]. In some contexts, a “scam” may be differentiated from a “fraud” by whether the victim is misled into revealing their personal information or is otherwise directly involved in the original breach. For example, according to this usage, a scheme in which an account is accessed using data stolen in a large security breach would be categorized as a fraud; but if the account owner is tricked into sharing a passcode, then the scheme would be categorized as a scam. See, e.g., Dawn Kellogg, *Fraud and Scams – There’s a Big Difference*, THE SUMMIT FED. CREDIT UNION: THE SUMMIT BLOG (Nov. 15, 2023), <https://www.summitfcu.org/blog/fraud-and-scams-theres-a-big-difference/> [https://perma.cc/M5XG-MVNT].

<sup>27</sup> Zhang et al., *supra* note 10, at 1.

<sup>28</sup> As described above, in 2022, more than 5400 victims reported to the FBI that they lost more than \$100,000. See 2022 FBI ELDER FRAUD REPORT, *supra* note 2 and accompanying text.

<sup>29</sup> See CFPB FRAMEWORK 2022, *supra* note 8, at 25-26 (noting that “older adults often fear loss of independence following [elder financial exploitation], which may be heightened if they are in the early stages of cognitive decline”).

statement, “I blame myself for being defrauded.”<sup>30</sup> Physical well-being also can suffer, particularly if the incident results in greater isolation and reduced independence for the victims.<sup>31</sup>

B. *Measuring the Extent of the Problem*

Millions of Americans lost billions of dollars to fraud during the COVID-19 pandemic, with incidents exploding across all age cohorts.<sup>32</sup> The Federal Trade Commission (FTC) reported that in 2022 alone, consumers of all ages filed 2.4 million fraud reports through its Consumer Sentinel database.<sup>33</sup> Reported losses in 2022 totaled \$8.8 billion.<sup>34</sup>

Incidents involving older people were a significant component of this increase in fraud overall. Reports to the FBI’s IC3 involving fraud against people over 60 jumped by almost 30% between 2019 and 2022.<sup>35</sup> The dollar amount lost by victims in this age group was a staggering \$5.7 billion for the three-year period spanning 2020 to 2022.<sup>36</sup> Reported losses increased each year during the

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<sup>30</sup> See FINRA, *supra* note 6, at 13.

<sup>31</sup> See Zhang et al., *supra* note 10, at 1.

<sup>32</sup> The FBI’s annual Internet Crime Reports publish the numbers of reported incidents by age cohort, and demonstrate how reports increased during the pandemic across all age cohorts. Compare FED. BUREAU OF INVESTIGATION, 2019 INTERNET CRIME REPORT, INTERNET CRIME COMPLAINT CTR. 3, 16, (2019), [https://www.ic3.gov/Media/PDF/AnnualReport/2019\\_IC3Report.pdf](https://www.ic3.gov/Media/PDF/AnnualReport/2019_IC3Report.pdf), with FED. BUREAU OF INVESTIGATION, 2022 INTERNET CRIME REPORT, INTERNET CRIME COMPLAINT CTR. 3, 16, (2022), [https://www.ic3.gov/Media/PDF/AnnualReport/2022\\_IC3Report.pdf](https://www.ic3.gov/Media/PDF/AnnualReport/2022_IC3Report.pdf).

<sup>33</sup> Press Release, Fed. Trade Comm’n, New FTC Data Show Consumers Reported Losing Nearly \$8.8 Billion to Scams in 2022 (Feb. 23, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/02/new-ftc-data-show-consumers-reported-losing-nearly-88-billion-scams-2022> [<https://perma.cc/2J7U-UMXV>].

<sup>34</sup> *Id.* Total losses reported to the FBI during the period 2020-2022 were reported at \$21.4 billion. The number of complaints to the FBI jumped 69% between 2019 and 2020, and an additional 7% from 2020 to 2021. There was a small decrease in number reports to the FBI from 2021 to 2022. The total number of reports in 2021 was 847,376, and the number in 2022 was 5.5% lower, at 800,944. See FBI INTERNET CRIME REPORT 2022, *supra* note 32.

<sup>35</sup> In 2019, there were 68,013 reports involving people over the age of 60, and \$835,164,766 in reported losses. See FED. BUREAU OF INVESTIGATION, 2019 INTERNET CRIME REPORT, INTERNET CRIME COMPLAINT, *supra* note 32. In 2022, there were 88,262 reports involving people over the age of 60, and \$3.1 billion in reported losses. FBI INTERNET CRIME REPORT 2022, *supra* note 32, at 18.

<sup>36</sup> See *infra* note 37.



pandemic, reaching \$3.1 billion in 2022.<sup>37</sup> This represented an extraordinary 82% increase over the losses from 2021 in the over 60 cohort.<sup>38</sup>

Although this Article focuses on older people and fraud, it is important to note that fraud negatively impacts adults of all ages. In fact, several studies have indicated that younger cohorts may be more likely than older adults to lose money to scams.<sup>39</sup> People aged 30-39 make the greatest number of fraud and scam reports to the FBI and FTC, although dollar losses are highest for people

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<sup>37</sup> In 2020, the FBI reported \$966 million in losses to people over 60; in 2021, \$1.7 billion; and in 2022, \$3.1 billion. See FED. BUREAU OF INVESTIGATION, 2020 ELDER FRAUD REPORT, INTERNET CRIME COMPLAINT CTR. 4 (2020), [https://www.ic3.gov/AnnualReport/Reports/2020\\_IC3ElderFraudReport.pdf](https://www.ic3.gov/AnnualReport/Reports/2020_IC3ElderFraudReport.pdf) [<https://perma.cc/623C-VC7M>]; FED. BUREAU OF INVESTIGATION, 2021 ELDER FRAUD REPORT 4 (2021), [https://www.ic3.gov/Media/PDF/AnnualReport/2021\\_IC3ElderFraudReport.pdf](https://www.ic3.gov/Media/PDF/AnnualReport/2021_IC3ElderFraudReport.pdf) [<https://perma.cc/4MC3-RT2V>]; 2022 FBI ELDER FRAUD REPORT, *supra* note 2, at 4.

<sup>38</sup> FED. BUREAU OF INVESTIGATION, 2022 INTERNET CRIME REPORT, *supra* note 32, at 4. Another source of data on fraud is provided by Suspicious Activity Reports (SARs) that are mandated by the Bank Secrecy Act of 1970, an anti-money laundering statute. Bank Secrecy Act of 1970, Pub. L. No. 91-508 (1970). Financial institutions that learn of fraud or suspected fraud are required to file a SAR describing the suspected criminal activity so that regulators and law enforcement may follow up as required. Institutions transmit the SARs to the Financial Crimes Enforcement Network (FinCEN), which is a component of the U.S. Treasury Department. The CFPB reports that over 62,000 elder financial exploitation SARs were filed in 2020 alone. RECOMMENDATIONS AND REPORT FOR FINANCIAL INSTITUTIONS ON PREVENTING AND RESPONDING TO ELDER FINANCIAL EXPLOITATION, CONSUMER FIN. PROT. BUREAU 3, 16 (2016), [https://files.consumerfinance.gov/f/201603\\_cfpb\\_recommendations-and-report-for-financial-institutions-on-preventing-and-responding-to-elder-financial-exploitation.pdf](https://files.consumerfinance.gov/f/201603_cfpb_recommendations-and-report-for-financial-institutions-on-preventing-and-responding-to-elder-financial-exploitation.pdf) [<https://perma.cc/Q7CH-G92C>].

<sup>39</sup> Yaniv Hanoch & Stacey Wood, *The Scams Among Us: Who Falls Prey and Why*, 30(3) CURRENT DIRECTIONS IN PSYCH. SCI., 260, 261 (2021) (“[C]urrent data do not provide a clear picture about the relationship between age and susceptibility to scams, and there is little insight as to why middle-aged adults are at particularly high risk.”). A survey conducted in 2017 and 2018 found that “[o]n average, those who lost money were 2-3 years younger than those who were targeted for a scam but did not engage.” See Marti DeLiema et al., *Exposed to Scams: What Separates Victims From Non-Victims?*, FINRA INVEST. EDUC. FOUND. 7 (2019), [https://www.finrafoundation.org/sites/finrafoundation/files/exposed-to-scams-what-separates-victims-from-non-victims\\_0\\_0.pdf](https://www.finrafoundation.org/sites/finrafoundation/files/exposed-to-scams-what-separates-victims-from-non-victims_0_0.pdf) [<https://perma.cc/SJ6J-AN7G>] [hereinafter DeLiema et al., *Exposed to Scams*]. See also James Toomey, *The Age of Fraud*, 60 HARV. J. ON LEGIS. 101, 101 (2023) (revealing that a survey conducted in 2020 found that younger people were more likely to engage with scams than were older people).

over 60.<sup>40</sup> Section I.D of this Article explores several possible reasons why fraud against older people in particular increased during the pandemic.<sup>41</sup>

The enormous volume of complaints almost certainly understates the true scope of the problem. Experts widely acknowledge that victims significantly underreport financial scams and other financial exploitation.<sup>42</sup> As noted previously, individuals who experience these scams often feel shame and embarrassment, making them reluctant to share their experiences with others by reporting.<sup>43</sup> Many people believe that reporting is a waste of time because lost funds are seldom recovered.<sup>44</sup> Among older victims, physical and cognitive impairment may pose additional barriers to reporting.<sup>45</sup>

Furthermore, victims who wish to file a report face a decentralized reporting infrastructure consisting of a bewildering array of federal and state enforcement and social service agencies.<sup>46</sup> At the federal level, reporting options include the US DOJ's National Elder Fraud Hotline for crimes against older people; the FBI's IC3 for internet-related crimes; and the FTC's Consumer Sentinel Database, among others. Rather than reporting to these federal authorities,

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<sup>40</sup> FED. BUREAU OF INVESTIGATION, 2022 INTERNET CRIME REPORT, *supra* note 32, at 18; *Who experiences scams? A story for all ages*, FED. TRADE COMM'N: DATA SPOTLIGHT (2022), <https://www.ftc.gov/news-events/data-visualizations/data-spotlight/2022/12/who-experiences-scams-story-all-ages> [<https://perma.cc/YFL7-VWZD>] [hereinafter "FTC DATA SPOTLIGHT 2022"].

<sup>41</sup> In a recent article, James Toomey advocates for greater focus on how fraud impacts younger people. *See* Toomey, *supra* note 39, at 105 (reporting results of survey conducted in 2020 that found that younger people were more likely to engage with scams than were older people). Efforts to fight the fraud epidemic will be most effective if they can be tailored to different groups – including different age groups – based on risk factors, frames of mind and preferred methods and styles of communication. *See* CRAIG HONICK ET AL., EXPOSED TO SCAMS: CAN CHALLENGING CONSUMERS' BELIEFS PROTECT THEM FROM FRAUD? 26 (FINRA Inv. Educ. Found. 2021), <https://www.finrafoundation.org/sites/finrafoundation/files/exposed-to-scams-can-challenging-consumers-beliefs-protect-them-from-fraud.pdf> [<https://perma.cc/A79Y-V8P3>].

<sup>42</sup> *See* CFPB FRAMEWORK 2022, *supra* note 8, at 19 (citing Mark Lachs & Jacquelin Berman, *Under the Radar: New York State Elder Abuse Prevalence Study*, N.Y. STATE OFF. OF CHILD. AND FAM. SERV. (2011)).

<sup>43</sup> *See* CFPB FRAMEWORK 2022, *supra* note 8, at 22. One individual who was interviewed by the CFPB for its report described his reluctance to file a complaint after losing money in an investment scam. He shared that he "did not involve law enforcement because [he was] just taking responsibility for [his] own decision . . . to put money into something that [he] shouldn't have." *Id.*

<sup>44</sup> *See id.* at 24. For example, some victims believe that law enforcement will not bother to investigate incidents, or that law enforcement simply is incapable of tracing scams to recover lost funds. *See id.* While unfortunately the large majority of fraud incidents reported to law enforcement are never resolved, the likelihood of recovering funds is virtually nonexistent when incidents go unreported. *See id.* at 19.

<sup>45</sup> *See id.* at 24–25.

<sup>46</sup> *See id.* at 25.

victims may turn to their state or local police departments. Or they may contact non-law enforcement helplines, such as the AARP's Fraud Watch Network Helpline.<sup>47</sup> While some reporting centers share data with each other, not all do, or their data sharing may be incomplete.<sup>48</sup>

Despite these data limitations, there is widespread agreement that fraud and scams increased dramatically during the pandemic years. The upward trend has continued since the survey was distributed in 2022, suggesting that this is an entrenched problem that will continue to harm older adults in the years to come. In 2023, the FBI IC3 reported increases in both reports and losses by people over 60 from the prior year,<sup>49</sup> while the FTC's Consumer Sentinel Database reported an increase of 20% in total losses recorded.<sup>50</sup> According to the IC3, \$3.4 billion was reported stolen from older adults in 2023.<sup>51</sup>

### C. *Varieties of Scams*

Scammers use a broad and expanding variety of deceptions, with the FBI's IC3 categorizing reports into more than two dozen separate types of scams.<sup>52</sup> While specific methods and strategies are constantly evolving, the following list describes several common types.

**Tech Support Scams.** In a tech support scam, someone posing as a technical expert contacts the victim and convinces them either to pay for technical support services that they do not need or to grant access to personal or financial information that can then be used to steal their assets or identity.<sup>53</sup> These were

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<sup>47</sup> The AARP provides a free Fraud Watch Network Helpline to counsel and advise callers who have encountered scams. See Christina Ianzito, *How AARP's Fraud Watch Network Helpline Is Fighting for You*, AARP (May 3, 2023), <https://www.aarp.org/money/scams-fraud/info-2023/helpline-volunteers.html> [<https://perma.cc/9CNP-A5SK>].

<sup>48</sup> See PROTECTING OLDER CONSUMERS 2022-2023, FED. TRADE COMM'N 39 (2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p144400olderadultsreportoct2023.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p144400olderadultsreportoct2023.pdf) [<https://perma.cc/J7N7-X6M2>].

<sup>49</sup> *Federal Bureau of Investigation Elder Fraud Report 2023*, INTERNET CRIME CTR. 5 (2022), [https://www.ic3.gov/Media/PDF/AnnualReport/2023\\_IC3ElderFraudReport.pdf](https://www.ic3.gov/Media/PDF/AnnualReport/2023_IC3ElderFraudReport.pdf) [<https://perma.cc/8LHK-AD74>] [hereinafter "2023 FBI ELDER FRAUD REPORT"].

<sup>50</sup> See FEDERAL TRADE COMMISSION FRAUD REPORTS, TABLEAU PUB., <https://public.tableau.com/app/profile/federal.trade.commission/vizzes> (select "Fraud Reports" then "Age & Fraud," then change the selected year to 2022 and to 2023).

<sup>51</sup> 2023 FBI ELDER FRAUD REPORT, *supra* note 49, at 3.

<sup>52</sup> See 2022 FBI ELDER FRAUD REPORT, *supra* note 2, at 8. There are variations in the categories and definitions used across agencies; for example, the FTC's reporting on fraud against older Americans counts "Romance Scams" and "Family and Friend Imposters" as two separate categories of scams, while the FBI's IC3 report combines them into a single category, "Confidence/Romance Scams." See *id.*; FED. TRADE COMM'N, PROTECTING OLDER CONSUMER 2022-2023 31 (2023).

<sup>53</sup> See *id.* at 12, 18; ADVISORY ON ELDER FINANCIAL EXPLOITATION, FIN. CRIME ENF'T NETWORK 7 (June 15, 2022), [https://www.fincen.gov/sites/default/files/advisory/2022-06-15/FinCEN%20Advisory%20Elder%20Financial%20Exploitation%20FINAL%](https://www.fincen.gov/sites/default/files/advisory/2022-06-15/FinCEN%20Advisory%20Elder%20Financial%20Exploitation%20FINAL%20)

by far the most frequent type of scam reported to the FBI in 2022 involving people over the age of 60, resulting in \$587 million in losses that year.<sup>54</sup>

**Investment Scams.** Investment scams use the guise of legitimate and potentially lucrative financial opportunities to steal large sums.<sup>55</sup> This category of scam was the costliest in 2022 for people over 60, resulting in losses worth over \$990 million.<sup>56</sup> The FBI reports that older victims are uniquely vulnerable to investment scams if they are convinced to turn over their retirement account balances or the equity in their homes.<sup>57</sup>

**Non-payment/Non-delivery Scams.** This category includes scams where the victim pays for goods or services that are never provided, and scams where the victim provides goods or services to the perpetrator but never is paid.<sup>58</sup> In 2022 these were the second most frequently reported scam to the FBI's IC3 involving people over 60, at 7,985 reports, and over \$51 million lost.<sup>59</sup>

**Confidence/Romance Scams.** These include scams in which someone uses a false identity to convince the victim that a close relationship exists between them and then uses that trust to steal from the victim.<sup>60</sup> In addition to romance scams, the "Grandparent Scam," in which someone impersonates a relative, such as a grandchild, also falls within the category of confidence scams.<sup>61</sup> Confidence and romance scams resulted in \$419 million in reported losses in 2022 to people over 60.<sup>62</sup>

"Pig Butchering" is a variety of confidence scam in which a scammer assumes a false identity and then gradually develops a relationship with the victim, "fattens" the victim, and eventually "butchers" them by convincing them to transfer large sums of money to the scammer.<sup>63</sup> The scam generally begins with a private message sent via social media that appears to the recipient as though it was innocently sent in error to the wrong account.<sup>64</sup> If the target responds, the scammer works to develop a relationship and build trust before conning the target into transferring money to a fake account, generally under the auspices of

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20508.pdf [https://perma.cc/S2GM-7H8E] [hereinafter "2022 FINCEN ADVISORY ON ELDER EXPLOITATION"].

<sup>54</sup> In 2022, the FBI received 17,810 reports concerning tech support scams involving people over 60. 2022 FBI ELDER FRAUD REPORT, *supra* note 2, at 6-7.

<sup>55</sup> *See id.* at 13.

<sup>56</sup> *Id.* at 7.

<sup>57</sup> *See id.* at 13.

<sup>58</sup> *See id.* at 18.

<sup>59</sup> *Id.* at 6-7.

<sup>60</sup> *See* 2022 FBI ELDER FRAUD REPORT, *supra* note 2, at 14.

<sup>61</sup> *See id.* at 14.

<sup>62</sup> *Id.* at 7.

<sup>63</sup> *See* Cezary Podkul, *What's a Pig Butchering Scam? Here's How to Avoid Falling Victim to One*, PROPUBLICA (Sept. 29, 2022), <https://www.propublica.org/article/whats-a-pig-butchering-scam-heres-how-to-avoid-falling-victim-to-one> [https://perma.cc/873X-L9SH].

<sup>64</sup> *See id.*

funding a fake investment opportunity.<sup>65</sup> When the victim either runs out of money or realizes that the interaction is fraudulent, the scammer cuts off contact – often after taunting the victim in a manner calculated to discourage them from seeking help from family or law enforcement.<sup>66</sup>

**Phishing Scams.** Phishing scams involve a communication – usually email, text, or phone call – that impersonates a legitimate entity, but in fact is seeking personal information so that it can be used to steal from the victim.<sup>67</sup> These scams were responsible for \$14 million in losses reported to the FBI’s IC3 in 2022 to people over 60.<sup>68</sup>

**Government Impersonation Scams.** These involve the impersonation of officials working for government agencies. In 2022, the FBI’s IC3 logged 3,425 reports of such scams and \$136 million in losses among people over 60.<sup>69</sup> Scammers may induce cooperation by threatening civil or criminal legal action, such as seizure of bank accounts or arrest.<sup>70</sup>

**Lottery/Sweepstakes/Inheritance Scams.** In a lottery/sweepstakes scam, the target receives a communication informing them that they won a contest and must pay money up front to claim their prize.<sup>71</sup> Inheritance scams are similar, but the communication purports to relate to a previously-unknown inheritance.<sup>72</sup> People over 60 reported losing \$69 million through these types of scams in 2022.<sup>73</sup>

This Article does not focus on frauds that use artificial intelligence (“AI”) to trick unsuspecting victims, as such scams had not yet become common during the pandemic years.<sup>74</sup> It is important to note, however, that as this article goes to publication, scammers have begun to use these technologies to create

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<sup>65</sup> *See id.*

<sup>66</sup> *See id.*

<sup>67</sup> *See* 2022 FBI ELDER FRAUD REPORT, *supra* note 2, at 18.

<sup>68</sup> *Id.* at 7.

<sup>69</sup> *Id.* at 6-7, 17.

<sup>70</sup> *See* 2022 FINCEN ADVISORY ON ELDER EXPLOITATION, *supra* note 53, at 6. The FBI notes that these types of frauds may continue for longer than others because victims may continue to believe that they are in contact with a legitimate government agency for some time before they realize that they have been scammed. *See* 2022 FBI ELDER FRAUD REPORT, *supra* note 2, at 12.

<sup>71</sup> 2022 FBI ELDER FRAUD REPORT, *supra* note 2, at 13.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 7.

<sup>74</sup> *See* Emily Flitter & Stacy Cowley, *Voice Deepfakes Are Coming for Your Bank Balance*, N.Y. TIMES (Aug. 30, 2023), <https://www.nytimes.com/2023/08/30/business/voice-deepfakes-bank-scams.html> [<https://perma.cc/SGM5-PFN6>] (describing in August 2023 how deepfakes only became common within the prior year). While most of the scams reported in the survey did not apparently use AI, one involved a recording of the local senior center director’s voice that was fraudulently re-used by scammers to lend legitimacy to their communications. *See infra* text accompanying notes 147-48.

compelling and effective fraudulent campaigns.<sup>75</sup> Sophisticated, AI-driven analytics can sift through extensive stolen data on potential targets and identify those who are most likely to yield the greatest returns.<sup>76</sup> Convincing “deepfakes” of a target’s loved one or a trusted public figure can be created using voice and video samples captured through public material on the internet.<sup>77</sup> As AI continues advancing as a preferred criminal tool, innocent consumers will find it increasingly challenging to distinguish between legitimate and illegitimate communications.<sup>78</sup>

#### D. *Using Routine Activity Theory to Explain Fraud During COVID*

A full explanation of the causes for the dramatic increase in fraud during the pandemic would exceed the scope of this Article, but this section will attempt to contextualize the trends through a leading theoretical approach, Routine Activity Theory. Routine Activity Theory attempts to explain patterns of criminal activity by focusing on the convergence of (1) motivated offenders, (2) suitable targets, and (3) an absence of capable guardianship.<sup>79</sup> First developed by Lawrence E. Cohen and Marcus Felson in 1979, the theory situates criminal activity within the context of the day-to-day activities of victims and offenders, and the circumstances that bring them together.<sup>80</sup> By focusing on the convergence of these three factors, the theory posits that crime rates may change due simply to where victims and offenders are located physically and temporally, and independent of structural changes that also impact them as individuals.<sup>81</sup>

As an approach that developed before widespread internet use, Routine Activity Theory historically was applied in non-virtual settings, where “convergence” referred to the literal meeting in physical space and time of a

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<sup>75</sup> See *Modern Scams: How Scammers Are Using Artificial Intelligence & How We Can Fight Back: Hearing Before the Senate Special Committee on Aging*, 118<sup>th</sup> Cong. (2023) (statement of Tom Romanoff, Director of the Technology Project, Bipartisan Policy Center) (observing that “[g]enerative AI’s capacity has gotten so good that most people cannot tell the difference between computer-generated content and human-generated content”).

<sup>76</sup> See *id.* (describing how AI-driven automation of confidence and other types of “traditional” scams allows criminals to target more potential victims with greater efficiency).

<sup>77</sup> See *id.*; see also Flitter & Cowley, *supra* note 74 (“[T]he speed of technological development, the falling costs of generative artificial intelligence programs and the wide availability of recordings of people’s voices on the internet have created the perfect conditions for voice-related A.I. scams.”).

<sup>78</sup> See Flitter & Cowley, *supra* note 74 (describing efforts to bolster security against deepfakes as “an arms race between the attackers and defenders”).

<sup>79</sup> See Lawrence E. Cohen & Marcus Felson, *Social Change and Crime Rate Trends: A Routine Activity Approach*, 44 AM. SOCIO. REV. 588, 588 (1979); see also Robert J. Bursik, Jr. & Harold G. Grasmick, *NEIGHBORHOODS AND CRIME: THE DIMENSIONS OF EFFECTIVE COMMUNITY CONTROL* 68-69 (1993).

<sup>80</sup> See Cohen & Felson, *supra* note 79, at 589.

<sup>81</sup> See *id.*

motivated offender and suitable target.<sup>82</sup> More recently, researchers have used the theory to help analyze how trends in internet usage impact the prevalence of fraud.<sup>83</sup> Cybercrime brings together victims and offenders from far-flung locations in a largely unregulated forum.<sup>84</sup> Unlike a robbery on a city street, there generally are no eyewitnesses to internet fraud, and there may be little or no opportunity for friends, family, or law enforcement to intervene while the crime is in progress.<sup>85</sup>

Routine Activity Theory also has proven useful in analyzing trends in financial exploitation of older people, including internet-based fraud.<sup>86</sup> While fraud victims include adults of all ages, there are a number of reasons why older people may be “suitable” as targets. Researchers have found, for example, that social isolation increases fraud risk, as can poor physical health.<sup>87</sup> Age-related cognitive impairment is strongly correlated with fraud victimization, due to the impact on the ability to identify a transaction as a scam.<sup>88</sup> Furthermore, even in the absence of cognitive impairment, more typical age-related cognitive changes

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<sup>82</sup> See *id.* (“[T]his analysis is confined to those predatory violations involving direct physical contact between at least one offender and at least one person or object which the offender attempts to take or damage.”); see also Bursik & Grasmick, *supra* note 79, at 68.

<sup>83</sup> See, e.g., Matthew L. Williams, *Guardians upon High: An Application of Routine Activities Theory to Online Identify Theft in Europe at the Country and Individual Level*, 56 BRIT. J. CRIMINOLOGY 21, 23 (2016); Alex Kigerl, *Routine Activity Theory and Malware, Fraud, and Spam at the National Level*, 76 CRIME L. AND SOC. CHANGE 109, 109 (2021).

<sup>84</sup> But see Williams, *supra* note 83, at 22, 34 (finding that measures such as anti-virus software and secure browsing are negatively associated with online identify theft).

<sup>85</sup> See CFPB FRAMEWORK 2022, *supra* note 8, at 8-9.

<sup>86</sup> See DeLiema, *Elder Fraud and Financial Exploitation*, *supra* note 23, at 707; see also Katalin Parti, *What Is a Capable Guardian to Older Fraud Victims? Comparison of Younger and Older Victims’ Characteristics of Online Fraud Utilizing Routine Activity Theory*, 14 FRONTIERS PSYCH., 1, 3 (June 6, 2023).

<sup>87</sup> See Marguerite DeLiema et al., *Correlates of responding to and becoming victimized by fraud: Examining risk factors by scam type*, 47 INT’L J. OF CONSUMER STUD. 1042, 1054 (2023). Engaging with a scammer is more likely “if [the target does] not have anyone to discuss the offer with,” while being unmarried, widowed, or divorced raises the likelihood of losing money. DeLiema et al., *Exposed to Scams*, *supra* note 39, at 7.

<sup>88</sup> See Rebecca A. Judges, *The Role of Cognition, Personality, and Trust in Fraud Victimization in Older Adults*, 8 FRONTIERS PSYCH. 1, 6 (2017); see also David Brancaccio, *Age of Fraud: Are Seniors More Vulnerable to Financial Scams?*, MARKETPLACE (May 16, 2019), <https://www.marketplace.org/2019/05/16/brains-losses-aging-fraud-financial-scams-seniors/> [<https://perma.cc/Q9SQ-NCH8>]. According to one study, 10% of people over the age of 65 have dementia, and 22% have mild cognitive impairment. See Jennifer J. Manly et al., *Estimating the Prevalence of Dementia and Mild Cognitive Impairment in the US*, 79 JAMA NEUROLOGY 1242, 1245 (2022). The prevalence of dementia increases with age, however, with only 3% of participants between the ages of 60 and 69 having dementia; moreover, the percentages were 18% for participants between the ages of 80 and 84, and 35% for participants who were over the age of 90. *Id.* at 1247.

may negatively impact the ability to avoid fraud.<sup>89</sup> Poor physical or cognitive health also can lead an older adult to place greater trust in others by necessity of the circumstances, which could in turn place their financial assets at risk.<sup>90</sup>

As researchers observed a dramatic increase in fraud during the pandemic, they turned to Routine Activity Theory to analyze the growing problem.<sup>91</sup> COVID dramatically disrupted the daily activities of living, including the circumstances under which people worked, socialized, and shopped. Stay-at-home orders significantly restricted interactions outside of the household.<sup>92</sup> After these initial orders were lifted, the U.S. experienced a lengthy period of gradual reopening, when indoor public gatherings remained limited.<sup>93</sup>

Due to their elevated risk for severe COVID-19, many people over the age of 60 continued to voluntarily reduce their social activities, even once vaccines became available.<sup>94</sup> For some, loneliness may have placed them into a mindset where they became overly trusting of strangers, while fewer interactions with family and friends also reduced opportunities to discuss suspicious communications with trusted individuals who could intervene.<sup>95</sup> Technology served as a lifeline to many older people who were physically isolated and relied

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<sup>89</sup> See Sumit Agarwal, *The Age of Reason: Financial Decisions over the Life Cycle and Implications for Regulation*, in BROOKINGS PAPERS ON ECONOMIC ACTIVITY 52, 55-56 (2009). Researchers have found that older people are more likely than younger people to erroneously judge untrustworthy expressions—such as “averted eyes, insincere smiles and a backward tilt of the head”—as trustworthy. See Meghan Mott, *Brain Changes as Trust Rises with Age*, NIH RSCH. MATTERS (2012), <https://www.nih.gov/news-events/nih-research-matters/brain-changes-trust-rises-age> [<https://perma.cc/E2H9-CJWK>].

<sup>90</sup> 2022 FINCEN ADVISORY ON ELDER EXPLOITATION, *supra* note 53, at 3-4.

<sup>91</sup> See, e.g., Jacky Cheuk Lap Siu et al., *Exploring the Impact of Routine Activity and Financial Strain on Fraud Victimization During the COVID-19 Pandemic in Hong Kong*, 19 ASIAN J. CRIMINOLOGY 441, 441 (2023); Shane D. Johnson & Manja Nikolovska, The Effect of COVID-19 Restrictions on Routine Activities and Online Crime, 40 J. QUANTITATIVE CRIMINOLOGY 131, 131 (2022); Yun Zhang et al., *Vulnerability and fraud: evidence from the COVID-19 pandemic*, 9 HUMAN. AND SOC. SCI. COMMUN. 424 (2022).

<sup>92</sup> See Senan Ebrahim et al., *Reduction of COVID-19 Incidence and Nonpharmacologic Interventions: Analysis Using a US County-Level Policy Data Set*, 22 J. MED INTERNET RSCH. 1 (Dec. 20, 2020) (describing variability of county-level restrictions across the United States instituted in 2020).

<sup>93</sup> See Alaa Elassar, *This Is Where Each State Is During Its Phased Reopening*, CNN (May 27, 2020), <https://www.cnn.com/interactive/2020/us/states-reopen-coronavirus-trnd/> [<https://perma.cc/4AZW-9JQS>].

<sup>94</sup> See Susan M. Benbow et al., *Invisible and at-Risk: Older Adults During the COVID-19 Pandemic*, 34 J. ELDER ABUSE & NEGLECT 70, 70 (2022); Ellen McCarthy, *The Masked Outliers*, WASH. POST, Oct. 27, 2022, at C1. COVID vaccine administration to health care workers and older people living in long-term care facilities began at the end of 2020, and the vaccine became more widely available over the following months. See *CDC Museum COVID-19 Timeline*, U.S. CTR. FOR DISEASE CONTROL (Mar. 15, 2023), <https://www.cdc.gov/museum/timeline/covid19.html> [<https://perma.cc/7V9S-ZVC7>].

<sup>95</sup> See DeLiema et al., *Exposed to Scams*, *supra* note 39, at 715.



on remote interactions for everything from medical appointments to social gatherings.<sup>96</sup> As described *infra*, aging services organizations provided their programs remotely as well.<sup>97</sup> Yet, as older adults increased their internet usage, they also raised the likelihood that they would converge with scammers online.<sup>98</sup>

Meanwhile, across the United States and the world, social disruption also pushed organized crime into these same digital spaces.<sup>99</sup> Many offenses against U.S. residents originated at large scam mills in Southeast Asia that are run by criminal syndicates.<sup>100</sup> These international cyber fraud activities scaled dramatically during the pandemic, with a report by the United Nations Office on Drugs and Crime tying the growth to a dearth of other income streams during the period.<sup>101</sup> Scam mill workers are themselves often victims of human trafficking, having been induced to travel to the region by the promise that they would be employed in legitimate technology jobs or call centers.<sup>102</sup> They instead find themselves imprisoned on large, armed compounds, cut off from their

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<sup>96</sup> See Benbow, *supra* note 94, at 72 (“The inevitable increased use of technology by older adults during lockdowns and social distancing may have exacerbated financial abuse associated with cybercrime, whilst simultaneously attempts to provide equitable, safe access to treatment using virtual health care have imposed new and inadvertent risks of abuse. Although innovative in terms of access, time, and cost effectiveness, virtual/remote care has come with a cost with regards to risk assessment and safeguarding.”); Zhang et al., *supra* note 10, at 1-3.

<sup>97</sup> See discussion *infra* Section II.

<sup>98</sup> DeLiema, *Exposed to Scams* et al., *supra* note 39, at 14 (individuals whom scammers contact via social media or a website have “high engagement and victimization rates”). For a discussion of technology and elder financial exploitation generally, see Zhang et al., *supra* note 10.

<sup>99</sup> See U.S. INST. PEACE, TRANSNATIONAL CRIME IN SOUTHEAST ASIA: A GROWING THREAT TO GLOBAL PEACE AND SECURITY 13-14, 18 (2024); see also Siu, *supra* note 91 (describing the role of international criminal syndicates in internet crime against people living in Hong Kong).

<sup>100</sup> See U.S. INST. PEACE, *supra* note 99, at 27, 35 (noting Myanmar, Laos, and Cambodia in particular house call centers where thousands of workers engage in large-scale scam operations); UNITED NATIONS OFF. ON DRUGS AND CRIME, CASINOS, CYBER FRAUD, AND TRAFFICKING IN PERSONS FOR FORCED CRIMINALITY IN SOUTHEAST ASIA 15-19 (2023) [hereinafter UNODC REPORT], [https://www.unodc.org/roseap/uploads/documents/Publications/2023/TiP\\_for\\_FC\\_Policy\\_Report.pdf](https://www.unodc.org/roseap/uploads/documents/Publications/2023/TiP_for_FC_Policy_Report.pdf) [<https://perma.cc/U8WY-R4ST>]. Fraudulent offshore call centers are located in other foreign countries as well. For example, in collaboration with authorities in India, the FBI prosecuted a tech support scam based in India that laundered money through a family located in Iowa. See FED. BUREAU OF INVESTIGATION, 2023 INTERNET CRIME REPORT, INTERNET CRIME COMPLAINT CTR. 15, 16, (2023), [https://www.ic3.gov/annualreport/reports/2023\\_ic3report.pdf](https://www.ic3.gov/annualreport/reports/2023_ic3report.pdf) [<https://perma.cc/2MAW-SHLW>].

<sup>101</sup> See UNODC REPORT, *supra* note 100, at 7.

<sup>102</sup> See *id.* at 11-13 (describing how trafficking victims are recruited to work at scam mills).

families, and forced to perpetrate fraud.<sup>103</sup> Workers who have escaped tell harrowing stories of imprisonment, forced labor, and torture.<sup>104</sup>

Not all scams against older adults in the U.S. originate abroad, with numerous home-grown fraud enterprises also victimizing enormous numbers of people during COVID.<sup>105</sup> Yet it is worth noting the extraordinary scale of the international schemes. One estimate suggests that as many as half a million people worked in the industry's offshore centers in 2023, looting \$63.9 billion from victims around the world.<sup>106</sup>

Only a few years have passed since the COVID pandemic began, and further research is imperative to fully unpack the range of factors contributing to the rise in fraud and scams. As these inquiries move forward, Routine Activity Theory provides a helpful framework for considering how the pandemic created a perfect storm. Increased online activity brought isolated older adults into contact with motivated, organized criminal actors, most of whom were physically located far away from their unsuspecting targets. Without suitable guardians to intervene, the criminal actors caused billions of dollars in harm to their victims.

## II. AGING SERVICES NETWORK

As fraud increased during the pandemic, local aging services agencies stepped in to help their older clients to avoid scams, and to begin the recovery process. The U.S. Aging Services Network ("the Network") was created in 1973 to facilitate local implementation of the Older Americans Act of 1965 (OAA).<sup>107</sup> The U.S. Administration on Aging, which is a sub-agency within the U.S. Department of Health and Human Services, sits at the head of the Network.<sup>108</sup> The Network also includes State Units on Aging and Area Agencies on Aging (AAAs).<sup>109</sup> Most AAAs in Massachusetts also serve as Aging Service Access

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<sup>103</sup> See UNODC REPORT, *supra* note 100, at 13-15; Isabelle Qian & Pablo Robles, *Duped, Trapped Then Tortured in Scam Camp*, N.Y. TIMES (Dec. 20, 2023), at A1.

<sup>104</sup> See UNODC REPORT, *supra* note 100, at 13-15 (describing how supervisors coerce trafficking victims to meet quotas by using isolation, fines, physical abuse, sexual exploitation, and threats to sell organs, or to sell the victims to other scam mills or to brothels); see also Cezary Podkul, *Human Trafficking's Newest Abuse: Forcing Victims Into Cyberscamming*, PROPUBLICA (Sept. 13, 2022), <https://www.propublica.org/article/human-traffickers-force-victims-into-cyberscamming> [<https://perma.cc/J3SJ-YSTM>].

<sup>105</sup> See FED. TRADE COMM'N, *supra* note 49, at 14 (describing case resolution involving tech support scheme); see also Jaclyn Diaz, *Jen Shah, 'Real Housewives' Star, Sentenced to 6 1/2 Years for Telemarketing Fraud*, NAT. PUB. RADIO (Jan. 8, 2023), <https://www.npr.org/2023/01/06/1147452652/jen-shah-real-housewives-star-sentenced-fraud> [<https://perma.cc/S9NB-KUVP>].

<sup>106</sup> U.S. INST. PEACE, *supra* note 99, at 26 tbl. 1.

<sup>107</sup> Gallo & Wilber, *supra* note 14, at 153.

<sup>108</sup> *Id.* at 152-53.

<sup>109</sup> *Id.* at 152. The State Agency on Aging for Massachusetts is the Executive Office of Elder Affairs. See *Protecting Older Adults from Abuse*, COMMONWEALTH MASS.,

Points (ASAPs), which are created by state law “to assist [Medicaid-eligible] elders in maintaining their residences in the community.”<sup>110</sup>

AAAs form the backbone of the Network and include both public agencies and private, non-profit organizations.<sup>111</sup> There are over 600 AAAs throughout the country.<sup>112</sup> Pursuant to the OAA, they provide services in five primary areas: caregiving; nutrition, including meal delivery; health and wellness; elder rights, including abuse prevention; and a variety of other “supportive services” on the basis of local community needs.<sup>113</sup> Services may be provided either directly, or through contracts with other public and private providers.<sup>114</sup>

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<https://www.mass.gov/protecting-older-adults-from-abuse> (last visited Dec. 8, 2024); see also *Alzheimer’s Association Map Through the Maze Exhibitor Hall – Massachusetts Executive Office of Elder Services*, ALZHEIMER’S ASS’N, <https://www.alz.org/manh/events/map-through-the-maze/sponsor-exhibitor/exhibitors/ma-executive-office-of-elder-affairs> (last visited Sept. 27, 2024).

<sup>110</sup> See Mass Gen. Laws ch. 19A, § 4B (2003). Some entities are both AAAs and ASAPs; and some are either one type of agency, or the other. *Compare Aging Services Access Points (ASAPs) in Massachusetts*, COMMONWEALTH MASS., <https://www.mass.gov/location-details/aging-services-access-points-asaps-in-massachusetts> (last visited Sept. 27, 2024) (list of Massachusetts ASAPs), with *Aging Services Access Points Area Agencies on Aging by Region*, MASS HOME CARE (Jan. 2, 2020), <https://masshomecare.info/wp/wp-content/uploads/2020/09/ASAP-AAAs-by-City-Town-September-2020.doc> [<https://perma.cc/75DN-3LTC>] (list of Massachusetts AAAs and ASAPs).

<sup>111</sup> See *Aging Services Network*, COMMONWEALTH MASS., <https://www.mass.gov/councils-on-aging-senior-centers> [<https://perma.cc/LZH8-B2C2>] (last visited Sept. 28, 2024); 42 USC § 3025(a)(2)(A) (2016) (noting State agency in charge of providing for the elderly shall designate “a public or private nonprofit agency or organization as the area agency on aging”).

<sup>112</sup> See #AAAS AT WORK, *supra* note 14, at 6. For a list of AAAs and ASAPs in Massachusetts, see MASS HOME CARE, *supra* note 109. In Massachusetts, organizations that are designated as AAA also may house Adult Protective Services (APS). See, e.g., *Protective Services*, AGESPAN, <https://agespan.org/solutions/safety/#:~:text=Under%20Massachusetts%20law%2C%20AgeSpan%20is,and%20to%20prevent%20a%20recurrence> [<https://perma.cc/WG95-7NYM>] (last visited Dec. 8, 2024); *Protecting Elders At Risk of Abuse*, SPRINGWELL, <https://springwell.com/service/protecting-elders-at-risk-of-abuse/> [<https://perma.cc/2DAH-2VJK>] (last visited Dec. 8, 2024); see also Adult Protective Services Functions and Grant Programs, 88 Fed. Reg. 62503, 62510-11 (U.S. Dep’t of Health and Hum. Servs. proposed Sept. 12, 2023) (to be codified at 45 C.F.R. pt. 1324). APS programs are charged with investigating and addressing incidents of mistreatment against older adults and adults living with disabilities. See *National Voluntary Consensus Guidelines for State Adult Protective Services Systems*, U.S. ADMIN. FOR CMNTY. LIVING (2020), <https://acl.gov/sites/default/files/programs/2020-05/ACL-Guidelines-2020.pdf> [<https://perma.cc/AE77-XL3C>]. APS programs often address financial exploitation of older adults, typically focusing on the most egregious incidents. See DeLiema, *Elder Fraud and Financial Abuse*, *supra* note 23, at 708. APS generally would not become involved on a frequent basis with the more common types of frauds and scams that are the focus of this Article.

<sup>113</sup> Gallo and Wilber, *supra* note 14, at 154.

<sup>114</sup> See *Aging Services Network*, *supra* note 110. AAAs may depend on support from

Many AAAs partner with municipal agencies that serve a smaller geographic area. In Massachusetts, this includes the Commonwealth's 350 Councils on Aging (COAs), which have been described as the "front door" of services and supports for older residents and those who care for them."<sup>115</sup> COAs are town- and city-based agencies that receive municipal, state and federal funding to provide services such as transportation, meals, counseling, and fitness and other recreational activities.<sup>116</sup> COAs also offer assistance with public benefits, health insurance, and personal financial counseling.<sup>117</sup> Almost all Massachusetts COAs are connected with a senior center that provides both a social gathering place and a central location for obtaining information about services available in the community.<sup>118</sup>

When the COVID pandemic began in March 2020, aging services providers faced increased and evolving client needs, while lockdowns restricted their traditional channels of service delivery.<sup>119</sup> Despite these challenges, most AAAs and COAs were able to continue serving their clients.<sup>120</sup> Some agencies continued providing services in person, often with adjustments to address staff and client COVID-related safety concerns.<sup>121</sup> Many agencies expanded remote services and programming.<sup>122</sup> They also prioritized programs to address increasing social isolation, such as daily check-in calls and group online programming.<sup>123</sup> These types of activities can be critical to helping individuals maintain levels of engagement and activity that foster healthy aging.<sup>124</sup>

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volunteers, many of whom are themselves older adults. #AAAS AT WORK, *supra* note 14, at 17, 20.

<sup>115</sup> Ceara Somerville et al., *Responding to COVID-19: How Massachusetts Senior Centers are Adapting*, CTR. FOR SOC. AND DEMOGRAPHIC RSCH. ON AGING PUBL'NS 1 (2020), <https://scholarworks.umb.edu/cgi/viewcontent.cgi?article=1044&context=demographyofaging> [<https://perma.cc/78SQ-XJ2Q>]. See also WILLIAM J. BRISK & ET AL., MASSACHUSETTS ELDER LAW § 108 (2d. ed. 2019).

<sup>116</sup> See *Aging Services Network*, *supra* note 111.

<sup>117</sup> See Somerville et al., *supra* note 115, at 1; BRISK, *supra* note 115.

<sup>118</sup> See *Aging Services Network*, *supra* note 111; Somerville, *supra* note 115, at 1.

<sup>119</sup> In a national survey of AAAs taken in May 2020, 93% reported serving more clients, and 69% reported increased need among existing clients since the beginning of the pandemic. See #AAAS AT WORK, *supra* note 14, at 5.

<sup>120</sup> See *id.* In a survey of Massachusetts COAs that was conducted from April through May of 2020, 91% reported that they were "continuing to provide limited programming or essential services to the community," but 6% reported that they were closed. See Somerville et al., *supra* note 115, at 2.

<sup>121</sup> For example, many AAAs that provided congregate meals prior to the pandemic were able to expand home-delivery and "grab-and-go" services to include clients who previously received their meals in-person. See #AAAS AT WORK, *supra* note 14, at 10.

<sup>122</sup> See *id.* at 12.

<sup>123</sup> *Id.* at 8 (60% of AAAs stated that they were "already seeing the negative health effects of social isolation on the older adults they serve.").

<sup>124</sup> See generally Sheila Novek et al., *Social Participation and its Benefits*, CENTRE ON

Technology-based service delivery offered many advantages, but it also posed challenges for some organizations and the individuals relying on them.<sup>125</sup> Not all aging services providers had sufficient resources or support to make the transition smoothly.<sup>126</sup> Because many older adults lack access to the internet, they also continued to rely on non-digital media, such as the telephone and cable access television.<sup>127</sup>

### III. AGING SERVICES SURVEY

The authors distributed an electronic survey to aging services organizations across Massachusetts via email in May 2022 to learn how fraud and scams were impacting their operations and their clients.\* The project was funded by an Academic Research Grant from the Albert & Elaine Borchard Foundation Center on Law and Aging. This section describes the survey's development, distribution, and key findings.

#### A. *Survey Development and Distribution*

The survey was developed with the goals of understanding the experiences of Massachusetts aging services providers with fraud and scams and learning about emerging best practices for prevention and response. The research team developed and distributed the survey with feedback from community partners including Massachusetts Councils on Aging (MCOA), the Massachusetts Executive Office of Elder Affairs (EOEA), and Greater Boston Legal Services (GBLS).<sup>128</sup>

A copy of the survey questions is included in the Appendix to this Article. Respondents were asked about the experiences of their organizations and their clients with fraud and scams during the pandemic, including: the frequency of reports of fraud and scams by clients, and whether this reflected change since the period prior to the pandemic; what measures the organization was taking in response to fraud and scams; experiences with reporting processes; what outside resources were available to the organization to assist clients; and what additional resources would have been helpful.<sup>129</sup> The survey included both multiple-choice and open-ended questions.<sup>130</sup>

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AGING (2013), <https://umanitoba.ca/centre-on-aging/sites/centre-on-aging/files/2021-02/centre-aging-research-publications-report-social-participation-and-its-benefits.pdf> [<https://perma.cc/C74M-FZUL>].

<sup>125</sup> See #AAAS AT WORK, *supra* note 14, at 23.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*; see also Somerville et al., *supra* note 115, at 4.

\* Survey results are on file with the authors.

<sup>128</sup> The survey also was submitted to the University of Massachusetts Boston Institutional Review Board, which determined that it was exempt from review.

<sup>129</sup> See *infra* Appendix.

<sup>130</sup> *Id.*

Distribution and analysis were conducted using Qualtrics survey software. A total of 416 individuals were contacted via email and asked to participate. These individuals worked for AAAs, ASAPs, COAs, and legal services organizations that specifically serve older people. These participants were selected because of the likelihood that their staff would have encountered clients who either were targeted or fell victim to fraud and scams during the pandemic.

The survey was open from May through July 2022. By the time that the survey was distributed, stay-at-home orders had been lifted, vaccines were available, and most aging services organizations had returned to providing in-person services.<sup>131</sup> Over 90% of the survey respondents indicated that their organizations were providing services in-person at the time of the survey administration.<sup>132</sup>

Responses were received from 209 participants, constituting a response rate of 50%.<sup>133</sup> These respondents work for organizations that are located in 186 cities and towns of Massachusetts, including organizations in each of the Commonwealth's fourteen counties.<sup>134</sup> Just under three quarters of respondents indicated that they worked for either a COA, senior center, or community center.<sup>135</sup> An additional 16% reported working for an AAA or an ASAP.<sup>136</sup> Other respondents worked for legal services organizations, police departments, or other types of organizations providing aging services.<sup>137</sup> The large majority of the responses were completed by individuals who described themselves as serving in leadership or executive roles.<sup>138</sup>

After the survey closed, Qualtrics was used to tally the responses. Two members of the research team reviewed the narrative responses to manually identify and classify common themes. Disagreements about classifying narrative responses were reviewed and resolved to reach a consensus.

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<sup>131</sup> See McCarthy *supra* note 94; Section II.

<sup>132</sup> See Summary Results at Question 5.

<sup>133</sup> See *id.* at Question 3.

<sup>134</sup> *Id.* at Question 1.

<sup>135</sup> See *id.* at Question 2.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* Survey recipients were able to share the survey link with others and, as a result, some respondents worked for organizations other than AAAs, ASAPs, COAs, and legal services organizations.

<sup>138</sup> See Summary Results at Question 3. Because Councils on Aging tend to be thinly staffed, even staff in leadership or executive roles likely would have some direct contact with individual clients of the organizations. See Somerville et al., *supra* note 115 at 6-7.

### B. Survey Findings

1. Almost all respondents knew of clients who had been involved with a scam

Almost 90% of respondents indicated that they had encountered one or more older clients who had been victimized by a financial scam during the pandemic.<sup>139</sup> Forty-seven percent believed that the number of scams targeting their clients had increased during the pandemic, while one third believed that the numbers had stayed about the same.<sup>140</sup>

Many narrative responses provided details about specific types of scams that were committed against the respondents' clients. Confidence scams (including romance scams and grandparent/grandchild scams) were mentioned most frequently, followed by government impersonator scams; phishing-type scams; and scams asking the target to claim money from a lottery, sweepstakes, or inheritance.<sup>141</sup> Descriptions of government imposter scams mentioned numerous agencies and programs, including the Internal Revenue Service, Medicare, and Social Security.<sup>142</sup> A few responses stated that scammers impersonated the online retailer Amazon.<sup>143</sup> One respondent described how a scammer impersonated the local power department in communications to an older resident.<sup>144</sup> A number of responses described tech support scams, in which a scammer fraudulently notifies someone that their computer needs maintenance.<sup>145</sup>

In one noteworthy incident, scammers tried to defraud older adults by hijacking the well-intentioned efforts of an aging services organization.<sup>146</sup> The

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<sup>139</sup> See Summary Results at Question 8 (87% of respondents who shared the number of times since the pandemic began that they “learned of an older client who has been victimized by a financial scam” indicated a number greater than zero).

<sup>140</sup> See *id.* at Question 9.

<sup>141</sup> See Summary of Narrative Responses at Question 10.

<sup>142</sup> See Survey Responses at Question 10, response number 26 (IRS); response 43 (Medicare); and response 49 (Social Security Administration).

<sup>143</sup> For example, a respondent described the following scenario:

“A woman was called by [someone impersonating Amazon, who claimed] her account had been hacked and she needed to pay them to reinstate it. She was instructed to purchase a gift card for its max[imum] amount and read them the numbers over the phone. She was stopped before purchasing the card.” *Id.*, response 227.

<sup>144</sup> In this scam, the perpetrator told a town resident that “if she did not pay immediately her power would be shut off. She was told [she] had pay with prepaid gift card over the phone.” According to the respondent, the municipal utility company sent a communication to all customers informing them of the scam. See *id.*, response 94.

<sup>145</sup> Tech support scams were mentioned less frequently than confidence scams, government impersonator scams, phishing scams, or lottery/sweepstakes/inheritance scams. See Summary of Narrative Responses at Question 10.

<sup>146</sup> See Survey Responses at Question 10, Response 89; Rich Harbert, *Phone scam uses recording of Plymouth senior center director*, WICKED LOCAL OLD COLONY MEMORIAL (Mar.

incident—which also was described in a local newspaper—reportedly involved a scammer fraudulently re-using a recording of the town’s senior center director that had previously been sent as a public service robo call to provide information to users of the center. Upon learning of the scam, the senior center sent out a new message to warn recipients about the fraud.<sup>147</sup>

2. Respondents described mixed experiences reporting incidents to law enforcement

Although about half of respondents indicated that they had reported a scam and were either very satisfied or somewhat satisfied, others were less positive about the experience.<sup>148</sup> About one third reported that they were neither satisfied nor dissatisfied, and close to 10% reported that they were either somewhat or completely dissatisfied.<sup>149</sup>

Several narrative responses described a sense of futility with respect to the reporting process.<sup>150</sup> They noted that even when they reported incidents, their clients were unlikely to recover the money they had lost.<sup>151</sup> A few respondents noted that they had not heard back from the law enforcement agencies to whom they made their reports.<sup>152</sup> Other responses described positive reporting experiences with certain agencies, and also noted situations where clients were able to recover money.<sup>153</sup>

One respondent explained that their organization was not certain where to report incidents. This respondent elaborated: “scams are everyone’s job and no

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31, 2021), <https://www.wickedlocal.com/story/old-colony-memorial/2021/03/31/phone-scam-uses-plymouth-senior-center-directors-recorded-voice/4826455001/> [https://perma.cc/6TSX-LD6E].

<sup>147</sup> See Harbert, *supra* note 146.

<sup>148</sup> Survey Responses at Question 12a.

<sup>149</sup> Summary Results at Question 12a.

<sup>150</sup> For example, one respondent stated, “[y]ou know there is nothing that can really be done, yet you report it anyway.” *Id.* at Question 12a, response 257.

<sup>151</sup> One respondent stated, “There is never a good resolution if someone has already sent money. It’s impossible to get back and seemingly no way to prevent it from happening again. It’s frustrating!” *Id.* at Question 12a, response 245. Another said that “[t]he likelihood of the senior’s large amount of money being recovered was unlikely.” *Id.* at Question 12a, response 202. Said another, “Once the money has moved, it is impossible to get back. I’m not satisfied with that but understand the constraints.” *Id.* at Question 12a, response 45.

<sup>152</sup> One respondent noted that “[s]ometimes the cases are passed around or response time is too long.” *Id.* at Question 12a, response 256. Another noted that the state Attorney General’s Office “was excellent for one case,” but also shared their opinion that “not much can be done by local police.” *Id.* at Question 12a, response 32.

<sup>153</sup> See *id.* (commenting positively on experience reporting to state Attorney General). One respondent said they were “sorry [their client] lost the initial sums but thankful she recovered the last.” *Id.* at Question 12a, Response 157.



one's job. There are multiple places to report, but I'm never sure where the right place is . . . and what the follow up is that they are supposed to do."<sup>154</sup>

3. Client education was the most common preventive approach

Respondents were asked to describe what services their organizations provided to help prevent clients from becoming scam victims. The most common was education for clients, with over two thirds of the responses describing speakers, workshops, written materials, or some other type of client education.<sup>155</sup> Numerous responses described using regular newsletters to share information about avoiding scams.<sup>156</sup> Many described speakers, workshops, or other live training offered in conjunction with partner organizations.<sup>157</sup> About 40% of the responses described partnerships with law enforcement.<sup>158</sup> A handful of respondents indicated that their organizations had established partnerships with banks to address the risks to their clients.<sup>159</sup>

Respondents were asked what, in their opinions, were good approaches to prevent financial fraud and scams. In their narrative answers, education, training, and increasing client awareness were the approaches most frequently cited.<sup>160</sup> Numerous respondents indicated that training must be consistent and repeated to be effective.<sup>161</sup> Several noted the importance of making any training relatable to participants, and of reducing the negative stigma associated with scams.<sup>162</sup>

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<sup>154</sup> *Id.* at Question 15, Response 61.

<sup>155</sup> See Summary of Narrative Responses at Question 14.

<sup>156</sup> See, e.g., Survey Responses at Question 8, Response 110 and Question 14, Response 117; see also Summary of Narrative Responses at Question 14.

<sup>157</sup> See Summary of Narrative Responses at Question 14. For example, a respondent described a "[m]onthly 'Cops & Coffee'" hour where elders can come in and learn about /discuss scams." Survey Responses at Question 14, Response 19. Another respondent described a partnership with their county's District Attorney to provide client training. *Id.* at Question 14, Response 18.

<sup>158</sup> See Summary of Narrative Responses at Question 14; see also responses cited *infra* note 159.

<sup>159</sup> See Summary of Narrative Responses at Question 14; see also Survey Responses at Question 14, Response 46, and Response 57 (mentioning seminars, bi-annual programs presented in conjunction with banks).

<sup>160</sup> See Summary of Narrative Responses at Question 18.

<sup>161</sup> See e.g., *id.* at Question 18, Response 156 (recommending "consistent reminders to people to not trust methods of communication and verify the source of requests,") and Response 195 ("Constant education is vital!!!").

<sup>162</sup> See Survey Responses at Question 15, Response 91 ("[I] find it hard as sometimes the older adults will say 'we know about scams' or '[I wouldn't] fall for that'! [M]akes me think they sometimes shut their mind to it. [W]e need to overcome the stigma [] and embarrassment."); Question 18, Response 109 (noting it is easier to get older adults to "relate" to training when "personal experiences [are] shared").

For example, one response explained that their organization's "best trainings" involved role-playing by participants, because passive informational materials cannot "replicate what the actual scam is like."<sup>163</sup> At the interactive training, "many [participants] admitted to being scammed when they never had before."<sup>164</sup>

#### 4. Aging services staff expressed frustration

Several respondents expressed concern that their efforts to educate clients were not changing behavior.<sup>165</sup> A number of comments observed that even individuals who are well-versed in the risks may nonetheless engage with scammers—or, as one respondent stated, "even the most educated can be taken."<sup>166</sup> Stated one respondent, "I think [our clients] understand the concept of all the scams but unfortunately due to loneliness, boredom, forgetfulness, or not wanting to be rude, they talk to [scammers] who seem kind on the phone."<sup>167</sup> Another stated: "sometimes the older adults will say 'we know about scams' or 'I wouldn't fall for that!' [It] makes me think they sometimes shut their mind[s] to it. We need to overcome the stigma [] and embarrassment."<sup>168</sup> This respondent suggested that people who have been harmed by scams could help others by sharing their experiences.<sup>169</sup>

Other comments expressed the need to reach older people who are either less involved or not involved at all with their local aging services organizations.<sup>170</sup> One respondent specifically identified older people who are homebound and people with limited English proficiency as less likely to receive their organization's materials on scam prevention.<sup>171</sup>

In addition, numerous responses expressed skepticism about law enforcement's ability to stop fraud from occurring and recover lost funds.<sup>172</sup>

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<sup>163</sup> Survey Responses at Question 18, Response 63.

<sup>164</sup> *Id.*

<sup>165</sup> See Summary of Narrative Responses at Question 15; see e.g., Survey Responses at Question 15, Response 23, Response 91, and Response 240.

<sup>166</sup> Survey Responses at Question 15, Response 33.

<sup>167</sup> *Id.* at Question 15, Response 240.

<sup>168</sup> *Id.* at Question 15, Response 91.

<sup>169</sup> *Id.*

<sup>170</sup> For example, one response observed that "it's hard to know if everyone reads our newsletters, looks at our messages online, etc. People that are active in the center are educated often; I have more concern for the seniors in town that are not active in our center." Survey Responses at Question 15, Response 32. Another noted that "[o]nly those who attend our events hear [the organization's fraud and scams outreach] on a regular basis." *Id.* at Question 15, Response 24.

<sup>171</sup> One respondent expressed the desire to "[h]ave better outreach to those who are homebound or who do not speak or read English." *Id.* at Question 15, Response 4.

<sup>172</sup> See Summary of Narrative Responses. For example, one respondent wrote "you know there is nothing that can really be done, yet you report it anyway." Survey Responses at Question 12a, Response 257. Another stated that "Reporting to law enforcement usually does

One respondent wrote, “There is nothing our organization can do [beyond] what we are [doing]. It is really up to the government to stop these attacks . . . and prosecute to the fullest extent of the law. You don’t see much of this happening.”<sup>173</sup> This sentiment was echoed by many others who also wrote about the need to stop the perpetrators of these incidents.<sup>174</sup>

#### IV. DISCUSSION AND RECOMMENDATIONS

##### A. *Limitations of the Survey*

The survey results illuminate aging service providers’ perspective on the pandemic’s wave of fraud against older people. The 50% response rate is notably high, given the operational challenges during the summer of 2022 due to the continuing pandemic.<sup>175</sup> There are, however, some limitations of the study, and caution should be exercised in generalizing the results. Because the survey was distributed electronically, it may include a greater proportion of responses from aging services personnel who are more comfortable with technology, or who were simply better able to keep up with electronic messages during the period when the survey was open.

The survey was conducted in Massachusetts because the principal investigators are affiliated with the University of Massachusetts Boston’s Gerontology Institute and were able to leverage the Institute’s existing relationships with the Massachusetts aging services network. However, states experienced the impacts of COVID-19 differently across the course of the pandemic, which could limit the broader applicability of the findings beyond Massachusetts.<sup>176</sup>

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not result in any closure.” *Id.* at Question 15, Response 47. In response to Question 15, “What do you wish your organization could do to prevent frauds and scams,” one respondent stated, “Good question. Stop it from happening in the first place. Money is gone, never returned once you’ve paid a scammer. Identity theft can happen to anyone, even those who have some awareness of the possibility.” *Id.* at Question 15, Response 27.

<sup>173</sup> Survey Responses at Question 15, Response 137.

<sup>174</sup> See, e.g., Survey Responses at Question 15, Response 17 (“Unless or until there are federal or state resources to stop scammers, the most important issue is how to prevent someone from being taken advantage of.”); Question 15, Response 131 (“Catch the criminals and heavily publicize it in the media and how they did it.”); Question 15, Response 22 (“[K]nowing that those doing it would be prosecuted would go a long way to making people feel better.”); Question 17, Response 5 (“[M]ore ability for law enforcement to catch and prosecute offenders” would help).

<sup>175</sup> For a discussion of the challenges faced by aging services providers during this period, see *supra* notes 119-127 and accompanying text.

<sup>176</sup> See William H. Frey, *One Year In, COVID-19’s Uneven Spread Across the U.S. Continues*, BROOKINGS (Mar. 5, 2021), <https://www.brookings.edu/articles/one-year-in-covid-19s-uneven-spread-across-the-us-continues/> [https://perma.cc/NJG8-GTU9].

### B. *Comparisons with National Data*

The high number of respondents whose clients had encountered a scam was consistent with federal government data showing a sharp increase in incidents during the period.<sup>177</sup> Forty-seven percent of survey respondents indicated that they believed these numbers had climbed since the time prior to the pandemic, suggesting that the national upward trends were visible to many, but not all, of these local entities.<sup>178</sup>

Whereas the national data reported in Section I is based on individual reports to federal agencies,<sup>179</sup> the information collected through the survey consists of second-hand reports shared by social service providers about their clients.<sup>180</sup> This is a fundamentally different method of measuring and understanding fraud based upon the direct point-of-view of the providers, rather than the individuals targeted. The survey responses undoubtedly exclude important details about these incidents that were not shared with the providers, and therefore were not reported through the survey. Also missing from the survey are those incidents that clients chose not to share with their local aging services organization.<sup>181</sup>

Despite these limitations, future, periodic surveys of aging services organizations could help supplement the imperfect data generated from direct reports to government agencies.<sup>182</sup> Some victims may share experiences with trusted staff at their local aging services organization that they do not report to local police, to the FBI, or to the FTC. If so, then the information collected by aging services may capture incidents that are excluded from other data sets.<sup>183</sup>

### C. *Education Through Aging Services Providers*

Respondents indicated that client education is a best practice and also a significant focus of their efforts to prevent fraud.<sup>184</sup> Even prior to the pandemic, many providers featured educational programming on financial exploitation and

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<sup>177</sup> See *supra* notes 32–38 and accompanying text.

<sup>178</sup> See *supra* note 140 and accompanying text.

<sup>179</sup> See *supra* notes 42–48 and accompanying text (explaining that data based on individual reports likely underrepresents the true number of scams).

<sup>180</sup> See discussion *supra* Section III.A (describing survey participants).

<sup>181</sup> As noted previously, respondents may not wish to report incidents due to shame and embarrassment. See *supra* notes 42–45.

<sup>182</sup> Elder abuse research has used assessments conducted by health care and other service providers. For a discussion of the potential opportunities and challenges of using second-hand reports on elder abuse, see Scott R. Beach et al., *Screening and detection of elder abuse: Research opportunities and lessons learned from emergency geriatric care, intimate partner violence, and child abuse*, 28 J. ELDER ABUSE NEGL. 185, 187–88 (2016).

<sup>183</sup> See *id.* Secondhand reports are filtered through the lens of the service provider, and the provider's subjective view of a situation may differ from the experience of the individual victim. See *id.* at Table 1 (citing differing viewpoints as a challenge to using health care provider screening to accurately identify elder abuse).

<sup>184</sup> See *supra* notes 155–64 and accompanying text.

related topics among their offerings to clients and were prepared to continue serving in this role.<sup>185</sup> Their belief in education as a best practice aligns with studies finding that teaching consumers about scams can reduce the likelihood that they will engage with scammers or lose money.<sup>186</sup> One study funded by the FINRA Investor Education Foundation<sup>187</sup> found that consumers who were armed with knowledge of specific types of scams were 80% less likely to engage with them; and that, if they did engage, they were 20% less likely to lose money.<sup>188</sup>

This and other research provide insight into how thoughtful design can maximize the impact of training.<sup>189</sup> For example, training should be both (1) “scam-specific,” and (2) “directed to individuals who have a set of characteristics that make them particularly vulnerable to that type of scam.”<sup>190</sup> The most effective interventions address mental frames that enhance vulnerability, in addition to providing descriptive information about specific scams.<sup>191</sup> For example, people who are inclined to trust authority are more likely to fall victim to government imposter scams, so training about such scams should teach participants that it is important to verify the identity of anyone who claims to work for the government.<sup>192</sup> People who are confident in their

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<sup>185</sup> See USAGING, 2020 AAA NATIONAL SURVEY REPORT: MEETING THE NEEDS OF TODAY’S OLDER ADULTS 8 (2020), <https://www.usaging.org/Files/AAA-Survey-Report-new-identity-508.pdf> [<https://perma.cc/R79D-F9KY>] (85% of surveyed AAAs provided community training about elder abuse, and 62% provided training specifically on financial abuse).

<sup>186</sup> See HONICK ET AL., *supra* note 41, at 26; see also DeLiema et al., *Exposed to Scams*, *supra* note 39, at 11-12 (survey found that 30% of respondents who did not engage knew about the scam before they were targeted compared to 12% of people who engaged but were not victimized).

<sup>187</sup> The Financial Industry Regulatory Council (FINRA) operates under the supervision of the U.S. Securities and Exchange Commission to regulate FINRA member companies, including broker dealers. The FINRA Investor Education Foundation funds initiatives related to “financial capability and fraud prevention.” See FIN. INDUS. REGUL. COUNCIL, 2022 FINRA ANNUAL FINANCIAL REPORT 3, 6 (2023) [https://www.finra.org/sites/default/files/2023-06/2022\\_Annual\\_Financial\\_Report.pdf](https://www.finra.org/sites/default/files/2023-06/2022_Annual_Financial_Report.pdf) [<https://perma.cc/3ZA5-ZRLW>].

<sup>188</sup> See HONICK ET AL., *supra* note 41, at 26.

<sup>189</sup> The FINRA Investor Education Foundation has supported research into the risk factors for fraud and the pedagogical approaches that are most effective at reducing individual risk. See HONICK ET AL., *supra* note 42, at 26; MARGUERITE DELIEMA ET AL., DOES ONE SIZE FIT ALL? AN EXAMINATION OF RISK FACTORS BY SCAM TYPE 5 (FINRA Inv. Education Found., Capability 2022); DeLiema et al., *Exposed to Scams*, *supra* note 39; see also DeLiema et al., *supra* note 87, at 1055-56.

<sup>189</sup> See HONICK ET AL., *supra* note 41, at 27.

<sup>190</sup> DeLiema et al., *Exposed to Scams*, *supra* note 39, at 5; see also DeLiema et al., *Correlates of responding to and becoming victimized by fraud: Examining risk factors by scam type*, *supra* note 87, at 1055-56.

<sup>191</sup> See HONICK ET AL., *supra* note 41, at 26-27.

<sup>192</sup> See *id.* at 26.

investing abilities are more likely to fall for investment scams, so training about investment scams should teach participants to investigate thoroughly when considering any new financial opportunity, even if they believe they already understand it.<sup>193</sup>

Developing sophisticated training materials incorporating the latest research requires specialized expertise that few aging services providers will have in-house. As described in Section II, many agencies are thinly staffed, under-resourced, and rely on outside contractors and volunteers to provide services.<sup>194</sup> While existing newsletters and programming can be effective channels to distribute information, providers require additional resources and outside help to maximize the quality and effectiveness of their messaging.

On the other hand, local providers are well-situated to tailor content and means of delivery based on their knowledge of their local communities.<sup>195</sup> For example, they can assess the needs of their clientele for materials that are linguistically and culturally appropriate, and that are provided in accessible formats.<sup>196</sup> The recommendation to provide training to clients with limited English proficiency also points to the need to make information available equitably across the diverse populations accessing aging services.<sup>197</sup>

#### D. *Perceptions of Enforcement Trends*

Several respondents suggested that law enforcement should do more to prevent crimes before they occur, to catch and prosecute the perpetrators, and to return funds to the victims.<sup>198</sup> Although the large majority of these crimes go unsolved, federal enforcement agencies have, in fact, reported a number of civil enforcement successes since the COVID pandemic began, including several that have returned money to victims.<sup>199</sup> The Department of Justice also continues to

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<sup>193</sup> See *id.* at 21-23.

<sup>194</sup> See *supra* Section II.

<sup>195</sup> See USAGING, *supra* note 185, at 6 (“[AAAs] respond to the unique needs, challenges and demographics of the older adults in the communities they serve.”).

<sup>196</sup> See *id.* at 6-7 (53% of AAAs provide “translator/interpreter assistance”).

<sup>197</sup> *Id.*

<sup>198</sup> See survey responses discussed *supra* note 174.

<sup>199</sup> See, e.g., FED. TRADE COMM’N, PROTECTING OLDER CONSUMERS 2021-2022: A REPORT OF THE FEDERAL TRADE COMMISSION 11 (2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P144400OlderConsumersReportFY22.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P144400OlderConsumersReportFY22.pdf) [<https://perma.cc/L68M-JZYT>] (describing almost \$300,000 in remediation paid to mostly older consumers who, the FTC alleged, paid “large sums” to Elite IT Partners, Inc. after “intimidation and scare tactics” convinced them to purchase unnecessary tech support services); *id.* at 12 (describing \$1.8 million in remediation to consumers who allegedly paid the company Lifewatch Inc. for medical alert systems that had been advertised as free in telemarketing calls); *id.* at 14 (describing \$23 million settlement in a case against MOBE Ltd., alleging that MOBE’s advertisements stated that their program was “A Surefire Way To Create A Six-Figure Retirement Income In Less Than 12 Months.”). DOJ and FTC also returned \$115 million to consumers, including many older people, through a forfeiture by the company MoneyGram in connection with a deferred

prosecute numerous scams targeting older people, with noted cases involving romance, grandparent, and tech support scams, among others.<sup>200</sup> While there is much room for additional progress—particularly in the area of international enforcement—the common perception that law enforcement efforts are completely stymied is inaccurate.<sup>201</sup>

Furthermore, prompt reporting to both law enforcement and financial institutions is vital to reducing losses and recovering funds.<sup>202</sup> In some instances, fraudulent transactions may be halted before funds have left the custody of the victim's financial institution.<sup>203</sup> In 2018, the FBI established the IC3 Recovery Asset Team, which facilitates communication between FBI field offices and financial institutions.<sup>204</sup> Complaints received by the FBI are entered into a database that is analyzed to identify trends in suspicious activity.<sup>205</sup> In addition, some complaints are shared with financial institutions to attempt to

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prosecution action that had been entered with the company several years earlier. *See* Press Release, U.S. Dep't of Just., Nearly 40,000 Victims Receive Over \$115M in Compensation for Fraud Schemes Processed by MoneyGram (Feb. 10, 2023), <https://www.justice.gov/opa/pr/nearly-40000-victims-receive-over-115m-compensation-fraud-schemes-processed-moneygram#:~:text=In%20November%202018%2C%20MoneyGram%20agreed,processed%20during%20the%20DPA%20term> [<https://perma.cc/5ZYW-ZDUA>].

<sup>200</sup> *See, e.g.*, Press Release, U.S. Dep't of Just., Money Launderer Sentenced for \$8 Million Romance Scam Fraud Scheme (Mar. 21, 2023), <https://www.justice.gov/usao-ma/pr/money-launderer-sentenced-8-million-romance-scam-fraud-scheme> [<https://perma.cc/DE9D-5G4Q>]; Press Release, U.S. Dep't of Just., Two Defendants Sentenced for Participating in Nationwide Grandparent Scam (Nov. 17, 2022), <https://www.justice.gov/usao-sdca/pr/two-defendants-sentenced-participating-nationwide-grandparent-scam#:~:text=From%20approximately%20November%201%2C%202019,for%20car%20accident%20victims%2C%20or> [<https://perma.cc/6V6X-ZB7V>]; Press Release, U.S. Dep't of Just., Passaic County Man Charged in \$13 Million Technology Support Scam Targeting over Seven Thousand U.S. Victims (Aug. 31, 2023), <https://www.justice.gov/usao-nj/pr/passaic-county-man-charged-13-million-technology-support-scam-targeting-over-seven> [<https://perma.cc/NF86-VEL8>].

<sup>201</sup> *See* CFPB FRAMEWORK 2022, *supra* note 9, at 19 (“Among those who do recover funds from [elder financial exploitation], reporting to an authority is often an important step. Doing so can initiate an investigation about who was responsible, which can ultimately lead to the return of their money.”).

<sup>202</sup> *Id.*

<sup>203</sup> A true reversal is only possible if the perpetrator has not yet moved the funds out of the receiving account. For a discussion of how a reversal works, *see* Bruce Phillips, *The Moneys Gone – After a Successful Wire Fraud*, WFGAGENT: TECH TALK (Sept. 17, 2018), <https://wfgagent.com/tech-talk/the-moneys-gone-after-a-successful-wire-fraud/> [<https://perma.cc/K7N7-CTM4>].

<sup>204</sup> U.S. DEP'T. OF JUST., ANNUAL REPORT TO CONGRESS ON DEPARTMENT OF JUSTICE ACTIVITIES TO COMBAT ELDER FRAUD AND ABUSE 60 (2022), <https://www.justice.gov/media/1253691/dl?inline> [<https://perma.cc/T6NL-79CL>].

<sup>205</sup> FED. BUREAU OF INVESTIGATION, 2022 INTERNET CRIME REPORT, *supra* note 32, at 9.

freeze the affected funds.<sup>206</sup> The FBI reports that in the twelve-month period ending June 2022, the program succeeded in freezing funds in time to prevent losses worth over \$375 million.<sup>207</sup> Experts note that “[t]ime is of the essence,” as law enforcement must act during the brief lag between the transaction’s initiation and completion to quickly recover the funds.<sup>208</sup> The FBI urges victims to immediately contact any financial institutions involved in the transaction, and to “request a recall or reversal.”<sup>209</sup>

Aging services providers are well-situated to urge their clients to report fraud to law enforcement and to any financial institutions involved, maximizing the likelihood of recovery.<sup>210</sup> Staff who mistakenly believe that reporting is useless may be less inclined to facilitate the process for their clients. Communication about rapid response efforts and enforcement successes will encourage these efforts and help change the perception among some that “there’s nothing [law enforcement] can do to catch the criminals.”<sup>211</sup>

#### E. Recommendations

This Section offers recommendations about how to elevate, support and leverage efforts by aging services in the continuing fight against fraud. While the acute challenges of COVID have abated since the survey was distributed, fraud and scams continue to grow ever more prevalent.<sup>212</sup> Local organizations have a wealth of knowledge about their communities, making them uniquely situated to sound the alarm to their clients and others.<sup>213</sup> Staff are in contact with older people every day, providing essential services and serving as trusted resources.<sup>214</sup> When their capabilities were strained by the pandemic, they used available internal and external resources to respond with proactive anti-fraud training and support. Yet, their descriptions of their experiences during the pandemic reflect a level of fatigue as the problem dragged on despite their best efforts.

The theme of collaboration was repeated throughout the survey responses and carries into these recommendations. Aging services were already overextended when COVID and its accompanying wave of fraud and scams arrived.<sup>215</sup> They

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 10.

<sup>208</sup> See CFPB FRAMEWORK 2022, *supra* note 8, at 38. Reporting may also help law enforcement contact the victim in the event that funds become available for remediation or restitution. *Id.* at 45 (“[L]aw enforcement often interact[s] with EFE victims in ways that are critical to their prospects for financial recovery.”).

<sup>209</sup> FED. BUREAU OF INVESTIGATION, 2022 INTERNET CRIME REPORT, *supra* note 32, at 9.

<sup>210</sup> See *supra* Section II.

<sup>211</sup> Survey Responses at Question 11, Response 29.

<sup>212</sup> See 2022 FBI ELDER FRAUD REPORT, *supra* note 2, at 5.

<sup>213</sup> See *supra* Section II.

<sup>214</sup> See *supra* Section II.

<sup>215</sup> See #AAAS AT WORK, *supra* note 14, at 22.



should not, and cannot, fight this battle on their own. Numerous stakeholders and systems act individually, interactively, and collaboratively to prevent financial exploitation; no one stakeholder will solve, or fail to solve, the problem on its own.<sup>216</sup> Rather, interactions between and among the stakeholders and systems will determine whether older people are protected from future harm.<sup>217</sup> Social isolation, work-from-home orders, and the shift to remote and hybrid operations posed obstacles to effective collaboration during the pandemic. As these challenges fade, stakeholders are presented with new opportunities to renew and develop partnerships.

1. Law Enforcement and Financial Services Should Enhance Their Collaborative Efforts

National law enforcement would benefit from specific, dedicated channels of communication with the Aging Services Network to facilitate cooperation in fighting fraud. The FBI should appoint an Aging Services Liaison to coordinate efforts at the national level. Quarterly or more frequent information and listening sessions will ensure that information about enforcement tools and successes reaches social services providers in the community, while also giving aging services staff the opportunity to share the latest threats and other trends that they learn through their work with older people.

All levels of law enforcement must remain committed to enhancing support for fraud victims and should ensure that they are communicating their commitment to aging services and other local community partners. Local police departments and national enforcement agencies should follow up consistently with the victims to share updates on any investigations—or, if they decide to close a matter without investigating, to explain why that decision was made. Many aging services organizations and local law enforcement already enjoy robust partnerships, collaborating on abuse prevention, client education, and other joint projects. Where these relationships are weaker, however, closer partnerships may reduce the sense of futility expressed by survey respondents.

Better coordination also would provide law enforcement with the opportunity to share their successes. Recent indictments, prosecutions, and restitution awards are a testament to the possibility of stopping the perpetrators and restoring funds to victims.<sup>218</sup> While they reflect only a small proportion of all incidents, they nonetheless provide encouraging evidence that fraud-fighting efforts are not in vain.<sup>219</sup>

Financial institutions are another critical partner for aging services providers, as both share a common interest in scam prevention.<sup>220</sup> Unlike the under-funded

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<sup>216</sup> See *Elder Justice Initiative*, *supra* note 26.

<sup>217</sup> *Id.*

<sup>218</sup> See *supra* notes 192-93.

<sup>219</sup> See CFPB FRAMEWORK 2022, *supra* note 9, at 37-41, for a detailed discussion of factors that may enhance the likelihood of a monetary recovery.

<sup>220</sup> See, e.g., J.P. MORGAN CHASE & CO., ANNUAL REPORT 2022 47 (2023),

Aging Services Network, the financial services industry spends billions of dollars each year on fraud prevention to prevent costly losses.<sup>221</sup> Some survey respondents described existing collaborations with banks to provide client training.<sup>222</sup> An expansion of these relationships would allow aging services to leverage the deep expertise of the private sector, while also providing a new channel for banks to directly educate individuals who are at risk of being targeted for fraud. Closer partnerships may also facilitate prompt reporting to financial institutions to maximize the likelihood of preventing losses.

## 2. Streamline the Reporting Process

Organizations that serve older people should be empowered to help their clients contact law enforcement and complete other follow-up after fraud occurs. Yet many survey respondents described confusion about how to help, and had mixed experiences with reporting.<sup>223</sup> The system is decentralized, and it is unclear which of the numerous national, state, and local enforcement agencies to contact.<sup>224</sup> Because the likelihood of recovering lost funds is low, older people and the organizations that help them may be less motivated to put in the effort to identify which agency or agencies should be notified.<sup>225</sup> This is an obstacle both to obtaining redress for older people and to the collection of accurate data to inform enforcement and policy making.

To address these issues, the reporting process should be streamlined and communicated to aging services organizations and others who are likely to encounter affected older people in real time, when there is some chance of recovering lost funds. This could involve single point reporting through a

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<https://www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/investor-relations/documents/annualreport-2022.pdf> [https://perma.cc/7XK2-PSQ5] (“While fraud is everywhere, we are improving our ability to protect customers earlier and more often. Education plays a big role, too. Bankers, Community Managers and marketing work together to help customers build healthy financial habits and avoid becoming victims of fraud.”).

<sup>221</sup> See KEN FEINSTEIN ET AL., JS HELD, DETECTING FRAUD USING EMERGING TECHNOLOGY: DON’T BE AFRAID TO INNOVATE 1 (2023) (“[A] Juniper Research report on online payment fraud said merchants and financial service organizations will spend \$9.3 billion annually on fraud prevention.”).

<sup>222</sup> See *supra* note 159.

<sup>223</sup> See *supra* notes 151-54.

<sup>224</sup> One 2023 AARP consumer-facing article suggested that victims of fraud should report these incidents to three different entities: local law enforcement, the FTC, and the FBI. See Christina Ianzito, *Americans Think Fraud is at ‘Crisis Level,’ Survey Finds*, AARP (May 17, 2023), <https://www.aarp.org/money/scams-fraud/info-2023/fraud-awareness-survey.html#:~:text=As%20scams%20skyrocket%2C%20AARP%20report,scam%20threat%20and%20scammers%20methods&text=Incidents%20of%20fraud%20have%20exploded,billion%20reported%20stolen%20in%202022> [https://perma.cc/NJ5N-PRAA].

<sup>225</sup> See CFPB FRAMEWORK 2022, *supra* note 8, at 24 (“Among victims who did not report their experience to the police, one of the most common reasons for not reporting was their belief that law enforcement would not consider their experience to be worth investigating.”).

national phone number, following the model of the national poison control hotline or the 988 Suicide & Crisis Lifeline.<sup>226</sup> The DOJ's National Elder Fraud Hotline, which was started in March 2020, could take on this role.<sup>227</sup> Alternatively, reporting could be coordinated among a network of state or local reporting agencies that cooperate to share resources and data. In either case, a single call by the client or caregiver would begin a process that would both inform the appropriate law enforcement agencies and connect the client with local support resources.

### 3. Centralize Education and Training Resources

Survey respondents indicated that the most effective training is current, frequent, interactive, and relatable, and also avoids any shaming towards people who engage with scammers.<sup>228</sup> Some survey respondents already partner with law enforcement, banks, or others to coordinate free or low-cost training.<sup>229</sup> Yet developing high-quality training materials is time consuming, as is identifying external resources. Aging services providers may have limited specialized expertise with respect to content and pedagogy. They may not be able to maintain training and educational materials that reflect the most current scams, either because they have not learned about them yet, or because they simply lack the resources to make frequent revisions to their existing materials. Staff may not have the translation skills necessary to provide training materials in languages other than English.<sup>230</sup>

Designating a central, national resource center to produce education and training resources about fraud would enhance efforts of local aging services programs. A resource center could employ knowledgeable instructional designers to incorporate research on adult learners, and older learners in particular, using up-to-date pedagogical approaches to maximize effectiveness. Developers could implement best practices identified by fraud researchers, such as integrating behavioral training that prepares individuals to effectively respond

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<sup>226</sup> The U.S. Poison Control helpline is a network consisting of more than fifty poison centers located around the country. *Who We Are*, AM.'S POISON CTRS., <https://www.aapcc.org/> (last visited Sept. 28, 2024). The 988 Suicide & Crisis Lifeline is managed by the Substance Abuse and Mental Health Services Administration. Calls to the central number are routed to local service providers depending on the area code of the call. See *SAMHSA's National Helpline*, SUBSTANCE ABUSE AND MENTAL HEALTH SERV.'S ADMIN., <https://www.samhsa.gov/find-help/national-helpline> [<https://perma.cc/LAK4-HGWC>] (last visited Sept. 28, 2024).

<sup>227</sup> See *Elder Fraud & Abuse: National Elder Fraud Hotline*, U.S. DEP'T OF JUST. OFF. FOR VICTIMS OF CRIME, <https://ovc.ojp.gov/program/elder-fraud-abuse/national-elder-fraud-hotline#:~:text=In%20March%202020%2C%20the%20U.S.,averaging%2083%20calls%20a%20day> [<https://perma.cc/HA8A-ZNAW>] (last visited Dec. 8, 2024).

<sup>228</sup> See *supra* notes 161-64 and accompanying text.

<sup>229</sup> See *supra* notes 157-59 and accompanying text.

<sup>230</sup> See Gallo & Wilber, *supra* note 14, at 155 (demographic trends will call for aging services to be offered in "a variety of languages").

to scams in real life.<sup>231</sup> Creating multilingual materials also would help local agencies that lack their own translation resources.

The resource center could be located within an existing public agency, such as the U.S. Administration for Community Living; or placed under the aegis of a private organization with specialized expertise, such as the National Council on Aging. Alternatively, instead of a single center, a well-coordinated resource network consisting of state or regional centers could provide many of the benefits of national centralization, while also allowing for training to be tailored locally as needed.

#### CONCLUSION

The aging services response to COVID-19 modeled institutional flexibility in the face of uncertainty and challenge.<sup>232</sup> These agencies quickly pivoted to meet the new and expanded needs of their clients, including a wave of fraud and scams perpetrated with the very technologies that helped these organizations remain open despite social distancing.<sup>233</sup> Now, as the world continues its return to a post-COVID normalcy, it unfortunately appears that fraud targeted against older people will remain a persistent feature of the aging landscape.<sup>234</sup>

Moving forward, the Aging Services Network provides a unique environment to implement and test interventions for preventing and addressing fraud. Local agencies stand ready to distribute enhanced anti-fraud training and could partner with scholars and policymakers to test its effectiveness.<sup>235</sup> Randomized controlled trials assessing interventions would greatly enhance the currently limited knowledge of best practices, providing a roadmap for future efforts.<sup>236</sup>

The need for effective interventions will only grow with the rise of artificial intelligence, which adds a new level of complexity to technology-based frauds. Aging services providers and their partners will need to redouble their efforts, enhancing their own sophistication and leveraging additional resources to address the new threats. The staggering level of dollar losses over the past several years suggests that there is much work ahead.<sup>237</sup> Collaboration, coordination, and communication among stakeholders will be critical to meeting the challenge.

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<sup>231</sup> See HONICK ET AL., *supra* note 41.

<sup>232</sup> See generally Gallo & Wilber, *supra* note 14.

<sup>233</sup> See #AAAS AT WORK, *supra* note 14, at 4, 11.

<sup>234</sup> See 2022 FBI ELDER FRAUD REPORT, *supra* note 2, at 5.

<sup>235</sup> In addition, because AAAs and COAs already provide programs to combat social isolation, they could serve as a laboratory to examine how anti-loneliness interventions may have the added positive effect of reducing susceptibility to fraud. See USAGING, *supra* note 183, at 9 (describing AAA efforts to “assess clients for social isolation . . . and for loneliness” and addressing both through services “encouraging socialization”).

<sup>236</sup> AAAs already offer evidence-based programming through funding provided under the Older Americans Act for disease prevention and health promotion. See *id.* at 12.

<sup>237</sup> See generally 2022 FBI ELDER FRAUD REPORT, *supra* note 2.

## APPENDIX

#	Question Text	Response Options
1	In what city or town is your organization located?	Open response
2	What is the name of your organization?	Open response
3	What is your job title?	Open response
4	Approximately how many years have you worked in aging services or legal services for older people?	Open response
5	At your COA/Senior Center or legal service, what methods are used to deliver programs and services? Check all that apply:	Check all that apply: 1. Phone; 2. Email; 3. Written materials; 4. Live video streaming (zoom, facebook live); 5. Social media (Facebook, Twitter, Instagram, etc); 6. Cable access television; 7. In-person, with COVID-19 safety protocols in place; 8. Pre-recorded video; 9. Remote notary; 10. DocuSign, online forms; 11. Does not apply - programs and services cancelled.
6	Approximately what percentage of the services at your organization are provided via technology and what are provided in-person?	% Technology: open response; % In-person: open response

#	Question Text	Response Options
7	Over your entire career in aging services or legal services for older people, about how many times have you learned of an older client who had been victimized by a financial scam? (ex: lost money or personal information)	Open response
8	Since the pandemic started in March 2020 about how many times have you learned of an older client who has been victimized by a financial scam?	Open response
9	In your opinion, since the pandemic started has the number of scams targeting your clients increased, stayed about the same, or decreased, compared to the period before the pandemic?	Multiple choice: 1. <i>Increased</i> ; 2. <i>Stayed about the same</i> ; 3. <i>Decreased</i> ; 4. <i>Don't know, not sure</i>
10	If any of your clients have been targeted for a scam during the pandemic – please describe what happened:	Open response
11	If you have been alerted to someone who has been scammed, what did you do?	Open response
12	If you've reported financial fraud or a scam, who did you report it to?	Open response

#	Question Text	Response Options
12a	If you've reported a scam, were you satisfied with how the situation was resolved?	Multiple choice: 1. <i>Very satisfied</i> ; 2. <i>Somewhat satisfied</i> ; 3. <i>Neither satisfied nor dissatisfied</i> ; 4. <i>Somewhat dissatisfied</i> ; 5. <i>Completely dissatisfied</i> .
12b	Additional comments:	Open response
13	Does your organization have staff training resources about scams?	Multiple choice: 1. <i>Yes</i> ; 2. <i>No</i>
14	If applicable, describe any services your organization provides to help prevent your clients from becoming the victims of scams:	Open response
15	What do you wish your organization could do to prevent frauds and scams?	Open response
16	Would additional resources help your organization to protect your clients against scams? Check all that would help:	Check all that apply: 1. <i>Training for existing staff</i> ; 2. <i>Educational materials to give to clients</i> ; 3. <i>Additional staffing to focus on scam prevention</i> ; 4. <i>Internal policies and procedures about protecting clients' personal information</i> ; 5. <i>Collaborations with legal or financial services</i> ; 6. <i>No additional resources are needed</i>

#	Question Text	Response Options
17	Would additional collaboration with the groups listed below help your organization to protect your clients against scams? Check all that would help:	Check all that apply: <i>1. Social services providers; 2. Legal services organizations; 3. Law enforcement agencies; 4. Government agencies outside of law enforcement; 5. No additional collaboration is needed</i>
17a	Other:	Open response
18	What in your opinion are good approaches for financial fraud and scam prevention?	Open response
19	Please use the space below to provide any additional information that you weren't able to provide in the responses above:	Open response
20	We'd appreciate the opportunity to follow up with you via telephone. If you would be willing to speak with us, please provide your contact information:	Open response



## IVORY TOWER COLONIALISM

ANTHONY M. CIOLLI<sup>\*</sup>

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## INTRODUCTION

Nearly 125 years to this day, the *Harvard Law Review* laid the foundation for the Supreme Court to systematically deny many constitutional protections to the “savage,” “half-civilized,” “ignorant and lawless” “alien races” that inhabit the United States territories of Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, and the Northern Mariana Islands.<sup>1</sup> It did so by publishing openly racist legal “scholarship”—if it could even be called that—written by the most prominent law professors of the day, such as A. Lawrence Lowell and Christopher Columbus Langdell, that relied on the white man’s burden and other theories of racial inferiority as the basis for treating these insular territories differently than those that came before.<sup>2</sup>

This year, the *Harvard Law Review* again repeats its mistake, opening its pages and lending its credibility to the theory of “borderlands constitutionalism.”<sup>3</sup> This borderlands constitutionalism proposes a merger of “the law of the territories” and “federal Indian law” so that the same principles apply to “all peoples colonized by the United States.”<sup>4</sup> While seemingly benign and relying on anti-racist theory, the ultimate result of borderlands constitutionalism is actually *worse* for the territories than what came from the racist diatribes of Langdell and Lowell: the denial of all constitutional rights to those who reside in the territories—not just *some* rights as is currently the case, but *all* rights; *each and every single one, without exception*.

I. THE REAL-WORLD DAMAGE TO THE TERRITORIES CAUSED BY  
ACADEMIA

The elite of the legal profession bear the most responsibility for the current inequities facing modern United States territories. The Supreme Court of the United States created the doctrine of territorial incorporation out of whole cloth in the *Insular Cases* because they did not want to confer the same constitutional protections on the “savage,” “half-civilized,” “ignorant and lawless” “alien races” that inhabited them.<sup>5</sup> The Supreme Court did so by relying on a line of so-called legal scholarship written by Lowell, Langdell, and other prominent figures in the academy that relied on the white man’s burden and other theories

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<sup>1</sup> See, e.g., *Downes v. Bidwell*, 182 U.S. 244, 287 (1901); C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365 (1899); Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393 (1899); James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464 (1899); Abbott Lawrence Lowell, *The Status of Our New Possessions — A Third View*, 13 HARV. L. REV. 155 (1899).

<sup>2</sup> See, e.g., Langdell, *supra* note 1; Baldwin, *supra* note 1; Thayer, *supra* note 1; Lowell, *supra* note 1.

<sup>3</sup> Maggie Blackhawk, *Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 66 (2023).

<sup>4</sup> *Id.* at 145.

<sup>5</sup> See, e.g., *Downes*, 182 U.S. at 287.

of racial inferiority.<sup>6</sup> These racist diatribes were not published in some fly-by-night publications but graced the pages of the *Harvard Law Review* and the *Yale Law Journal*.<sup>7</sup>

We like to believe that the legal profession is different today than 125 years ago—that the phrase “Equal Justice Under Law” chiseled on the Supreme Court Building now means what it says without needing an asterisk, or that law schools professing to value diversity, equity, and inclusion truly support the fair treatment and full participation of all people. Yet we also know this is not the case—while courts and law schools certainly progressed relative to a century ago, much work remains to achieve those ideals.

But a major problem arises when these entities, and the people who comprise them, act in ways they subjectively *believe* promote those ideals but in practice makes equality much more difficult to achieve. Just two years ago, a panel of the United States Court of Appeals for the Tenth Circuit in *Fitisemanu v. United States*<sup>8</sup> denied the right of constitutional birthright citizenship—oft considered “the right to have rights”<sup>9</sup>—to those born in American Samoa. Unlike the *Insular Cases*, the court did not do this because the panel majority believed the people of American Samoa were so “savage” or “half-civilized” that they could not understand citizenship or comport with its responsibilities.<sup>10</sup> Rather, it denied the right to citizenship with the velvet glove of the language of empowerment and decolonization, such as by emphasizing that a court should not “impose citizenship on an unwilling people from a courthouse thousands of miles away”<sup>11</sup> or that denying citizenship is somehow necessary “to preserve traditional cultural practices” such as restrictions on the alienation of land.<sup>12</sup>

What formed the legal rationale for the Tenth Circuit to effectively recognize a cultural preservation exception to the Citizenship Clause of the United States Constitution? Like the territorial incorporation doctrine discovered by the United States Supreme Court in the *Insular Cases*, the Tenth Circuit panel majority invented this exception out of whole cloth, elevating scholarship recently published in the *Harvard Law Review* and the *New York University Law Review* over the plain text of the Constitution.<sup>13</sup> This and similar scholarship,<sup>14</sup>

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<sup>6</sup> See, e.g., sources cited *supra* note 1.

<sup>7</sup> See sources cited *supra* note 1.

<sup>8</sup> 1 F.4th 862, 864-65 (10th Cir. 2021).

<sup>9</sup> See, e.g., *Gonzalez-Alarcon v. Macias*, 884 F.3d 1266, 1277 (10th Cir. 2018) (quoting *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting)).

<sup>10</sup> See *Downes*, 182 U.S. at 287.

<sup>11</sup> *Fitisemanu*, 1 F.4th at 865.

<sup>12</sup> *Id.* at 870–71.

<sup>13</sup> See *Developments in the Law – U.S. Territories*, 130 HARV. L. REV. 1616 (2017) [hereinafter *Developments*]; Russell Rennie, *A Qualified Defense of the Insular Cases*, 92 N.Y.U. L. REV. 1683 (2017).

<sup>14</sup> See, e.g., Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CALIF. L. REV. 1249, 1259, 1264 (2019); *Developments*, *supra* note 13, at 1637 n. 41.

while purporting to reject the racism of the likes of Lowell and Langdell, nevertheless provided the Tenth Circuit panel majority with the roadmap and moral authority to arrive at the same ultimate result as the *Insular Cases*: the Indigenous culture of American Samoa is so frail that it cannot possibly survive without the intervention of enlightened Westerners in the form of *withholding birthright citizenship* despite the plain and unambiguous language of the Constitution.

But perhaps one of the most tragic aspects of this judicial reliance on this scholarship is that the authors likely did not intend for their writings to form the basis for withholding the right of constitutional birthright citizenship from the inhabitants of American Samoa. While the author of the *New York University Law Review* article did propose reimagining the *Insular Cases* to protect indigenous cultures, his article expressly *rejected* the idea that American Samoans must choose between citizenship and cultural preservation and proposed this reimagining as a way for courts to *simultaneously* confer birthright citizenship and other “basic freedoms” on a territory while also respecting “bargained for” accommodations such as restrictions on the alienation of land.<sup>15</sup> The same is true of the *Harvard Law Review* article, whose anonymous authors did not advocate for repurposing the *Insular Cases* as a means to justify withholding birthright citizenship, but likewise proposed it as a mechanism to avoid “the constitutional invalidation of territorial land laws” in American Samoa.<sup>16</sup> Thus, these authors likely did not intend to become modern-day accomplices of Lowell and Langdell, but to establish a theoretical framework for fixing the “shameful history” of prior legal scholars and the law journal editors who published their work.<sup>17</sup> Despite what were likely good intentions, the words they selected, the theories they proposed, ultimately harmed the territories.

Yet another unfortunate aspect is that those theories ultimately were solutions in search of a problem. The problem these authors sought to solve through reimagining of the *Insular Cases* seems legitimate: somehow reconciling the land alienation laws in effect in American Samoa with the Fourteenth Amendment to the United States Constitution. But what went uncited and presumably unnoticed by the authors—and, not surprisingly, the Tenth Circuit—is that this problem *had already been decisively resolved* by the High Court of American Samoa in its opinion in *Banks v. American Samoa*,<sup>18</sup> in which it held both that (1) the Fourteenth Amendment applied to American Samoa; and, more importantly, (2) the territory’s land alienation laws were constitutional and did not run afoul of the Fourteenth Amendment. The High Court did so by applying existing doctrine, without the need to rely on the *Insular Cases* or create a new

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<sup>15</sup> See Rennie, *supra* note 13, at 1713.

<sup>16</sup> *Developments*, *supra* note 13, at 1629.

<sup>17</sup> See Sam Erman, *Accomplices of Abbot Lawrence Lowell*, 131 HARV. L. REV. F. 105 (2018).

<sup>18</sup> 4 Am. Samoa 2d 113 (1987).

theory of constitutional interpretation to reach that result.<sup>19</sup> In other words, the very premise of the theory espoused by these articles—that existing jurisprudence meant that extending constitutional birthright citizenship under the Fourteenth Amendment to American Samoa required striking down American Samoa’s land alienation laws under the Equal Protection Clause of the Fourteenth Amendment—was false, and reimagining or repurposing the *Insular Cases* became necessary only due to the authors’ unfamiliarity with well-established territorial law.

The theories published by these legal scholars in these elite law journals and later adopted—often in distorted form—by the federal courts perpetuate a system of Ivory Tower Colonialism over United States territories. Of course, not all or even most legal scholarship related to the territories falls within this category; in recent years, many law reviews have published extraordinarily impactful articles from law professors and others that provide much-needed theoretical or practical analysis relevant to the territories.<sup>20</sup> The factors that distinguish scholarship of the Ivory Tower Colonialism variety from genuinely helpful scholarship generally include (1) explicit or implicit reliance on harmful stereotypes pertaining to the territories or the people who inhabit them, often without realizing that they are stereotypes or recognizing that they are harmful; (2) treatment of the territories as some sort of academic curiosity or oddity, divorced from the fact that real people make the territories their home; (3) proposals that courts impose on the territories a grand, new, and untested theory of constitutional interpretation unconnected to precedent or the plain text of the United States Constitution; (4) ignorance of relevant laws, judicial decisions, historical facts, or other materials generally known to those who practice law in a territory that, if known to the author and disclosed to the reader, casts doubt on or even outright disproves the author’s thesis; and, perhaps most unfortunately, (5) inclusion of language and ideas that, often unintentionally, provide courts with support to continue the second-class treatment of one or more territories.

The *Harvard Law Review* now provides a platform to the newest entrant in the Ivory Tower Colonialism genre: the theory of “borderlands constitutionalism,”<sup>21</sup> which proposes “[w]edding together the territories and Native nations” because while these groups “do have meaningful distinctions from each other . . . the legal and constitutional bases for these categories do not necessarily hold.”<sup>22</sup> This proposed merger or wedding, however, more closely

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<sup>19</sup> *Id.*

<sup>20</sup> See, e.g., Dolace McLean, *Cultural Identity and Territorial Autonomy: U.S. Virgin Islands Jurisprudence and the Insular Cases*, 91 *FORDHAM L. REV.* 1763, 1766 (2023); Adriel I. Cepeda Derieux & Neil C. Weare, *After Aurelius: What Future for the Insular Cases?*, 130 *YALE L.J. FORUM* 284, 286-87 (2020); Joseph T. Gasper II, *Too Big to Fail: Banks and the Reception of the Common Law in the U.S. Virgin Islands*, 46 *STETSON L. REV.* 295, 299-300 (2017).

<sup>21</sup> Blackhawk, *supra* note 3, at 89-90.

<sup>22</sup> *Id.* at 146.

resembles an acquisition or an adoption. Effectively, borderlands constitutionalism throws out the law of the territories and instead applies federal Indian law (or some close variant thereof) to the territories—which is rather ironic since the elimination of local law in favor of foreign law is perhaps a textbook example of colonization.

This radical proposal denies *all* federal constitutional rights to the people of the territories, and in doing so disregards the plain text of the Constitution as well as the original intent of the Founders and relies on false and harmful stereotypes about the territories. To paraphrase the late Judge Juan Torruella, the notion of a so-called borderlands constitutionalism as a solution to the unequal treatment of the United States territories is exactly the kind of inopportune experimentation which, notwithstanding any good intentions, is misguided, and “[i]t is perhaps with a modicum of déjà vu and historical irony that the birth of this latest proposal draws its breath from within the annals of the same legal journal that initially promoted the first of the experiments regarding [the territories] that eventually became the doctrine of the *Insular Cases*.”<sup>23</sup>

## II. BORDERLANDS CONSTITUTIONALISM: DENYING *ALL* CONSTITUTIONAL RIGHTS TO *ALL* U.S. TERRITORIES

Law professors have been justifiably criticized from all corners of the legal profession as largely “out of touch” and often failing to recognize the real-world implications that would arise if their esoteric theories were adopted by courts or legislatures.<sup>24</sup> Legal academics often fail “to look, feel, see, and hear the voices, emotions, and thoughts of real people in real communities.”<sup>25</sup> Part of this is that law journals, whose student editors are typically lacking in both subject-matter expertise and real-world experience with a topic, often “unrealistically require excessive citations to prove well-known facts,” but fail “to weed out ridiculous assertions” because they are satisfied with citations to “*any* authority” as opposed to “the best possible authorities.”<sup>26</sup> The result, of course, is that law journals publish scholarship without “fully consider[ing] the feasibility and practical application of their theories in the real world,”<sup>27</sup> with law students and even fellow law professors often being reluctant to critically analyze the writings

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<sup>23</sup> Juan R. Torruella, *Why Puerto Rico Does Not Need Further Experimentation with its Future: A Reply to the Notion of “Territorial Federalism,”* 131 HARV. L. REV. F. 65, 69 (2018).

<sup>24</sup> See Richard E. Redding, *The Legal Academy Under Erasure*, 64 CATH. U. L. REV. 359, 404-05 (2015); Will Rhee, *Law and Practice*, 9 LEGAL COMM’N & RHETORIC: JALWD 273, 290-91 (2011).

<sup>25</sup> Rebecca R. French, *Of Narrative in Law and Anthropology*, 30 L. & SOC’Y REV. 417, 433 (1996).

<sup>26</sup> Colin P.A. Jones, *Unusual Citings: Some Thoughts on Legal Scholarship*, 11 LEGAL WRITING: J. LEGAL WRITING INST. 377, 382-83 (2005) (emphasis in original).

<sup>27</sup> Redding, *supra* note 24, at 410.

of their peers because “‘go along to get along’ is the motto that most law professors, as well as most students, are inclined to follow.”<sup>28</sup>

Let me be clear: I cannot conceive of any field or subfield that is governed by a body of law as incoherent, inconsistent, and intellectually bankrupt as the law of United States territories. As outlined in greater detail earlier, this state of affairs is, in large part, the fault of the legal academy and in particular the *Harvard Law Review* and the *Yale Law Journal* for giving a platform to the racist theories that the Supreme Court would shortly thereafter adopt as law in the *Insular Cases*.<sup>29</sup> To quote Justice Gorsuch,

The flaws in the *Insular Cases* are as fundamental as they are shameful. Nothing in the Constitution speaks of “‘incorporated” and “‘unincorporated” Territories. Nothing in it extends to the latter, only certain supposedly “‘fundamental” constitutional guarantees. Nothing in it authorizes judges to engage in the sordid business of segregating Territories and the people who live in them on the basis of race, ethnicity, or religion.<sup>30</sup>

There is no question in my mind that we must reform the law of the territories by dismantling the ad hoc framework established by the *Insular Cases* and replacing it with a new doctrine that does right by the people of the territories while remaining faithful to the text of the Constitution.

But that does not mean that any theory will do. Despite their many faults, the *Insular Cases* and their progeny arrived at the result in certain cases, even if not for the right reasons. In one of the *Insular Cases*, the Supreme Court extended the Due Process Clause to the unincorporated territory of Puerto Rico;<sup>31</sup> in another, it applied the Double Jeopardy Clause to the unincorporated territory of the Philippine Islands.<sup>32</sup>

While the Swiss-cheese approach to the application of the Bill of Rights endorsed by the *Insular Cases* is unjustifiable both doctrinally and morally, even under the *Insular Cases* framework, there are at least *some* individual rights and liberties extended to the territories by virtue of the Constitution rather than by the grace of Congress.

And here is where the theory of borderlands constitutionalism crosses the threshold from well-intentioned yet flawed to outright dangerous: borderlands constitutionalism, if extended to United States territories, would deny all constitutional rights to those who reside in the territories—not just *some* rights as is currently the case under the *Insular Cases* regime, but *all* rights; *each and every single one, without exception*. Other than only mentioning it on page 119 of a 152-page article, the author makes no attempt to hide this: “the United States

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<sup>28</sup> Marijan Pavcnik & Louis E. Wolcher, *A Dialogue on Legal Theory Between a European Legal Philosopher and His American Friend*, 35 TEX. INT’L L.J. 335, 383 (2000).

<sup>29</sup> See discussion *supra* Part I.

<sup>30</sup> *United States v. Vaello Madero*, 596 U.S. 159, 184-85 (2022) (Gorsuch, J., concurring).

<sup>31</sup> See *Ochoa v. Hernandez y Morales*, 230 U.S. 139 (1913).

<sup>32</sup> See *Kepner v. United States*, 195 U.S. 100 (1904).

Constitution does not apply to tribal governments.”<sup>33</sup> Not only that, the author does not view this as a bad thing: in literally the next sentence, the author bemoans that the Supreme Court of the United States “held that Native nations lack recognition, self-determination, and territorial sovereignty in areas that might involve the rights of non-Indians,” and that “[w]hat these cases have meant in practice is that Native nations can no longer apply their criminal and civil laws to punish and deter wrongdoing by non-Indians within Indian Country”<sup>34</sup>—failing to disclose, however, that the “laws” in question include provisions such as the authorization to restrict jury membership based on race.<sup>35</sup>

That tribal lands may permissibly serve as constitution-free zones is not a radical idea by any means. In fact, it is fully consistent with the plain text of the United States Constitution. Only three provisions of the United States Constitution contain any express reference to the tribes—all pertaining to the organization or powers of Congress. Two of these provisions are exclusionary in nature: Clause 3 of Section 2 of Article I requires apportionment of direct taxes and members of the House of Representatives according to state population, “excluding Indians not taxed,”<sup>36</sup> while the Apportionment Clause of the Fourteenth Amendment likewise provides for apportionment of the House of Representatives by state population while also “excluding Indians not taxed.”<sup>37</sup> The other reference is in what is commonly known as the “Indian Commerce Clause,” listed among the enumerated powers of Congress, which affirmatively grants Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>38</sup>

“The limited references to Indians or Indian tribes make plain not only that they were not parties to the Constitutional Convention but also that they neither received nor surrendered any rights under the Constitution.”<sup>39</sup> Because the tribes pre-date the United States Constitution, were not part of the United States, had no say in the Constitution’s drafting, and did not ratify the Constitution, it makes perfect sense—both as a matter of textualism and normative values—to exclude them from the Constitution’s application.

Yet the question here is not whether the United States Constitution applies (or should apply) to these tribes. Rather, it is whether United States territories should join the tribes as part of a sort of constitution-free zone. Unlike the tribes, there is no basis whatsoever in either the plain text of the Constitution or any basic notions of fairness to justify denying federal constitutional rights to every one of the territories. The word “Territory” only appears three times in the entire Constitution: the Territorial Clause, the Eighteenth Amendment enacting a

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<sup>33</sup> Blackhawk, *supra* note 3, at 119.

<sup>34</sup> *Id.* at 119-20.

<sup>35</sup> See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194 (1978).

<sup>36</sup> U.S. CONST. art. I, § 2, cl. 3.

<sup>37</sup> U.S. CONST. amend. XIV, § 2.

<sup>38</sup> U.S. CONST. art. I, § 8.

<sup>39</sup> Clay R. Smith, *American Indian Tribes and the Constitution*, 48 ADVOC. 19, 19 (2005).



nationwide prohibition on alcohol, and the Twenty-First Amendment repealing the Eighteenth Amendment and returning regulation of alcohol to local authorities.<sup>40</sup> Of these, the Territorial Clause is a natural starting point to determine the constitutional status of the territories. It reads, in its entirety, as follows:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.<sup>41</sup>

Much has been written about this language and its meaning.<sup>42</sup> There is no need to summarize those lengthy arguments here; suffice it to say, an analysis of the language's original meaning using Founding-era sources simply cannot support the premise of the *Insular Cases* that Congress possesses completely unrestricted plenary authority over the territories.

But one aspect of the Territorial Clause is certainly clear: it pertains to “the Territory or other Property *belonging to the United States*.”<sup>43</sup> Unlike in other provisions pertaining to the tribes, the words used in the Territorial Clause are words of inclusion rather than exclusion; while the tribes are separate from the United States, the territories belong to the United States. The end result of borderlands constitutionalism, then, would be to establish constitution-free zones in land belonging to the United States rather than contiguous land belonging to separate sovereigns such as the tribes.

Borderlands constitutionalism thus essentially supports the result of the *Insular Cases*: that the Constitution does not follow the flag. But while the territorial incorporation doctrine endorsed by the *Insular Cases* still recognizes that so-called “fundamental” rights must extend to the territories regardless of the will of Congress,<sup>44</sup> there is no fundamental rights exception that applies with respect to the tribes: because the tribes are separate from the United States, *none* of the rights and liberties codified in the Constitution are self-executing on tribal lands, including the rights unquestionably fundamental such as those set forth in the First Amendment<sup>45</sup> and the Fifth Amendment.<sup>46</sup>

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<sup>40</sup> U.S. CONST. art. IV, § 3, cl. 2; *id.* amend. XVIII (repealed 1933); *id.* amend. XXI.

<sup>41</sup> U.S. CONST. art. IV, § 3, cl. 2.

<sup>42</sup> See Anthony M. Ciolli, *Needful Rules and Regulations: Originalist Reflections on the Territorial Clause*, 77 VAND. L. REV. 1263 (2024).

<sup>43</sup> U.S. CONST. art. IV, § 3, cl. 2 (emphasis added).

<sup>44</sup> *United States v. Vaello Madero*, 596 U.S. 159, 183-84 (2022) (Gorsuch, J., concurring).

<sup>45</sup> *Native Am. Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959) (holding First Amendment not applicable to tribes).

<sup>46</sup> *Talton v. Mayes*, 163 U.S. 376 (1896) (holding Fifth Amendment not applicable to tribes).

### III. BORDERLANDS CONSTITUTIONALISM: MARGINALIZING THE INDIGENOUS PEOPLE OF THE TERRITORIES

What, however, of the claim that the remaining five so-called “unincorporated” United States territories—American Samoa, Guam, Puerto Rico, the Northern Mariana Islands, and the U.S. Virgin Islands—seem to more closely resemble tribes than the incorporated territories that eventually achieved statehood? As Justice Gorsuch has observed, “[n]othing in the Constitution speaks of ‘incorporated’ and ‘unincorporated’ territories”—in terms of the Constitution, a territory is a territory.<sup>47</sup>

Unquestionably, “[t]he United States has a colonies problem.”<sup>48</sup> But this does not mean that *every* United States territory is a colony, or that *each* aspect of the federal-territorial relationship mirrors the relationship between a colony and its colonizing nation. Even putting aside the plain text of the Constitution, the historical and contemporary relationship between the United States and each of its territories is distinct from that of the tribes and the United States. Most ironically, the attempts to homogenize these relationships—both those of individual territories with the United States and of the territories collectively—to justify the theory of borderlands constitutionalism rely on one of the most versatile tools of a colonizer’s handbook: erasing the identity and agency of the indigenous peoples of the territories.

Perhaps the most appropriate place to begin is the relationship between each territory and the United States. It has been alleged that “[a]t present, the fields of federal Indian law and territorial law treat all Native nations alike and all territories alike.”<sup>49</sup> Whatever may be the case with federal Indian law, that is certainly not true of the law of the territories. On the contrary, the disparate treatment of the territories, not just with respect to the fifty states, *but even relative to each other*, is one of the core areas of study within the field. As a recent article has briefly summarized,

A jury trial in a criminal prosecution is a right in the U.S. Virgin Islands, but not in the Northern Mariana Islands. The border between the mainland United States and Puerto Rico is a domestic border to which the full protections of the Fourth Amendment apply, but the border between the U.S. Virgin Islands and the rest of the United States is an international border subject to the border-search exception. The territorial government of Guam is an instrumentality of the federal government and thus is not precluded under the Dormant Commerce Clause from enacting tax laws that discriminate against non-residents, but the territorial government of the U.S. Virgin Islands is treated as a state government for Dormant Commerce Clause purposes and may not. The Northern Mariana Islands may enact laws that limit otherwise fundamental rights, such as the right to

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<sup>47</sup> *Vaello Madero*, 596 U.S. at 185-86 (Gorsuch, J., concurring).

<sup>48</sup> Anthony M. Ciolli, *Judicial Antifederalism*, 91 FORDHAM L. REV. 1695, 1696 (2023).

<sup>49</sup> Blackhawk, *supra* note 3, at 146.

own land, only to the indigenous Chamorro people, but Guam may not, even though it is located 100 miles away and its indigenous population is also Chamorro.<sup>50</sup>

In addition, an entire subgenre of territorial law scholarship—which has even been embraced by some jurists such as Justice Sonia Sotomayor—is “what may be best described as a theory of Puerto Rico exceptionalism” that elevates Puerto Rico to a higher status than its fellow territories by effectively treating Puerto Rico as something other than a territory due to its “Commonwealth” status.<sup>51</sup>

This does not mean that sound legal reasoning supports all the actual and proposed differences in how the law treats the territories. It is unfortunately not hyperbole to acknowledge the reason the U.S. Virgin Islands, but not Guam, are bound by the Dormant Commerce Clause. It seems to be a combination of sheer prejudice and ignorance of binding Supreme Court precedent on the part of the Third Circuit panel that decided the case.<sup>52</sup> But other distinctions between the territories are supported by obvious differences between them. For instance, the reason courts repeatedly affirm the constitutionality of the Northern Mariana Islands and American Samoa’s land alienation laws is that those now-territories voluntarily joined the United States through negotiated treaties between the federal government and the government of the islands’ Indigenous peoples that contained provisions mandating the preservation of local customs.<sup>53</sup>

That American Samoa and the Northern Mariana Islands expressly sought and negotiated the terms of their annexation by the United States is seemingly completely overlooked by this so-called theory of “borderlands constitutionalism.” The “people of American Samoa” are referred to as “colonized people,”<sup>54</sup> but how can this possibly be the case when American Samoa voluntarily elected to join the United States pursuant to a treaty whose terms remain honored to this day?<sup>55</sup> Certainly, “American Samoans have long resisted United States citizenship as a form of assimilation.”<sup>56</sup> However, it is not the United States seeking to impose that citizenship, but fellow American

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<sup>50</sup> Ciolli, *supra* note 42, at 1270 (collecting cases).

<sup>51</sup> See Anthony M. Ciolli, *Territorial Constitutional Law*, 58 IDAHO L. REV. 206, 246-47 (2022).

<sup>52</sup> Compare *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285 (9th Cir. 1985), with *JDS Realty Corp. v. Gov’t of the V.I.*, 824 F.2d 256 (3d Cir. 1987). The Third Circuit did not mention the *Sakamoto* decision or acknowledge *Farmers’ & Mechanics’ Savings Bank v. Minnesota*, 232 U.S. 516 (1914), where the Supreme Court held that a territorial government is an instrumentality of the federal government. Rather, it seemingly premised its holding on it being somehow improper “that an unincorporated territory would have more power over commerce than the states possess.” *JDS Realty Corp.*, 824 F.2d at 260.

<sup>53</sup> See *Wabot v. Villacrusis*, 958 F.2d 1450 (9th Cir. 1990); *Craddick v. Territorial Registrar*, 1 Am. Samoa 2d 10 (1980).

<sup>54</sup> *Blackhawk*, *supra* note 3, at 101.

<sup>55</sup> See *Craddick*, 1 Am. Samoa 2d.

<sup>56</sup> *Blackhawk*, *supra* note 3, at 98.

Samoans bringing private lawsuits in their individual capacities to force it over the objections of both the American Samoa and the United States.<sup>57</sup>

This is further illustrated by perhaps one of the most shockingly factually inaccurate statements found in the article: that “American Samoans have not been wronged because they have been denied birthright citizenship; they have been wronged because the United States invaded their country and continues to establish its structure of, admittedly now republican, government unilaterally.”<sup>58</sup> But there was no invasion by the United States; the military did not swoop in and conquer American Samoa as a “spoils of war.” Rather, the matai of the islands comprising the non-territory voluntarily entered deeds of cession.<sup>59</sup> Nor did the United States impose a government on American Samoa; on the contrary, “[e]ven without an organic act or other explicit Congressional directive on governance, the people of American Samoa adopted their own constitution in 1967 and first constitutional elections were in 1977.”<sup>60</sup>

The same is true of the people of the Northern Mariana Islands, who the author also refers to as a United States colony.<sup>61</sup> While it is stated that “the Northern Mariana Islands, organized instead as a commonwealth of the United States, similar to Puerto Rico,”<sup>62</sup> conspicuously absent is any acknowledgement that the people of the Northern Mariana Islands chose this status in lieu of independence or free association, by a popular vote of 78.8% in favor of annexation by the United States.<sup>63</sup> And as with American Samoa, the United States continues to honor the terms of the covenant that it entered into with the now-territory, including permitting enforcement of its race-based land alienation laws.<sup>64</sup>

The relationship between the United States and the American Samoa and the Northern Mariana Islands is thus essentially the opposite of colonialism. The United States did not invade those lands, dissolve their indigenous governments, and impose its own rule. The United States did not import tens of thousands of its own citizens into those territories and give them land that it confiscated from the indigenous population. Nor did it make promises to the indigenous peoples of either territory to induce them into signing the respective treaties that it later

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<sup>57</sup> See *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015); see also *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021).

<sup>58</sup> Blackhawk, *supra* note 3, at 133-34.

<sup>59</sup> See *Instrument of Cession Signed on April 17, 1900, by the Representatives of the People of Tutuila*, U.S. DEP’T OF STATE, OFF. OF THE HISTORIAN (1929), <https://history.state.gov/historicaldocuments/frus1929v01/d853> [<https://perma.cc/BSN3-HV5G>].

<sup>60</sup> *American Samoa, Political Status*, U.S. DEP’T OF INTERIOR, <https://www.doi.gov/oia/islands/american-samoa> [<https://perma.cc/3597-6YZX>] (last visited Dec. 28, 2024).

<sup>61</sup> Blackhawk, *supra* note 3, at 76.

<sup>62</sup> *Id.* at 75.

<sup>63</sup> See *U.S. ex rel. Richards v. De Leon Guerrero*, Misc. No. 92-00001, 1992 WL 321010, at \*23 & n.32 (D. N. Mar. I. July 24, 1992) (summarizing the history of the relationship between the Northern Mariana Islands and the United States).

<sup>64</sup> *Waboll v. Villacrusis*, 958 F.2d 1450, 1461–62 (9th Cir. 1990).

disregarded. It is not clear what more—other than simply saying “No” to the requests for annexation—that the United States should have done when faced with these circumstances.

Yet what of the other three territories? The U.S. Virgin Islands, for example, had been purchased by the United States from Denmark for \$25,000,000 in gold coins.<sup>65</sup> But does that make the people of the U.S. Virgin Islands a “colonized people”?<sup>66</sup> The answer, perhaps counterintuitively, is a resounding no. As the Virgin Islands Supreme Court recently explained in rejecting the contention that the U.S. Virgin Islands had become part of the United States against the will of its people:

Although several other insular territories became part of the United States involuntarily as spoils of war, the population of the Virgin Islands supported becoming part of the United States. While the Virgin Islands officially became part of the United States upon their purchase from Denmark on March 31, 1917, an unofficial referendum on the sale of the islands to the United States passed with a vote of 4,727 in favor and only seven against. And on August 24 and 28, 1916, respectively, the elected Colonial Councils of St. Thomas-St. John and St. Croix unanimously passed resolutions in support of annexation of the islands by the United States. Thus, the people of the Virgin Islands—whether directly through the unofficial referendum, or indirectly through their duly-elected local government—had in fact overwhelmingly supported their change in political status.<sup>67</sup>

Even after the transfer, the United States repeatedly acceded to the wishes of the indigenous population of the territory. Similar to American Samoa and the Northern Mariana Islands, Congress did not impose American law on the U.S. Virgin Islands—rather, it expressly provided that the Danish laws already in effect at the time of the transfer would continue indefinitely unless amended by the territory’s democratically-elected colonial councils.<sup>68</sup> What has thus far often gone unrecognized is that these elected councils then voluntarily chose to discard Danish law in favor of American law, believing it far superior to the laws of the Danish regime that they had overwhelmingly voted to leave.<sup>69</sup>

The political status of the U.S. Virgin Islands, as well as the internal organization of its territorial government, has also been an area in which Congress has repeatedly deferred to the indigenous population through their elected leaders. Here, too, the Virgin Islands Supreme Court provided a summary of this often-overlooked history:

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<sup>65</sup> Treaty for Cession of the Danish West Indies, Den-U.S., Aug. 4, 1916, T.S. No. 629.

<sup>66</sup> Blackhawk, *supra* note 3, at 101.

<sup>67</sup> Balboni v. Ranger Am. of the V.I., Inc., 70 V.I. 1048, 1088 n.34 (2019) (internal citations omitted).

<sup>68</sup> 48 U.S.C. § 1392.

<sup>69</sup> See Joseph T. Gasper II, *Too Big to Fail: Banks and the Reception of the Common Law*, 46 STETSON L. REV. 295, 314–17 (2017).

But perhaps even more importantly, the Organic Act of 1936 and the Revised Organic Act were not unilaterally imposed on the Virgin Islands by Congress. When Congress first considered establishing a permanent government for the Virgin Islands, the Chair of the Senate Committee on Territories and Insular Possessions—Senator Millard E. Tydings—rejected a draft organic act that had been prepared by the Presidentially-appointed governor, and instead demanded that another bill be drafted “which would meet with approval of the local people.” In response, the two democratically-elected Virgin Islands legislatures existing at that time drafted the bill that would, with only minor changes, eventually become the Virgin Islands Organic Act of 1936. In other words, the first charter and *de facto* constitution of the Virgin Islands, which includes the Bill of Rights provisions at issue in this case, was not solely drafted by Congress, but was—like the Constitution of Puerto Rico and the CNMI Constitution—drafted by representatives elected directly by the people of the Virgin Islands, and then subsequently approved by Congress. Likewise, the adoption of the Revised Organic Act and the subsequent amendments thereto had also not been initiated unilaterally by Congress. Rather, those enactments were spurred by local referendums on several subjects, including a desire to combine the two legislatures into a single legislature. In other words, like the Constitution of Puerto Rico, both the Virgin Islands Organic Act of 1936 and the Revised Organic Act of 1954 were adopted with the consent of the people of the Virgin Islands either directly or through their democratically-elected representatives and then made official through the acquiescence of Congress.<sup>70</sup>

None of the above is in any way consistent with any traditional notion of colonialism. To characterize the people of the U.S. Virgin Islands, American Samoa, or the Northern Mariana Islands as “colonized peoples,” given the overwhelming support of both their local indigenous populations and elected leaders for the transfer of sovereignty to the United States, is to completely deprive them of any agency. It is that invalidation, and not the United States’s actual treatment of those three territories, that perpetuates the colonial mindset, assuming that these indigenous peoples are too ignorant to voluntarily choose to become part of the United States or were somehow tricked into doing so. This is essentially the same reasoning as the white man’s burden and “reinforces the subtle and normalized marginalization of the territories.”<sup>71</sup>

But what about Puerto Rico and Guam? Those territories were certainly “spoils of war,” having been ceded by Spain to the United States in 1898 as part of the treaty that ended the Spanish-American War.<sup>72</sup> But whatever may have

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<sup>70</sup> *Balboni*, 70 V.I. at 1089 n.34 (internal citations omitted).

<sup>71</sup> Anthony M. Ciolli, *Microaggressions Against United States Territories and Their People*, 50 S. U. L. REV. 54, 61 (2022).

<sup>72</sup> Treaty of Peace between the United States of America and the Kingdom of Spain, Spain-U.S., Dec. 10, 1898, 30 Stat. 1754.

been the case 125 years ago, an overwhelming majority of the population in both of those territories today support being part of the United States either as a territory or a state. For instance, a clear majority—often exceeding 95 percent or more—of all voters who voted for an option on the ballot at every political status referendum in Puerto Rico have voted for either statehood, commonwealth status, or some other formalized relationship with the United States, with only 5 percent—and often less—voting in favor of independence.<sup>73</sup> The same is true with Guam, where in its January 1982 status referendum, only 3.82 percent of voters supported independence, and more than 95 percent supported statehood, commonwealth status, the status quo, or some other relationship with the United States.<sup>74</sup> How can we say, on the one hand, that we wish to empower the indigenous populations of the territories, yet at the same time simply ignore or disregard how those people have already spoken?

The marginalization of these indigenous people that permeates the theory of borderlands constitutionalism flows from the very name of the theory: why are Puerto Rico, Guam, the Northern Mariana Islands, American Samoa, and the U.S. Virgin Islands considered the “borderlands” of the United States, but not the other parts of the United States that border an ocean or another country, such as Alaska, Hawaii, the ten mainland states that border Canada, the four mainland states that border Mexico, or all the states on the East and West Coasts that border the Atlantic and Pacific Oceans?

The underlying assumption that *these* five territories and *only* these five territories constitute the “borderlands,” and not any of the 50 states with an international border, is reflective of the colonial mindset towards the territories that has permeated in legal academia for more than a century: that the territories are some “exotic” places that “conjur[] up images of pirates and brigands, people operating on the edge of the continent and on the edge of the law”<sup>75</sup> and which need saving from enlightened “white saviors.”<sup>76</sup> Certainly, the territories differ

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<sup>73</sup> BALLOTPEDIA, *Puerto Rico Statehood, Independence, or Free Association Referendum*, [https://ballotpedia.org/Puerto\\_Rico\\_Statehood,\\_Independence,\\_or\\_Free\\_Association\\_Referendum\\_\(2024\)](https://ballotpedia.org/Puerto_Rico_Statehood,_Independence,_or_Free_Association_Referendum_(2024)) [<https://perma.cc/LAC5-6XGQ>] (last visited Dec. 28, 2024)..

<sup>74</sup> *Guam, 30. January 1982: Status*, DIRECT DEMOCRACY, <https://www.sudd.ch/event.php?lang=en&id=gu011982> [<https://perma.cc/S8A6-DH7U>] (last visited Dec. 28, 2024).

<sup>75</sup> Stanley K. Laughlin, Jr., *U.S. Territories and Affiliated Jurisdictions: Colonialism or Reasonable Choice for Small Societies?*, 37 OHIO N.U. L. REV. 429, 431 (2011).

<sup>76</sup> Ciolli, *supra* note 48, at 252 & n.271. The fallacy and offensiveness white savior mentality that permeates borderlands constitutionalism and similar theories is perhaps best illustrated by the following scene from the pilot episode of *Star Trek Deep Space Nine*:

BASHIR: This’ll be perfect . . . real . . . frontier medicine . . .

KIRA: Frontier medicine?

BASHIR: Major . . . I had my choice of any job in the fleet . . .

KIRA: Did you . . .

BASHIR: I didn’t want some cushy job . . . or a research grant . . . I wanted this. The furthest reaches of the galaxy. One of the most remote outposts available. This is where the adventure is. This is where heroes are made. Right here. In the wilderness.

from the fifty states in several very important respects that deserve recognition and analysis. However, to conclude that the territories somehow constitute the “borderlands” of the United States is certainly not one of them.

#### CONCLUSION

The law of the territories had long been dismissed by legal academia as “a marginal debate about marginal places.”<sup>77</sup> Today, we can safely say this is no longer the case, with an explosion of published scholarship over the past ten years—including in special issues of the *Harvard Law Review* and *Yale Law Journal* and symposia at the *Fordham Law Review* and the *Stetson Law Review*—and even the establishment of the first-ever LL.M. in Territorial Law at St. Mary’s University School of Law.<sup>78</sup>

Unfortunately, this newfound recognition and popularity comes with the challenge of defending the very existence of the field. The five inhabited United States territories are not like Native American tribes. While the territories could surely learn from the tribes, and vice versa, the fact remains that the five territories have their own unique relationships and histories with the United States that must be respected rather than overlooked in the name of solidarity. Most importantly, while some of the territories may have coalesced around different views as to what that relationship should look like moving forward, the people of the territories have demonstrated, time after time again, that they are proud to be part of the United States and desire more, rather than less, constitutional rights.<sup>79</sup>

Borderlands constitutionalism, if ever implemented by the courts, would undo all the strides that the territories have made over the last 125 years, and render further progress impossible. I close by reminding readers of the words of the late Judge Juan Torruella, who two years before his death felt similarly compelled to respond to another misguided grand theory of the territories published in the *Harvard Law Review*:

This is why I believe that the promotion of one more experiment regarding Puerto Rico’s place within the constitutional and political polis of the

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KIRA: This wilderness is my home.

BASHIR: I didn’t mean . . .

KIRA: The Cardassians left behind a lot of injured people, Doctor . . . you can make yourself useful by bringing some of your Federation Medicine to the “natives” . . . you’ll find them a friendly, simple folk . . .

STAR TREK DEEP SPACE NINE: EMISSARY (Paramount Pictures 1993).

<sup>77</sup> Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973, 1040-41 (2009).

<sup>78</sup> See *Territorial Law Concentration*, ST. MARY’S U. SCH. L., <https://law.stmarytx.edu/academics/programs/ll-m-degrees/territorial-law-llm/> [<https://perma.cc/Y7QV-6CTG>] (last visited Dec. 28, 2024).

<sup>79</sup> See cases cited *supra* note 57; see also *About PR51st*, PR51ST, <https://www.pr51st.com/pr51st/> [<https://perma.cc/Q28P-DWTA>] (last visited Dec. 28, 2024).



United States . . . is not an acceptable solution to that pervasive issue. At this point in history, further experimentation by substituting one unequal framework for another, rather than one that puts Puerto Rico's citizens on equal footing with the rest of the nation, is no more acceptable than the concept of "separate but equal"—the constitutional remedy once considered valid in resolving racial discrimination and inequality that the Court struck down in *Brown v. Board of Education*. Continued conjectural exploration with new and untried governance formulas, 119 years after the annexation of Puerto Rico by the United States, 100 years since the granting of United States citizenship to its inhabitants, and after more than a century of their being subjected to diverse shades of colonial control and bias, all during which a common thread has been the basic premise of inequality vis-à-vis the rest of the nation—although perhaps providing academic entertainment for some and political cover for others bent on maintaining colonial control over Puerto Rico—are simply put, not acceptable in this twenty-first century. The United States cannot continue its state of denial by failing to accept that its relationship with its citizens who reside in Puerto Rico is an egregious violation of their civil rights. The democratic deficits inherent in this relationship cast doubt on its legitimacy and require that it be frontally attacked and corrected with "all deliberate speed." I strongly believe that this is exactly the kind of inopportune experimentation with Puerto Rico's U.S. citizens to which I have been referring, and which, notwithstanding good intentions, is "misguided." It is perhaps a modicum of déjà vu and historical irony that the birth of this latest proposal draws its breath from within the annals of the same legal journal that initially promoted the first of the experiments regarding Puerto Rico that eventually became the doctrine of the Insular Cases, the noxious condition that continues to the present day allowing the citizens of the United States who reside in Puerto Rico to be treated unequally from those in the rest of the nation solely by reason of their geographical residence.<sup>80</sup>

It is my sincere hope that those fortunate enough to teach and write about the law, as well as the editors of the *Harvard Law Review* and other law journals, will heed these words and give voice to the territories rather than support efforts to marginalize them.

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<sup>80</sup> Torruella, *supra* note 23, at 68–69.

## NOTES

### PROTECTING DIRECT DEMOCRACY

*Ben Wishnie-Edwards\**

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## INTRODUCTION

State ballot initiatives have become increasingly popular mechanisms for safeguarding abortion rights since the Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization*.<sup>1</sup> Following a string of recent victories for abortion rights groups in states such as Kansas, Kentucky, Montana, Ohio, and Michigan, opponents have sought to make it harder to pass and use citizen-approved ballot measures to guarantee abortion access.<sup>2</sup>

The rise in the prevalence of state ballot initiatives coincides with a circuit split on the appropriate level of judicial scrutiny to apply to procedural and substantive regulations imposed on such initiatives. The split originates from the inherent federalism conflict over which entity is best suited to control and regulate state elections. The Constitution vests States with the power to govern their own elections, and the Supreme Court has thus given States "considerable leeway to protect the integrity and reliability of the initiative process."<sup>3</sup> However, the Supreme Court has expressly recognized that ballot initiatives are not subject to unrestrained state control. In *Meyer v. Grant*, the Court held that initiative petition circulation involves "core political speech" and states therefore may not "limit discussion of political issues raised in initiative petitions" or otherwise restrict the exercise of the initiative in a manner that unduly burdens the First Amendment.<sup>4</sup> The circuits differ, though, in how to apply *Meyer* to neutral procedural regulations.

The First, Sixth, and Ninth Circuits hold that the First Amendment requires heightened scrutiny of the State's interests when issuing procedural regulations that inhibit a person's ability to place an initiative on the ballot.<sup>5</sup> Conversely, five other circuits hold that regulations making the initiative process more challenging do not implicate the First Amendment.<sup>6</sup> The Supreme Court has identified the circuit split; when concurring on a grant of stay in 2020, Chief Justice Roberts wrote that "the Court is reasonably likely to grant certiorari to resolve the split presented by this case on an important issue of election

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<sup>1</sup> Emily Bazelon, *Is There a Popular Backlash to the Supreme Court's Dobbs Decision?*, N.Y. TIMES MAGAZINE, Sept. 17, 2023, <https://www.nytimes.com/2023/09/12/magazine/abortion-laws-states.html> [<https://perma.cc/B8HY-E8JV>].

<sup>2</sup> Fredreka Schouten, *Abortion foes take aim at ballot initiatives in next phase of post-Dobbs political fights*, CNN, (Apr. 1, 2023), <https://www.cnn.com/2023/04/01/politics/abortion-opponents-ballot-initiatives-ohio/index.html> [<https://perma.cc/2LKA-NSBV>].

<sup>3</sup> *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 191 (1999).

<sup>4</sup> *Meyer v. Grant*, 486 U.S. 414, 424-25 (1988).

<sup>5</sup> See *Thompson v. DeWine*, 959 F.3d 804, 808 (6th Cir. 2020) (per curiam); *Angle v. Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012); *Wirzburger v. Galvin*, 412 F.3d 272, 274, 276-77 (1st Cir. 2005).

<sup>6</sup> See, e.g., *Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935, 938 (7th Cir. 2018); *Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1099-1100 (10th Cir. 2006) (en banc); *Dobrovlny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997).

administration.”<sup>7</sup> However, the court declined to address the issue when presented with a relevant petition for certiorari in 2021.<sup>8</sup> State efforts to hinder the ballot initiative process have surged since the Court’s 2021 cert denial and subsequent decision in *Dobbs*, heightening the importance of resolving the split. While this Note focuses on ballot questions concerning abortion and reproductive rights, those are not the only areas of controversial and vital initiatives. Initiatives concerning worker classification, cannabis, criminal justice reform, and other fundamental issues are playing out in many states today.<sup>9</sup> Their significance further supports the need for heightened scrutiny over state efforts to restrict the initiative process.

This Note proceeds in three parts. Part I explains the ballot initiative process and surveys post-*Dobbs* initiatives and state efforts to minimize their success. Using Ohio’s 2023 effort as an illustration, this Part establishes the issue’s relevance and likelihood of reoccurrence. Part II provides an overview of First Amendment election law doctrine, a detailed discussion of the differing circuit approaches to the question and highlights the Supreme Court’s recognition of the issue. Part III demonstrates why the Supreme Court should resolve the circuit split by adopting heightened scrutiny as the nationwide standard. It does so through four key methodologies, demonstrating the breadth of justifications for this Note’s conclusion. Part III-A presents purposive arguments rooted in the history of the First Amendment to show how heightened scrutiny aligns with key First Amendment purposes. Part III-B provides textual and public meaning arguments to demonstrate how courts can evaluate animus and viewpoint discrimination in state regulations. Part III-C demonstrates that there are no stare decisis concerns with adopting heightened scrutiny and that this standard respects Supreme Court precedent on the issue. Part III-D presents pragmatic policy arguments for adopting heightened scrutiny. Each Part III section acknowledges and addresses counterarguments in turn.

This Note does not take a position on which specific form of heightened scrutiny should apply to initiative regulations for three reasons. First, the circuit split is chiefly over the foundational question of whether to apply the First Amendment at all. Second, the form of scrutiny generally applied to election regulations under the First Amendment — the *Anderson-Burdick* framework — is a sliding scale that does not fit into a clear tier of scrutiny but rather opens the door for courts to apply varying degrees of review based on specific factual circumstances.<sup>10</sup> Third, the Supreme Court has recently shifted away from interpreting the Constitution through strict tiers of scrutiny, signaling that arguments made on those grounds alone will be less persuasive to the Roberts

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<sup>7</sup> *Little v. Reclaim Idaho*, 140 S.Ct. 2616, 2616 (2020) (granting application for stay).

<sup>8</sup> *Thompson v. DeWine*, 959 F.3d 804 (6th Cir. 2020) *cert. denied*, 141 S.Ct. 2512 (2021)..

<sup>9</sup> *2024 ballot measures*, BALLOTPEDIA, [https://ballotpedia.org/2024\\_ballot\\_measures](https://ballotpedia.org/2024_ballot_measures) [https://perma.cc/L76V-AT3C] (last visited Dec. 5, 2024).

<sup>10</sup> See discussion *infra* Part II.

Court.<sup>11</sup> Instead, this Note provides courts with the tools to analyze a range of possible arguments that will likely be raised by advocates seeking to defeat restrictions on the initiative process. Because rational basis review will hardly ever allow a court to strike down a state election regulation, adopting heightened scrutiny over state limitations on ballot initiatives will prevent states from hindering the democratic process. Which form of scrutiny is most appropriate and persuasive will depend on future circumstances.

Much has been written and said about *Dobbs* and its impact on democracy.<sup>12</sup> Less has been written about how the success of pro-choice activists at the ballot box will impact the legal framework surrounding those efforts.<sup>13</sup> This Note fills that gap by demonstrating why heightened scrutiny of initiative regulations is both a more legally sound test and will better allow federal courts to protect reproductive health and safeguard the exercise of democracy from state legislatures and interest groups that seek to diminish it.

#### I. POLITICAL BACKGROUND: POST-DOBBS BALLOT INITIATIVES

The Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health*<sup>14</sup> to overrule *Roe v. Wade*<sup>15</sup> and *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>16</sup> was largely justified through an appeal to and

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<sup>11</sup> See, e.g., *New York State Rifle and Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 24 (2022) (rejecting tiers of scrutiny in Second Amendment analysis); Andrew Willinger, *Does Bruen Herald the End of Constitutional Strict Scrutiny Amendments?*, DUKE CTR. FOR FIREARMS L. (Aug. 26, 2022), <https://firearmslaw.duke.edu/2022/08/does-bruen-herald-the-end-of-constitutional-strict-scrutiny-amendments> [<https://perma.cc/9TQD-S6Z7>] (“*Bruen* entirely repudiates tiers of scrutiny in the Second Amendment context.”); Jonathan Scruggs, *From Guns to Websites: Clarifying Tiers of Scrutiny for Free-Speech Cases*, THE FEDERALIST SOC’Y (Jul. 14, 2022), <https://fedsoc.org/commentary/fedsoc-blog/from-guns-to-websites-clarifying-tiers-of-scrutiny-for-free-speech-cases> [<https://perma.cc/66SL-8CN3>] (“The Constitution doesn’t mention anything about tiers or balancing. It is atextual, ahistorical, and very discretionary. Justices and scholars alike have criticized it, including Justices Thomas, Kennedy, and Kavanaugh, and Professors Eugene Volokh and Joel Alicea.”); R. George Wright, *Wiping Away the Tiers of Judicial Scrutiny*, 93 ST. JOHN’S L. REV. 4, 1119 (2019) (“Tiered scrutiny review has decayed to the point to which its use is no longer justifiable.”); Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, NAT’L AFFS. (2019), <https://www.nationalaffairs.com/publications/detail/against-the-tiers-of-constitutional-scrutiny> [<https://perma.cc/6PWL-P8C3>] (“That framework ought to be abandoned. The tiers of scrutiny have no basis in the text or original meaning of the Constitution.”).

<sup>12</sup> See Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728 (2024).

<sup>13</sup> *Id.* at 776 (discussing state ballot initiatives following *Dobbs* and writing that: “These dynamics are striking and worthy of further scholarly attention.”).

<sup>14</sup> *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

<sup>15</sup> 410 U.S. 113 (1973).

<sup>16</sup> 505 U.S. 833 (1992).

invocation of democracy.<sup>17</sup> Writing for the majority, Justice Alito proclaimed that it was “time to heed the Constitution and return the issue of abortion to the people’s elected representatives.”<sup>18</sup> Political activists on both sides of the issue, but particularly those in states with conservative legislatures, responded to Justice Alito’s words with a wave of state and federal advocacy.<sup>19</sup> Following *Dobbs*, fifteen predominately conservative states enacted near-total abortion bans, and two more established limits at just six weeks of pregnancy.<sup>20</sup> As pro-life activists advanced state-level initiatives, federal legislators unsuccessfully introduced legislation in the House and Senate to guarantee national abortion access.<sup>21</sup> Given the limited prospects for federal success, however, pro-choice activists have increasingly relied on state ballot initiatives and voter referenda to protect reproductive rights.<sup>22</sup>

Ballot initiatives are a process by which citizens can propose statutes or constitutional amendments, collect a set number of signatures, and then place those proposals directly on the ballot for voters to decide. Currently, twenty-six states and Washington D.C. provide some form of citizen-initiated ballot measures.<sup>23</sup> While each state has slightly different requirements, initiatives can generally be a state statute, constitutional amendment, or veto referendum, which asks voters whether to uphold or repeal a previously enacted law. Some states also allow for legislative referrals, where legislatures themselves put laws directly on the ballot.<sup>24</sup>

In 2022, six states voted on ballot measures addressing abortion, the most on record in one year at the time.<sup>25</sup> In August of 2022, Kansas voters—a traditionally conservative electorate—were faced with a proposed state constitutional amendment to allow the state legislature to ban or restrict

<sup>17</sup> Murray & Shaw, *supra* note 12, at 729.

<sup>18</sup> *Dobbs*, 597 U.S. at 232.

<sup>19</sup> William Brangham, *Conservative states continue to restrict abortion following overturn of Roe v. Wade*, PBS (Sept. 15, 2022), <https://www.pbs.org/newshour/show/conservative-states-continue-to-restrict-abortion-following-overturn-of-ro-v-wade#:~:text=Yes%20Not%20now-Conservative%20states%20continue%20to%20restrict%20abortion%20following%20overturn%20of%20Roe,Wade&text=Conservative%20states%20continue%20to%20pass,abortion%20ban%20signed%20into%20law> [https://perma.cc/8848-5H22].

<sup>20</sup> Bazon, *supra* note 1.

<sup>21</sup> Women’s Health Protection Act, S.4132, 117th Cong. (2021-2022).

<sup>22</sup> *Abortion on the Ballot*, BALLOTPEDIA, [https://ballotpedia.org/Abortion\\_on\\_the\\_ballot](https://ballotpedia.org/Abortion_on_the_ballot) [https://perma.cc/8US8-BB3Y] (last visited Dec. 27, 2024).

<sup>23</sup> *Ballot Initiative*, BALLOTPEDIA, [https://ballotpedia.org/Ballot\\_initiative](https://ballotpedia.org/Ballot_initiative) [https://perma.cc/7HN7-AZ66] (last visited Dec. 27, 2024).

<sup>24</sup> *Id.*

<sup>25</sup> *2022 Abortion-Related Ballot Measures*, BALLOTPEDIA, [https://ballotpedia.org/2022\\_abortion-related\\_ballot\\_measures](https://ballotpedia.org/2022_abortion-related_ballot_measures) [https://perma.cc/U2HT-9SYD] (last visited Dec. 27, 2024).

abortion.<sup>26</sup> Kansans overwhelmingly rejected the referendum by a vote of 59% to 41%, keeping in place a 2019 Kansas Supreme Court decision that allowed abortion up to the twenty-second week of pregnancy.<sup>27</sup>

In November 2022, anti-abortion ballot measures were defeated in two other traditionally conservative states: Kentucky and Montana.<sup>28</sup> The Kentucky initiative, which was placed on the ballot as a legislatively referred constitutional amendment,<sup>29</sup> would have amended the Kentucky Constitution to state that “nothing in this Constitution shall be construed to secure or protect a right to abortion or require the funding of abortion.”<sup>30</sup> The measure was defeated by a vote of 52.35% to 47.65%.<sup>31</sup> The Montana measure came to voters as a legislatively referred state statute<sup>32</sup> and would have required healthcare providers to offer “reasonable care” to preserve the life of an infant born alive after an attempted abortion and enforced criminal and civil penalties against providers for failing to do so.<sup>33</sup> The measure was defeated by voters 52.55% to 47.45%.<sup>34</sup> Also in 2022, voters in traditionally progressive California<sup>35</sup> and

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<sup>26</sup> Rachel M. Cohen, *Why the Kansas abortion amendment is so confusing*, VOX (Aug. 2, 2022), <https://www.vox.com/23273455/kansas-abortion-roe-dobbs-ballot-initiative-constitutional-amendment> [<https://perma.cc/XK5G-9E8F>].

<sup>27</sup> Dylan Lysen, Laura Ziegler, & Blaise Mesa, *Voters in Kansas decide to keep abortion legal in the state, rejecting an amendment*, NPR (Aug. 3, 2022), <https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment> [<https://perma.cc/77EH-7552>].

<sup>28</sup> *2022 Abortion-Related Ballot Measures*, BALLOTPEDIA, [https://ballotpedia.org/2022\\_abortion-related\\_ballot\\_measures](https://ballotpedia.org/2022_abortion-related_ballot_measures) [<https://perma.cc/6XL6-ZAAK>] (last visited Dec. 27, 2024).

<sup>29</sup> *Legislatively Referred Constitutional Amendment*, BALLOTPEDIA, [https://ballotpedia.org/Legislatively\\_referred\\_constitutional\\_amendment](https://ballotpedia.org/Legislatively_referred_constitutional_amendment) [<https://perma.cc/6W5V-NHA4>] (last visited Dec. 27, 2024).

<sup>30</sup> *An Act proposing an amendment to the Constitution of Kentucky Related to abortion*, Ky. Gen., H.B. 91 (2021).

<sup>31</sup> *Kentucky Constitutional Amendment 2, No Right to Abortion in Constitution Amendment (2022)*, BALLOTPEDIA, [https://ballotpedia.org/Kentucky\\_Constitutional\\_Amendment\\_2\\_No\\_Right\\_to\\_Abortion\\_in\\_Constitution\\_Amendment\\_\(2022\)](https://ballotpedia.org/Kentucky_Constitutional_Amendment_2_No_Right_to_Abortion_in_Constitution_Amendment_(2022)) [<https://perma.cc/N72C-VZ8X>] (last visited Dec. 27, 2024).

<sup>32</sup> *Legislatively Referred State Statute*, *supra* note 29.

<sup>33</sup> *Infant Safety and Care Act*, Mont. Legislature, H.B. 625, 68th Reg. Sess. (2022-2023).

<sup>34</sup> *Montana LR-131, Medical Care Requirements for Born-Alive Infants Measure (2022)*, BALLOTPEDIA, [https://ballotpedia.org/Montana\\_LR-131\\_Medical\\_Care\\_Requirements\\_for\\_Born-Alive\\_Infants\\_Measure\\_\(2022\)](https://ballotpedia.org/Montana_LR-131_Medical_Care_Requirements_for_Born-Alive_Infants_Measure_(2022)) [<https://perma.cc/3U6V-TM9Z>] (last visited Dec. 27, 2024).

<sup>35</sup> Jackie Fortier, *California voters enshrine right to abortion and contraception in state constitution*, NPR (Nov. 9, 2022), <https://www.npr.org/2022/11/09/1134833374/california-results-abortion-contraception-amendment-midterms> [<https://perma.cc/6RCH-JVLR>].

Vermont,<sup>36</sup> as well as the battleground state of Michigan,<sup>37</sup> where abortion rights were not directly threatened, proactively passed ballot measures to affirmatively establish a state constitutional right to abortion. Ohio was the only state to vote on an abortion-related measure in 2023.<sup>38</sup>

A. *“They’re Taking Power Away from the People”<sup>39</sup>: State Shenanigans to Limit the Initiative Process*

In February 2023, following pro-choice successes in other states with conservative legislatures, Ohio reproductive rights activists submitted ballot language for a constitutional amendment to enshrine abortion access to be voted on in November 2023.<sup>40</sup> Three months later, in May 2023, the Ohio legislature adopted Senate Joint Resolution No. 2, which created a special August 2023 election where voters would decide whether to raise the passage threshold for citizen-initiated constitutional amendments from a majority to 60%.<sup>41</sup> Conveniently, none of the 2022 abortion-related ballot measures in conservative or battleground states (Kansas, Michigan, Kentucky, Montana) exceeded 60%<sup>42</sup> and 2022 AP VoteCast polling found that 59% of Ohio voters said abortion should generally be legal.<sup>43</sup> Not only did the proposed amendment seek to inhibit the citizen-initiative process by changing the passage threshold, it also heightened the requirements to place measures on the ballot in the first place by requiring that five percent of the electors in each Ohio county sign the petition and eliminating the state’s ten-day cure period for insufficient signature numbers.<sup>44</sup> The validity of holding the special election was challenged, but the

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<sup>36</sup> Mikaela Lefrak, *Vermont votes to protect abortion rights in state constitution*, NPR (Nov. 9, 2022), <https://npr.org/2022/11/09/1134832172/vermont-votes-abortion-constitution-midterms-results> [https://perma.cc/XB7D-VTL4].

<sup>37</sup> Alice Miranda Ollstein, *Michigan votes to put abortion rights into state constitution*, POLITICO (Nov. 9, 2022), <https://www.politico.com/news/2022/11/09/michigan-abortion-amendment-results-2022-00064778> [https://perma.cc/H4YF-BQZA].

<sup>38</sup> *Abortion on the ballot by year*, BALLOTPEDIA, [https://ballotpedia.org/Abortion\\_on\\_the\\_ballot#By\\_year](https://ballotpedia.org/Abortion_on_the_ballot#By_year) [https://perma.cc/7Q42-FRB8] (last visited Dec. 27, 2024).

<sup>39</sup> Bazelon, *supra* note 1.

<sup>40</sup> Julie Carr Smyth, *Abortion rights groups submit 2023 ballot measure in Ohio*, ASSOCIATED PRESS (Feb. 21, 2023), <https://apnews.com/article/abortion-ohio-state-government-michigan-health-7758b37b35cbb87f3185877fcbfc2139> [https://perma.cc/4ZK6-L9CZ] (“In language similar to a constitutional amendment Michigan voters approved in November. . .”).

<sup>41</sup> S.J. Res. 2, 135th Gen. Assemb., Reg. Sess. (Ohio 2023) (as enrolled).

<sup>42</sup> See *supra* Part I.

<sup>43</sup> Robert Yoon, *What to expect when Ohio votes on abortion and marijuana*, ASSOCIATED PRESS (Nov. 3, 2023), <https://apnews.com/article/ohio-election-abortion-ballot-measure-issue-marijuana-b8a3e625deec79213ea9326b5ca1476a#:~:text=In%202022%2C%2059%25%20of%20voters,recreational%20adult%20use%20of%20marijuana> [https://perma.cc/UA2V-MHU].

<sup>44</sup> See Ohio S.J. Res. 2, at 5 (as enrolled).



Ohio Supreme Court upheld the election in a four to three vote.<sup>45</sup> The dissent in that decision noted that despite previously essentially eliminating August special elections except for those specifically prescribed by legislation, the Ohio General Assembly here did so by joint resolution because it was politically incapable of passing such legislation.<sup>46</sup>

Ohio Republican legislators officially characterized the effort as “a constitutional protection act aimed at keeping deep-pocketed special interests out of Ohio’s foundational documents.”<sup>47</sup> A deeper look at their words, however, shows otherwise. Ohio Senate President Matt Huffman told reporters as much in March 2023, saying “[i]f we save 30,000 lives as a result of spending \$20 million, I think that’s a great thing.”<sup>48</sup> Huffman’s quote referred to the number of abortions performed annually in Ohio—21,813 in 2021—and the estimated cost of holding the August special election.<sup>49</sup> Ohio Secretary of State Frank LaRose, who is responsible for administering statewide elections but still campaigned extensively on behalf of the amendment,<sup>50</sup> admitted in June 2023 that the amendment proposal was “100%” about abortion.<sup>51</sup> Ultimately, Ohio voters rejected the proposal in August 2023, defeating the amendment by fourteen percentage points.<sup>52</sup> According to some observers, such as Mark Haake, a Republican City Councilor in Mason, Ohio, the resounding defeat was

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<sup>45</sup> State *ex rel.* One Pers. One Vote v. LaRose, 243 N.E.3d 1 (Ohio June 16, 2023).

<sup>46</sup> *Id.* at 25 (Brunner, J., dissenting) (“While the legislature could have repealed the prohibition on August special elections via legislation, it attempted to do so but failed. That failure speaks volumes. So instead, it simply adopted a joint resolution in direct violation of the law. But we have long held that ‘[t]he statute law of the state can neither be repealed nor amended by a joint resolution of the general assembly.’” (citation omitted)).

<sup>47</sup> Julie Carr Smyth & Samantha Hendrickson, *Ohio Constitution question aimed at thwarting abortion rights push heads to August ballot*, ASSOCIATED PRESS (May 10, 2023), <https://apnews.com/article/constitutional-access-ohio-house-abortion-ballot-95cae24b996ce943c976dbf06d7d9867> [<https://perma.cc/W9UD-9LZJ>].

<sup>48</sup> Jeremy Pelzer, *Spoiling abortion-rights amendment a ‘great’ reason to have August special election, Ohio Senate President Matt Huffman says*, CLEVELAND.COM (Mar. 23, 2023), <https://www.cleveland.com/news/2023/03/spoiling-abortion-rights-amendment-a-great-reason-to-have-august-special-election-ohio-senate-president-matt-huffman-says.html> [<https://perma.cc/NKF5-JQKA>].

<sup>49</sup> *Id.*

<sup>50</sup> David Skolnick, *LaRose Campaigns in Support of Issue 1*, TRIB. CHRON. (Aug. 3, 2023), <https://www.tribtoday.com/news/local-news/2023/08/larosecampaigns-in-support-of-issue-1/> [<https://perma.cc/Q4YP-4D37>].

<sup>51</sup> Morgan Trau, *Ohio Sec. of State LaRose admits making constitution harder to amend is ‘100% about... abortion’*, OHIO CAP. J. (June 5, 2023), <https://ohiocapitaljournal.com/2023/06/05/ohio-sec-of-state-larose-admits-making-constitution-harder-to-amend-is-100-about-abortion/> [<https://perma.cc/NSS5-ML6L>].

<sup>52</sup> Maggie Astor, *4 Takeaways From Ohio’s Vote on Abortion and Democratic Power*, N.Y. TIMES (Aug. 9, 2023), <https://www.nytimes.com/2023/08/09/us/politics/ohio-abortion-issue-1-takeaways.html> [<https://perma.cc/2SYM-NQB>].

in part due to the proposal's blatantly political motivations: "The complaint that I heard a lot was the hypocrisy of it—'They're taking power away from the people.'"<sup>53</sup> In November 2023, just as conservative lawmakers had sought to prevent, Ohio voters amended the state constitution to provide a state constitutional right to "make and carry out one's own reproductive decisions" by a vote of 56.78% to 43.22%.<sup>54</sup> Had Ohio legislators succeeded in modifying the process in August 2023, Ohio residents would not have the right to make their own reproductive decisions.

Ballot questions are one of the few mechanisms available for voters to speak directly on controversial issues.<sup>55</sup> Unsurprisingly, then, Ohio's 2023 effort is not the only example of state legislators and administrators seeking to undermine initiatives' impact and maintain their own control over state politics. The following examples (all since 2018 alone) demonstrate the range of ways states have sought to minimize the impact of ballot initiatives: expanding signature requirements (Arizona, Arkansas, Idaho, Michigan, North Dakota, Ohio, and Utah); expanding geographic distribution requirements for signature collection (Arizona, Ohio, Idaho, and Michigan have made such proposals to varying degrees of success); increasing the total number of signatures required (North Dakota, 2023); increasing the approval percentage necessary to adopt a ballot measure (Arizona, Ohio, Missouri, Oklahoma, and Florida have considered such proposals to varying degrees of success); attempts to block or amend initiatives after they pass (Ohio, Arizona, and Michigan); and state executive officers relying on technical aspects of the initiative certification process to nullify specific proposals (Florida attorney general, 2024; North Dakota secretary of state, 2022).<sup>56</sup>

Abortion-related ballot measures show no signs of slowing down. Voters decided on ten initiatives addressing state constitutional rights to abortion in the November 2024 election, the most on record in a single year.<sup>57</sup> Seven states—Arizona, Colorado, Maryland, Missouri, Montana, New York, and Nevada—approved questions addressing state constitutional rights to abortion, while

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<sup>53</sup> Bazelon, *supra* note 1.

<sup>54</sup> *Ohio Issue 1, Right to Make Reproductive Decisions Including Abortion Initiative* (2023), BALLOTPEDIA, [https://ballotpedia.org/Ohio\\_Issue\\_1\\_Right\\_to\\_Make\\_Reproductive\\_Decisions\\_Including\\_Abortion\\_Initiative\\_\(2023\)](https://ballotpedia.org/Ohio_Issue_1_Right_to_Make_Reproductive_Decisions_Including_Abortion_Initiative_(2023)) (last visited Dec. 27, 2024) [<https://perma.cc/AMZ6-RTPN>].

<sup>55</sup> Jennifer Brunner, *Is Limiting Abortion a Pretext for Oligarchy? Abortion and the Quest to Limit Citizen-Initiated Ballot Rights in Ohio*, 2023 WIS. L. REV. 1494, 1495 (2023).

<sup>56</sup> Sara Carter & Alice Clapman, *Politicians Take Aim at Ballot Initiatives*, BRENNAN CENT. (Jan. 16, 2024), <https://www.brennancenter.org/our-work/research-reports/politicians-take-aim-ballot-initiatives> [<https://perma.cc/B2SP-SUW8>].

<sup>57</sup> *2023 and 2024 Abortion Related Ballot measures*, BALLOTPEDIA, [https://ballotpedia.org/2023\\_and\\_2024\\_abortion-related\\_ballot\\_measures](https://ballotpedia.org/2023_and_2024_abortion-related_ballot_measures) [<https://perma.cc/LCK9-QLYR>] (last visited Dec. 27, 2024).

voters in Florida, Nebraska, and South Dakota defeated such initiatives.<sup>58</sup> Notably, the Florida proposal received 57.16% of votes in support, but was still defeated because state law requires a 60% vote for approval.<sup>59</sup>

While none of these states assaulted the initiative process to the same degree as Ohio did in 2023, the 2024 ballot initiative cycle was far from seamless. In September 2024, the Utah Supreme Court ordered the state to void an amendment that would have allowed the legislature to repeal or alter voter-approved ballot initiatives.<sup>60</sup> In October 2024, a federal judge in Florida found that the state health department was “trampling” on free speech rights when it threatened TV stations that aired commercials in support of the state’s abortion rights initiative.<sup>61</sup>

The New York Times described Ohio’s August 2023 special election as “a test of efforts by Republicans nationwide to curb voters’ use of ballot initiatives.”<sup>62</sup> As pro-choice advocates continue to win at the ballot box, pro-life state officials will likely persist in exploring avenues to undermine their prospects for success.

## II. ELECTION REGULATION AND INITIATIVE REVIEW CIRCUIT SPLIT

The rise of ballot initiatives raises the question of what authority courts have to protect them from state efforts to curb their influence. The Constitution provides States the power to prescribe “[t]he Times, Places, and Manner of holding Elections for Senators and Representatives.”<sup>63</sup> The Supreme Court has thus traditionally left questions of voting rights and election administration to the states.<sup>64</sup> State power is not, however, unlimited. Although the text of the Constitution vests election administration with the states, the Court has recognized that voting is a fundamental right entitled to special protections.<sup>65</sup>

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<sup>58</sup> 2024 abortion-related ballot measures and state context, BALLOTPEDIA, [https://ballotpedia.org/2024\\_abortion-related\\_ballot\\_measures\\_and\\_state\\_context](https://ballotpedia.org/2024_abortion-related_ballot_measures_and_state_context) [<https://perma.cc/XW44-CWHL>] (last visited Dec. 27, 2024).

<sup>59</sup> Florida Amendment 4, Right to Abortion Initiative (2024), BALLOTPEDIA, [https://ballotpedia.org/Florida\\_Amendment\\_4\\_Right\\_to\\_Abortion\\_Initiative\\_\(2024\)](https://ballotpedia.org/Florida_Amendment_4_Right_to_Abortion_Initiative_(2024)) [<https://perma.cc/5MS7-YYU5>] (last visited Dec. 27, 2024).

<sup>60</sup> League of Women Voters of Utah v. Utah State Legislature, 2024 WL 4294102 (Utah Sept. 25, 2024).

<sup>61</sup> Floridians Protecting Freedom, Inc. v. Ladapo, No. 4:24cv419-MW/MAF, 2024 WL 4518291 at \*6 (N.D. Fla. Oct. 17, 2024).

<sup>62</sup> Michael Wines, *Ohio Voters Reject Constitutional Change Intended to Thwart Abortion Amendment*, N.Y. TIMES (Aug. 8, 2023), <https://www.nytimes.com/2023/08/08/us/ohio-election-issue-1-results.html> [<https://perma.cc/TBD5-NMEE>].

<sup>63</sup> U.S. CONST. art. I, § 4, cl. 1.

<sup>64</sup> *Burdick v. Takashi*, 504 U.S. 428, 433 (1992).

<sup>65</sup> See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society”); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

The Court has found that the right to vote implicates the First Amendment because of the inherent connections between political activism and the freedom to associate: “[It] is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”<sup>66</sup> Despite voting’s fundamental nature, however, the Court has rejected calls to impose strict scrutiny on all voting regulations, finding that “to require that the regulation be narrowly tailored to advance a compelling state interest. . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.”<sup>67</sup> The Court has instead settled on a more flexible standard for reviewing laws that burden the right to vote under the First Amendment, known as the *Anderson-Burdick* framework.

When considering a challenge to a state election law, courts must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.”<sup>68</sup> When those First and Fourteenth Amendment rights are subjected to a “severe” burden, the regulation must be narrowly drawn to serve a compelling government interest (strict scrutiny); when a state election law instead imposes “reasonable, nondiscriminatory restrictions,” the State’s regulatory interests will generally sufficiently justify the restriction (rational basis review).<sup>69</sup> Many burdens, however, fall somewhere between those two extremes. When a law poses an intermediate burden, courts weigh the restriction against “the precise interests put forward by the State as justifications for the burden imposed by its rule.”<sup>70</sup> Heightened scrutiny therefore requires the state to come up with more precise and compelling justifications for its actions than rational basis review and gives courts greater ability to check state abuses of power.

The First Circuit evaluates state initiative procedural regulations not under the *Anderson-Burdick* framework but instead under another First Amendment test known as the *O’Brien* standard.<sup>71</sup> *O’Brien* governs regulations of noncommunicative conduct that nevertheless contain speech elements. According to *O’Brien*, when speech and nonspeech elements are combined in the same conduct, a “sufficiently important governmental interest in regulating

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<sup>66</sup> NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

<sup>67</sup> *Burdick*, 504 U.S. at 433; *see also* Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) (“Although these rights of voters are fundamental, not all restrictions imposed by the States on candidates’ eligibility for the ballot impose constitutionally-suspect burdens on voters’ rights to associate or to choose among candidates.”).

<sup>68</sup> *Anderson*, 460 U.S. at 789.

<sup>69</sup> *Burdick*, 504 U.S. at 434.

<sup>70</sup> *Anderson*, 460 U.S. at 789; *Burdick*, 504 U.S. at 434.

<sup>71</sup> *See* Wirzburger v. Galvin, 412 F.3d 271, 275-279 (1st Cir. 2005).

the nonspeech element can justify incidental limitations on First Amendment freedoms.”<sup>72</sup> *O’Brien* allows the government to regulate noncommunicative conduct through a four-part test: (1) the regulation “is within the constitutional power of the Government;” (2) “it furthers an important or substantial governmental interest;” (3) “the governmental interest is unrelated to the suppression of free expression;” and (4) “the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”<sup>73</sup> Although the *O’Brien* factors differ from the *Anderson-Burdick* framework, both modes of analysis represent forms of heightened scrutiny that give the courts greater power to police government regulation by requiring a detailed weighing of the burdens to voters and government interests.

A final relevant First Amendment theory is that of animus and viewpoint discrimination. Animus refers to the concept that discrimination against a particular group cannot constitute a legitimate governmental interest.<sup>74</sup> The Court’s animus doctrine is imprecise at best, but has recently grown in favor among conservative justices, particularly regarding religious freedom claims.<sup>75</sup> Similarly, the Court’s viewpoint discrimination doctrine holds that strict scrutiny is to be imposed for regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.<sup>76</sup>

Ballot initiatives occupy a murky status on the spectrum of election regulations. The Constitution does not guarantee the right to an initiative, but once a state has provided such a right, it may not restrict its exercise that unduly burdens First Amendment rights.<sup>77</sup> This rule originates from *Meyer v. Grant*, where the Supreme Court considered a Colorado statute that made it a felony to pay petition circulators collecting signatures for ballot initiatives. The Court subjected the statute to heightened scrutiny after holding that petition circulation “involves the type of interactive communication concerning political change that is appropriately described as ‘core political speech.’”<sup>78</sup> Although the Court did not explicitly say what tier of scrutiny it was subjecting the statute to, it carefully weighed the statute’s First Amendment burdens against Colorado’s offered

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<sup>72</sup> *United States v. O’Brien*, 391 U.S. 367, 376 (1968).

<sup>73</sup> *Id.* at 377.

<sup>74</sup> *See* U.S. Dep’t of Agric. v. *Moreno*, 413 U.S. 528, 534 (1973); *see also* Andrew T. Hayashi, *The Law and Economics of Animus*, 89 U. CHI. L. REV. 581, 628 (2022) (“A broader definition of animus allows for motives other than mere prejudice, including animus arising from moral disapproval or fear.”).

<sup>75</sup> *See* Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1215, 1240–45 (2018) (arguing that the Supreme Court has not settled on a unified definition of animus); *see also* Daniel Mach, *The Supreme Court Cares About Religious Animus – Except When It Doesn’t*, ACLU (June 26, 2018), <https://www.aclu.org/news/immigrants-rights/supreme-court-cares-about-religious-animus-except-when-it-doesnt> [https://perma.cc/U39T-MY2T].

<sup>76</sup> *See infra* Part III-B.

<sup>77</sup> *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

<sup>78</sup> *Id.* at 421–22.

interests.<sup>79</sup> Ultimately, the Court struck down the Colorado statute, finding that it unduly burdened the plaintiff's ability to "freely [] engage in discussions concerning the need for [the proposal] that is guarded by the First Amendment."<sup>80</sup> *Meyer* establishes clear Supreme Court precedent applying the First Amendment to state regulations of the ballot initiative process. This precedent, however, conflicts with the federalism principle that states retain "considerable leeway to protect the integrity and reliability of the initiative process."<sup>81</sup> This conflict has generated a split among the circuits on how to apply *Meyer* and manage State exercise of their discretionary authority over the initiative process.<sup>82</sup>

### 1. The Rational Basis Circuits

Today, five Circuits apply rational basis review to ballot initiative regulations, holding that even when regulations make the initiative process more onerous, they only implicate the First Amendment if the State directly restricts political discussion or petition circulation. In *Initiative and Referendum Institute v. Walker*, plaintiffs challenged a Utah statute that subjected initiatives related to wildlife management to a heightened passage standard, requiring a supermajority for passage.<sup>83</sup> The Tenth Circuit held that the supermajority requirement did not implicate freedom of speech protections.<sup>84</sup> In coming to this conclusion, the Tenth Circuit distinguished between laws that regulate or restrict the communicative conduct of persons advocating a position—which are subject to strict scrutiny—and laws that instead determine the process by which legislation is enacted or makes particular speech less likely to succeed—which are not.<sup>85</sup> The Tenth Circuit followed the D.C. and Eighth Circuits in holding that "a state constitutional restriction on the permissible subject matter of citizen initiatives [does not] implicate the First Amendment in any way."<sup>86</sup> The Tenth Circuit also rejected the plaintiffs' arguments for intermediate scrutiny by

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<sup>79</sup> See *id.* at 425 ("[T]he burden that Colorado must overcome to justify this criminal law is well-nigh insurmountable.").

<sup>80</sup> *Id.* at 421.

<sup>81</sup> *Buckley v. Am. Const. L. Found. Inc.*, 525 U.S. 182, 191 (1999).

<sup>82</sup> *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2616 (2020) (granting application for stay).

<sup>83</sup> 450 F.3d 1082, 1085 (10th Cir. 2006).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1099-1100.

<sup>86</sup> *Id.* at 1102; see also *Marijuana Policy Project v. United States*, 304 F.3d 82, 86 (D.C. Cir. 2002) (rejecting the claim that law barring D.C. voters from passing citizen-initiated legislation related to "controlled substances" violated the First Amendment); *Wellwood v. Johnson ex rel. Bryant*, 172 F.3d 1007, 1008-09 (8th Cir. 1999) (upholding Arkansas law requiring 30% of voters to sign a certain type of voting petition but only 15% to sign petitions on other subjects).

distinguishing between laws that restrict expressive conduct and those that make some outcomes more difficult to achieve.<sup>87</sup>

The Seventh Circuit has adopted a similar holding—that States are largely free to regulate the initiative process however they please—but rooted its finding in a different First Amendment theory: viewpoint discrimination.<sup>88</sup> In *Jones*, plaintiffs challenged an Illinois law limiting the number of referenda on any ballot to three (“Rule of Three”).<sup>89</sup> After enacting the Rule of Three, the city council in Calumet City, Illinois, placed three propositions on the ballot before citizens could collect signatures themselves.<sup>90</sup> The plaintiffs argued that this violated the First Amendment by effectively barring private proposals from the ballot.<sup>91</sup> The Seventh Circuit, however, upheld the Rule of Three under rational basis review: “[b]ecause the Rule of Three does not distinguish by viewpoint or content, the answer depends on whether the rule has a rational basis, not on the First Amendment.”<sup>92</sup> The Court further dispatched with the plaintiff’s argument through *Meyer*’s holding that placing proposals on a ballot is not a constitutionally protected right: “This assumes that the ballot is a public forum and that there is a constitutional right to place referenda on the ballot. But there is no such right. Nothing in the Constitution guarantees direct democracy.”<sup>93</sup>

The Eighth Circuit has held that it will apply the First Amendment when restrictions affect “the communication of ideas associated with the circulation of petitions” but will not apply the First Amendment to a ballot initiative signature requirement that restricts or makes more difficult the petition circulation process.<sup>94</sup> In narrower opinions, the Second and Eleventh Circuits declined to apply the First Amendment to challenges to state initiative mechanisms that did not clearly engage in viewpoint discrimination or merely limited the efficacy of certain legislative efforts.<sup>95</sup>

## 2. The Heightened Scrutiny Circuits

Three circuits hold that the First Amendment requires closer scrutiny of the State’s interests when a neutral, procedural regulation inhibits a person’s ability to place an initiative on the ballot.<sup>96</sup> The Sixth Circuit engaged in such an

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<sup>87</sup> *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1102 (10th Cir. 2006).

<sup>88</sup> *See Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935, 938 (7th Cir. 2018).

<sup>89</sup> *Id.* at 936.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 937.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Dobrovolsky v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997).

<sup>95</sup> *Molinari v. Bloomberg*, 564 F.3d 587, 601 (2d. Cir. 2009) (finding speech not restricted when state law “puts referenda and City Council legislation on equal footing, permitting the latter to supersede the former”); *Delgado v. Smith*, 861 F.2d 1489, 1498 (11th Cir. 1988).

<sup>96</sup> *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2616 (2020) (highlighting Sixth and Ninth Circuits); *see also Wirzbarger v. Galvin*, 412 F.3d 271, 274–75 (1st Cir. 2005).

analysis concerning a COVID-19-era challenge to Ohio's enforcement of its ballot initiative regulations amidst the pandemic.<sup>97</sup> Plaintiffs argued that Ohio's stay-at-home orders made it too burdensome to obtain the signatures required to place an initiative on the ballot and moved to enjoin the State from enforcing those requirements, asking Ohio to instead accept electronically signed petitions.<sup>98</sup> Although the Sixth Circuit rejected the Plaintiffs' motion, they answered whether the pandemic and associated stay-at-home orders increased the burden that Ohio's ballot-initiative regulations place on Plaintiffs' First Amendment rights through the *Anderson-Burdick* framework.<sup>99</sup> After determining that the burden was intermediate rather than severe, the court considered whether "the State has legitimate interests to impose the burden that outweigh it" and found the State's interest to be not only legitimate but compelling.<sup>100</sup> The Sixth Circuit also applied the *Anderson-Burdick* framework to a challenge to a Michigan ballot-initiative-regulation policy in 2020.<sup>101</sup> There, the court found a severe burden based on Michigan's stay-at-home order and applied strict scrutiny to strike down the provision for not being sufficiently narrowly tailored.<sup>102</sup>

The Ninth Circuit has taken a similar approach, adopting the *Anderson-Burdick* test to a Nevada signature requirement for placing an initiative on the ballot in *Angle v. Miller*.<sup>103</sup> The Ninth Circuit reasoned that weighing the burdens was logical to "guard against undue hindrances to political conversations and the exchange of ideas."<sup>104</sup> Following Supreme Court precedent in *Meyer v. Grant*, the Ninth Circuit identified two ways in which restrictions on the initiative process could severely burden core political speech: restricting one-on-one communication between petition circulators and voters and making it less likely that proponents will be able to garner the signatures necessary to place an initiative on the ballot.<sup>105</sup> Although the Ninth Circuit in *Angle* upheld the law as within the state's power to achieve its important

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<sup>97</sup> See *Thompson v. Dewine*, 959 F.3d 804, 809 (6th Cir. 2020).

<sup>98</sup> *Id.* at 807.

<sup>99</sup> *Id.* at 808–809.

<sup>100</sup> *Id.* at 811 (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1988)).

<sup>101</sup> *Esshaki v. Whitmer*, 813 F.App'x 170, 171–172 (6th Cir. 2020).

<sup>102</sup> *Id.* ("In deciding this claim, the district court properly applied the *Anderson-Burdick* test, which applies strict scrutiny to a State's law that severely burdens ballot access and intermediate scrutiny to a law that imposes lesser burdens. The district court correctly determined that the combination of the State's strict enforcement of the ballot-access provisions and the Stay-at-Home Orders imposed a severe burden on the plaintiffs' ballot access, so strict scrutiny applied, and even assuming that the State's interest (i.e., ensuring each candidate has a reasonable amount of support) is compelling, the provisions are not narrowly tailored to the present circumstances. Thus, the State's strict application of the ballot-access provisions is unconstitutional as applied here.") (citations omitted).

<sup>103</sup> See *Angle v. Miller*, 673 F.3d 1122, 1132 (9th Cir. 2012).

<sup>104</sup> *Id.* (quoting *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 192 (1999)).

<sup>105</sup> *Id.*



regulatory interests, they applied the First Amendment through the *Anderson-Burdick* framework rather than allowing the state unfettered freedom to regulate the initiative process.<sup>106</sup>

The First Circuit also applies the First Amendment to the state initiative process.<sup>107</sup> Unlike the Sixth and Ninth Circuits, however, the First Circuit does so using the *O'Brien* standard.<sup>108</sup> In *Wirzburger v. Galvin*, the First Circuit found that citizens' use of the initiative process constituted expressive conduct and thus applied *O'Brien* to a Massachusetts ballot-initiative law.<sup>109</sup> The split over what standard of review to apply, even within the circuits that do apply the First Amendment, further emphasizes the need for the Supreme Court to resolve the question.

### 3. Supreme Court Recognition

The Supreme Court acknowledged this circuit split in a 2020 stay grant regarding the signature certification process for an Idaho ballot initiative.<sup>110</sup> The Court recognized the deep divisions among circuits in evaluating state laws regarding ballot initiatives: “[T]he Circuits diverge in fundamental respects when presented with challenges to the sort of state laws at issue here.”<sup>111</sup> Because of this divergence, the Chief Justice, joined by Justices Alito, Gorsuch, and Kavanaugh, wrote that “the Court is reasonably likely to grant certiorari to resolve the split presented by this case on an important issue of election administration.”<sup>112</sup>

Curiously, however, the Supreme Court declined to address the issue in 2021 when presented with a cert petition that asked: “[w]hether and how the First Amendment applies to regulations that impede a person’s ability to place an initiative on the ballot.”<sup>113</sup> As the prevalence of ballot initiatives and state efforts to limit their power and success increases following *Dobbs*, we can expect to see more state regulations that “impede a person’s ability to place an initiative on the ballot.”<sup>114</sup> If, as Chief Justice Roberts wrote in 2020, the Supreme Court wants to prevent the Circuits from “appl[ying] their conflicting frameworks to reach predictably contrary conclusions,”<sup>115</sup> they should resolve the split at the next opportunity.

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<sup>106</sup> *Id.* at 1135.

<sup>107</sup> *Wirzburger v. Galvin*, 412 F.3d 271, 276 (1st Cir. 2005).

<sup>108</sup> *See id.* at 278.

<sup>109</sup> *Id.* at 276–78.

<sup>110</sup> *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2616–17 (2020).

<sup>111</sup> *Id.* at 2616.

<sup>112</sup> *Id.*

<sup>113</sup> Petition for Writ of Certiorari at i, *Thompson v. DeWine*, 959 F.3d 804 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 2512 (2021).

<sup>114</sup> *See id.*; *supra* Part I.

<sup>115</sup> *Little*, 140 S. Ct. at 2616–17.

### III. HEIGHTENED SCRUTINY IS THE APPROPRIATE TEST

The Supreme Court should follow the First, Ninth, and Sixth Circuits and apply the First Amendment to all state action that impedes a person's ability to place a petition on the ballot or successfully win the adoption of an initiative petition. All five major interpretive methodologies—text, public meaning, precedent, and pragmatism—support this conclusion.

Part A of this section outlines why protecting and strengthening the initiative process through heightened scrutiny aligns with three fundamental purposes of the First Amendment: expression and political change, discussion in the public sphere, and the marketplace of ideas. Part A also rebuts the counterargument that direct democracy should not be maximally protected because it was not the form of democracy envisioned by the founders. Part B of this section presents textual and public meaning arguments for striking down statutes that limit the initiative process. Part B demonstrates that some common proposals—such as subject matter restrictions or supermajority requirements—represent facial viewpoint discrimination and should thus be subject to heightened scrutiny. It also uses legislative history and contextual political understandings to demonstrate that the true public meaning of non-facially discriminatory proposals, such as Ohio's 2023 effort, nevertheless demonstrates impermissible animus. Part C of this section argues that heightened scrutiny does not offend the Supreme Court's First Amendment jurisprudence and in fact is a more accurate understanding of how the Court interpreted ballot initiative regulations in *Meyer*. Finally, Part D of this section presents pragmatic arguments for imposing heightened scrutiny as a means of protecting reproductive health and fulfilling the *Dobbs* majority's mandate to leave the issue of abortion to the people.

#### A. *First Amendment Purposes*

Purposive arguments strongly support applying the First Amendment to regulations that limit the efficacy of ballot initiatives. At first glance, strengthening direct democracy may not seem in line with the views of the founders, who were deeply wary of popular rule.<sup>116</sup> James Madison articulated this fear in *Federalist No. 10*, where he argued that direct democracy would lead to instability and factions.<sup>117</sup> Madison furthered his critiques of direct democracy in *Federalist No. 63*, arguing that a "respectable body of citizens" was necessary to protect "the people against their own temporary errors and delusions" that may lead them to "call for measures which they themselves will afterwards be the most ready to lament and condemn."<sup>118</sup> Some courts have

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<sup>116</sup> See THE FEDERALIST NOS. 10, 63 (James Madison).

<sup>117</sup> See THE FEDERALIST NO. 10, at 43 (James Madison) (Terrence Bell ed. 2003) ("When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.").

<sup>118</sup> THE FEDERALIST NO. 63, at 307 (James Madison) (Terrence Bell ed. 2003).

used this history to argue against robust protections for direct democracy.<sup>119</sup> Although it is true that the founders were fearful of direct democracy, modern democracy would be hardly recognizable to Madison and his contemporaries. States and the federal government have jettisoned key aspects of the founding vision of democracy, from entry requirements such as property ownership, race, or sex to structural elements such as the direct election of Senators.<sup>120</sup> Rather than analyzing whether an aspect of democracy aligns with the founders' conception of our system, it is more appropriate to analyze how it aligns with the Constitution's original purposes.

Because recent judicial analysis of petitioning for ballot initiatives has been subsumed within the First Amendment's speech and association clauses, this section will focus on the purposes behind those clauses.<sup>121</sup> The issue should, however, also prompt discussion of the First Amendment's explicit textual protection of the right to petition.<sup>122</sup> The Supreme Court has declared that the right to petition is "one of the most precious of the liberties safeguarded by the Bill of Rights."<sup>123</sup> Historically, both in England and in early America, the right for citizens to come together to petition their government for redress of grievances was so fundamental that it deserved explicit constitutional protection apart from speech and association.<sup>124</sup> Therefore, its exercise through ballot initiatives should be specially protected from state intrusion.

Arguing that direct democracy and the right to a ballot initiative are not worthy of heightened protections because the founders did not support them, as the *Jones* court did,<sup>125</sup> is an incomplete analysis that overlooks key First

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<sup>119</sup> See *Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935, 937 (7th Cir. 2018) ("The nation's founders thought that direct democracy would produce political instability and contribute to factionalism. There has never been a federal referendum. Nor has any federal court ever concluded that the ballot is a public forum that must be opened to referenda, let alone to as many referenda as anyone cares to propose." (Citing *FEDERALIST* NO. 10 (James Madison))).

<sup>120</sup> See, e.g., U.S. CONST. amend. XV § 1 (removing voting prohibitions based on race); U.S. CONST. amend. XIX (removing voting prohibitions based on sex); U.S. CONST. amend. XVII (providing for direct election of Senators). These amendments alone do not come close to accurately summarizing the historical battles to earn the right to vote among minority and marginalized groups. For a detailed history of the ongoing quest for suffrage in the United States and its many ebbs and flows, see generally ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (Basic Books, 2009).

<sup>121</sup> See *infra* Part II.

<sup>122</sup> U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people peaceably to petition the Government for a redress of grievances.").

<sup>123</sup> *BE & K Const. Co. v. NLRB*, 536 U.S. 516, 517 (2002).

<sup>124</sup> See Michael Wishnie, *Immigrants and the Right to Petition*, 78 NYU L. REV. 667 (2003) (canvassing history of petitioning and arguing that Petition Clause provides heightened protection for unfettered communications to government, which state and local governments may not obstruct).

<sup>125</sup> See *Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935, 937 (7th Cir. 2018).

Amendment purposes. Crucially, it minimizes that the First Amendment was designed to protect expression and promote political change, to promote discussions on the ground in the “public sphere,” and to foster a “marketplace of ideas.”<sup>126</sup> Because of ballot initiatives’ fundamental compatibility with the purposes of the First Amendment, the Court should not allow States to restrict their exercise without subjecting the State’s justifications for doing so to heightened scrutiny.

### 1. Expression and Political Change

Both the Supreme Court and prominent First Amendment scholars have repeatedly recognized that a key purpose of the First Amendment is to bring about political and social change. This purpose can be traced back to the founding. Thomas Jefferson’s Bill for Establishing Religious Freedom in Virginia, drafted in 1777, set out four reasons why government can make no law that constrains freedom of speech, conscience, or opinion.<sup>127</sup> Justice Brandeis in 1927 described Jefferson’s fourth reason as being that free speech allows the public discussion necessary for democratic self-government: “[P]ublic discussion is a political duty; and that this should be a fundamental principle of the American government.”<sup>128</sup> James Madison supported Jefferson’s arguments and ultimately guided the bill to passage in 1786.<sup>129</sup> The Virginia statute was a forerunner to the First Amendment and its purposes can thus be imputed to the Amendment itself.<sup>130</sup>

The Supreme Court directly endorsed this purpose in *Roth v. United States*, writing that “[t]he protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social

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<sup>126</sup> See Anna Skiba-Crafts, *Conditions on Taking the Initiative: The First Amendment Implications of Subject Matter Restrictions on Ballot Initiatives*, 107 MICH. L. REV. 1305, 1318 (2009).

<sup>127</sup> Jeffery Rosen, President/CEO, Nat’l Const. Center, Remarks at Celebration of Newly Installed Marble First Amendment Tablet (May 2, 2022) <https://constitutioncenter.org/go/firstamendment#:~:text=It%20protects%20freedom%20of%20conscience,the%20Preamble%20to%20the%20Constitution> [https://perma.cc/WQ52-HQP8].

<sup>128</sup> *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

<sup>129</sup> Matthew Harris, *Virginia Statute for Religious Freedom*, FREE SPEECH CENT. AT MIDDLE TENN. STATE UNIV. (Feb. 18, 2024), <https://firstamendment.mtsu.edu/article/virginia-statute-for-religious-freedom/#:~:text=from%20religious%20affairs-,Drafted%20by%20Thomas%20Jefferson%20in%201776%20and%20accepted%20by%20t> he,was%20the%20first%20attempt%20in [https://perma.cc/KFR2-7CCT].

<sup>130</sup> Daniel Dreisbach, *A New Perspective on Jefferson’s Views on Church-State Relations: The Virginia Statute for Establishing Religious Freedom in Its Legislative Context*, 35 AM. J. LEGAL HIST. 173, 176 (1991) (“In particular, the Supreme Court, as well as lower federal and state courts, have invoked Jefferson’s ‘Bill for Establishing Religious Freedom’ and Madison’s ‘Memorial and Remonstrance’ to inform their church-state pronouncements.”).

changes desired by the people.”<sup>131</sup> This idea was built off the Court’s previous finding in *Stromberg v. California* that “the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system.”<sup>132</sup> Self-expression, according to the Court in *Burson v. Freeman*, is “the essence of self-government.”<sup>133</sup> Scholars, too, have argued that a central goal of the First Amendment is to protect the success of self-government.<sup>134</sup>

Ballot initiatives are a near paradigmatic mechanism of self-government and thus support a key purpose of the First Amendment. Citizens directly enacting a statute, constitutional amendment, or otherwise directly exercising their legislative will is clearly intended to bring about political and social change.<sup>135</sup> Ballot initiatives are a direct mechanism for exercising self-government and are thus closely aligned with a key purpose of the First Amendment. Therefore, they deserve of special protections under the First Amendment. Heightened scrutiny provides these special protections by forcing states to develop specific justifications beyond mere regulatory interests for their restrictions.

## 2. Discussion in the Public Sphere

A second primary purpose of the First Amendment is to promote informal political discussions among private citizens as a mechanism to achieve political and social change—or to maintain the status quo. The Madisonian conception of democracy sought to create a system of “government by discussion” where outcomes would be reached through widespread public conversation.<sup>136</sup> According to this understanding, articulated by the scholar Cass Sunstein, these informal conversations in the public sphere were vital to promote “popular sovereignty by furthering a system of deliberative democracy.”<sup>137</sup> The First Amendment was created, in part, to “protect from [government] regulation the communicative processes of ‘private’ citizens deemed necessary for self-

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<sup>131</sup> *Roth v. United States*, 354 U.S. 476, 484 (1957); *see also* *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976); *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

<sup>132</sup> *Stromberg v. Cal.*, 283 U.S. 359, 369 (1931).

<sup>133</sup> *Burson v. Freeman*, 504 U.S. 191, 196 (1992) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)).

<sup>134</sup> *See, e.g.*, ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 9-28 (Oxford University Press, 1960); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV., 591, 592 (1982); Thomas P. Crocker, *Displacing Dissent: The Role of “Place” in First Amendment Jurisprudence*, 75 *FORDHAM L. REV.* 2587, 2591 (2007).

<sup>135</sup> Skiba-Crafts, *supra* note 126, at 1320 (2009).

<sup>136</sup> CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* xvi (1993).

<sup>137</sup> William Marshall, *Free Speech and the “Problem” of Democracy*, 89 *NW. U. L. REV.* 191, 195 (1994) (reviewing CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993)).

governance.”<sup>138</sup> Because political speech is essential for the functioning of democracy, it must not only be protected but encouraged.<sup>139</sup> This philosophy of the First Amendment—promoting the free exchange of ideas among citizens—has been repeatedly emphasized and relied upon by the Supreme Court.<sup>140</sup>

Ballot initiatives are a natural extension of the informal political communication of which Madison conceived.<sup>141</sup> While it is true that the mechanics of specific questions occur within a structured framework created by individual states, that official framework—the placing of an initiative on the ballot for certification by a Secretary of State and voting by citizens—represents only the final stages of an initiative’s lifecycle.

Ballot initiative campaigns are filled with paradigmatic examples of informal political communication. Initiatives generally begin on the back of an overwhelming swell of public support for an issue, or the recognition that elected officials do not have voters’ true interests in mind. Often called the incubation period, this initial stage consists of community events, research, and informal discussions to develop policies and narratives capable of reaching a critical mass.<sup>142</sup> These discussions develop into the circulation of petitions and collecting signatures for such petitions. Individual organizers going door-to-door and town square to town square talking to other citizens to solicit their support is as close to “government by discussion” as exists today.<sup>143</sup> Momentum often leads to media campaigns and advertisements, increasing interest and support for an idea. Only after all of this has occurred and tens of thousands (depending on the state) of voters have signed a petition can an initiative even reach the ballot, at which point its campaign further ramps up.<sup>144</sup>

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<sup>138</sup> Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1125 (1993).

<sup>139</sup> *Faculty Bibliography: Cass R. Sunstein, Democracy and the Problem of Free Speech (The Free Press 1993)*, HARV. L. SCH., <https://hls.harvard.edu/bibliography/democracy-and-the-problem-of-free-speech/> [<https://perma.cc/HK6S-E8MR>] (last visited Dec. 27, 2024).

<sup>140</sup> See e.g., *Brown v. Hartlage*, 456 U.S. 45, 52-53 (1982) (“At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed.”); *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966) (“[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-72 (1971) (“[T]he First Amendment was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”).

<sup>141</sup> Skiba-Crafts, *supra* note 126, at 1320 (2009).

<sup>142</sup> *BISC’s 360 Ballot Measure Lifecycle*, BALLOT INITIATIVE STRATEGY CTR., <https://ballot.org/biscs-360-ballot-measure-lifecycle/> [<https://perma.cc/525G-9KCZ>] (last visited Dec. 27, 2024).

<sup>143</sup> Sunstein, *supra* note 136 at xvi.

<sup>144</sup> See Skiba-Crafts, *supra* note 126, at 1320; *BISC’s 360 Ballot Measure Lifecycle*, *supra* note 142.

When the government restricts the subject matter of possible ballot measures,<sup>145</sup> it fails to live up to the First Amendment's purpose of promoting political discussions. By foreclosing the possibility of conducting a ballot initiative on a certain subject, the government prevents citizens from engaging in the free exchange of ideas, "deliberative democracy," and "government by discussion" that define the initiative process.<sup>146</sup> To allow these discussions informally but prevent them the instant they have the concrete ability to effectuate political and social change flies in the face of promoting political discussions. It thus fulfills a key purpose of the First Amendment to demand a thorough analysis of the state's interests in burdening political expression through heightened scrutiny.

### 3. Marketplace of Ideas

One of the most common conceptions of the First Amendment is the "marketplace of ideas" model. The marketplace theory first appeared in a Supreme Court opinion in 1919, when Justice Holmes wrote in dissent that "the best test of truth is the power of thought to get itself accepted in the competition of the market."<sup>147</sup> The theory of a competitive market of ideas has deeper historical roots than Justice Holmes, though, first originating with English philosophers John Milton and John Stuart Mill.<sup>148</sup> Proponents of the marketplace view argue that the First Amendment serves to facilitate the unfettered exchange of ideas because, like goods in a traditional marketplace, competition leads to the best results.<sup>149</sup> Since Justice Holmes introduced the theory to American jurisprudence, it has permeated judicial<sup>150</sup> and scholarly<sup>151</sup> discussions of the First Amendment. In the Court's most significant ballot initiative ruling, *Meyer v. Grant*, the court relied upon the First Amendment concept of an "unfettered interchange of ideas" in its holding that ballot-petition

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<sup>145</sup> See *supra* Part I; *infra* Part III-B.

<sup>146</sup> Sunstein, *supra* note 136 at xvi.

<sup>147</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>148</sup> Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L. J. 1, 3 (1984).

<sup>149</sup> Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671, 726-27 (1983) ("The marketplace of ideas theory is based on the view that government should not interfere with robust debate or the free flow of information because competition among ideas advances knowledge and leads to better decisions.").

<sup>150</sup> See, e.g., *Brown v. Hartlage*, 456 U.S. 45, 52-53 (1982); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981); *Miami Herald Publishing Co. v. Tornillo*, 417 U.S. 241, 248 (1974); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

<sup>151</sup> See, e.g., Stanley Ingber, *supra* note 148; T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 7-8 (1966); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT, 82-89 (1948).

circulation involved core political speech.<sup>152</sup> Given its deep historical roots, significant role in First Amendment jurisprudence, and presence in *Meyer*, any new First Amendment rule or standard must be compatible with the marketplace theory.

Ballot initiatives are a near paradigmatic example of the marketplace theory in action. Initiatives directly pit ideas against one another and ask voters to choose the one they prefer. They increase the availability and awareness of certain political ideas. By directly putting them into effect, initiatives provide a clear return for the most supported ideas. Ballot campaigns are costly and burdensome to run, incentivizing proponents to advocate for only the best ideas. Thrusting specific ideas into the public sphere and asking citizens to affirmatively say which ones are the best and most deserving of their support clearly mimics the market framework.<sup>153</sup>

Opponents may seek to “justify restrictions on the ballot initiative process as interventions designed to correct market imperfections.”<sup>154</sup> There is merit to the argument that an unrestrained market is more dangerous than one where the government can intervene to “equalize” opportunities for market participation. The Court has occasionally adopted this approach, as developed in *Austin v. Michigan State Chamber of Commerce*, limiting certain speakers who are seen as particularly loud or powerful to prevent them from drowning out other voices.<sup>155</sup> This argument should not lead the Supreme Court to allow restrictions on ballot initiatives, however. The Court has moved away from the *Austin* theory of allowing restrictions to equalize the playing field on speech issues. The Court’s most significant recent First Amendment election decision, *Citizens United*, overruled *Austin* and relied on the idea of an open marketplace of ideas in prohibiting the government from restricting independent expenditures for political campaigns by corporations.<sup>156</sup> Allowing government intervention to dictate issues that reach the ballot (subject matter restrictions) or the ways in which proponents can place those issues on the ballot (process restrictions) directly contravenes the purpose of the First Amendment to promote a marketplace of ideas and the Roberts Court’s understanding of that theory as providing a free, unrestrained market.

To comply with three chief purposes of the First Amendment as understood by the founders and generations of judges and scholars, the rights of citizens to place the ideas they want on the ballot should be protected and encouraged. The

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<sup>152</sup> *Meyer v. Grant*, 486 U.S. 414, 421 (2005) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

<sup>153</sup> See *Skiba-Crafts*, *supra* note 126, at 1322.

<sup>154</sup> *Id.*

<sup>155</sup> See *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 658-660 (1990) (upholding limitation on corporate contributions to mitigate political influence of corporations).

<sup>156</sup> See *Citizens United v. FEC*, 558 U.S. 310, 354 (2010) (“*Austin* interferes with the ‘open marketplace’ of ideas protected by the First Amendment.”).



Court should not allow states to restrict those citizen-driven efforts without subjecting such restrictions to heightened scrutiny and weighing the precise interests put forward by the State as justifications for the burden imposed by its rule.

B. *Text and Public Meaning Demonstrate Viewpoint Discrimination and Animus*

It is not sufficient, however, to rely on purposive arguments alone. In considering whether to adopt a new heightened standard, the Court will also examine the text and public meaning of the statutes in question. While we cannot yet know the exact text of the initiative restriction that may reach the Supreme Court, past and currently pending proposals provide a helpful roadmap of the language—and its true meaning—that conservative activists will utilize to prevent pro-choice success at the ballot. If the text explicitly says, or the public meaning clearly indicates, that the statute targets certain views or demonstrates animus towards certain populations, that may provide an additional avenue for the Supreme Court to exercise heightened scrutiny over a statute.

Ohio's 2023 effort provides a prime example of this. As discussed in Part I, the Ohio legislature referred a constitutional amendment to voters on the ballot for a special election in August 2023.<sup>157</sup> The text of the amendment was as follows:

A “yes” vote supported amending the Ohio Constitution to:

- increase the voter approval threshold for new constitutional amendments to 60%;
- require citizen-initiated constitutional amendment campaigns to collect signatures from each of the state's 88 counties, an increase from half (44) of the counties.
- eliminate the cure period of 10 days for campaigns to gather additional signatures for citizen-initiated constitutional amendments when the original submission did not have enough valid signatures.

A “no” vote opposed amending the Ohio Constitution, thus:

- maintaining that a simple majority (50%+1) vote is required for voters to approve new constitutional amendments;
- continuing to require campaigns to collect signatures from each of at least 44 (of 88) counties; and
- continuing to allow campaigns to have 10 additional days to collect signatures when their original submissions contained too few valid signatures.<sup>158</sup>

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<sup>157</sup> See *supra* Part I.

<sup>158</sup> *Ohio Issue 1, 60% Vote Requirement to Approve Constitutional Amendments Measure (2023)*, BALLOTPEDIA, [https://ballotpedia.org/Ohio\\_Issue\\_1,\\_60%25\\_Vote\\_Requirement](https://ballotpedia.org/Ohio_Issue_1,_60%25_Vote_Requirement)

On its face, the amendment appears to be a neutral state law aimed at managing its electoral system and administering its own elections, which would be squarely in Ohio's Article I power.<sup>159</sup> Neither animus nor viewpoint discrimination are implicit in the statutory text either. For a strict textualist, such as Justice Gorsuch, the inquiry may end there.<sup>160</sup> For other Justices more interested in the legislative history and discerning the original public meaning of a statute, the context for the amendment and the words of its proponents may be illuminating.

As detailed in Part I of this Note, Ohio legislators and elected officials were transparent that the proposed amendment was "100%" about abortion, particularly the impending November 2023 abortion-related ballot measure.<sup>161</sup> That legislative history demonstrates clear animus, which the Supreme Court has defined as "a bare . . . desire to harm a politically unpopular group."<sup>162</sup> Animus cannot constitute a legitimate governmental interest, a statute must have some other purpose.<sup>163</sup> While Ohio legislators presented other arguments about governmental interests, such as keeping "deep-pocketed special interests out of Ohio's foundational documents," as demonstrated in Part I, their true purpose was to prevent the political success of abortion advocates.<sup>164</sup> Beyond the legislators' specific words, the broader political context of the proposal makes clear that its intent was to specifically target abortion. It created a special election to pre-empt a previously scheduled election on the abortion issue and followed a run of pro-choice success in peer states. The true meaning and purpose of the proposal was clear to all observers.<sup>165</sup> Applying heightened

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\_to Approve Constitutional Amendments Measure (2023) [<https://perma.cc/2XRZ-T2N2>] (last visited Dec. 27, 2024).

<sup>159</sup> OHIO CONST., Art. I, § 4, cl. 1.

<sup>160</sup> Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265, n.10 (2020) ("See NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 131–32 (2019) ("[T]extualism offers a known and knowable methodology for judges to determine impartially . . . what the law is." *Id.* at 132.)). Justice Gorsuch was clear about his preference for textualism during his confirmation hearing. See *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 131 (2017) (statement of Judge Neil M. Gorsuch)).

<sup>161</sup> Morgan Trau, *supra* note 51.

<sup>162</sup> U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973); see also Andrew T. Hayashi, *The Law and Economics of Animus*, 89 U. CHI. L. REV. 581, 628 (2022) ("A broader definition of animus allows for motives other than mere prejudice, including animus arising from moral disapproval or fear.").

<sup>163</sup> Moreno, 413 U.S. at 534.

<sup>164</sup> See *supra* Part I.

<sup>165</sup> See Julie Carr Smyth & Samantha Hendrickson, *Ohio Constitution question aimed at thwarting abortion rights push heads to August ballot*, ASSOCIATED PRESS (May 10, 2023), <https://apnews.com/article/constitutional-access-ohio-house-abortion-ballot-95cae24b996ce943c976dbf06d7d9867>; Jeremy Pelzer, *Spoiling abortion-rights amendment a 'great' reason to have August special election, Ohio Senate President Matt Huffman says*,

scrutiny to Ohio's 2023 proposal and thoroughly examining the state's offered interests likely could have struck it down as being motivated by impermissible animus.

However, while the Supreme Court has recently embraced a broader conception of animus, particularly regarding First Amendment religious freedom claims, the doctrine is murky at best.<sup>166</sup> As one scholar writes, "[a]nimus is inherently subjective and fleeting, localized in the mind of an individual."<sup>167</sup> Furthermore, questions remain about how much legislative history is required to demonstrate animus. The inquiry into governmental neutrality is a fact-specific one that considers several factors, including "legislative or administrative history, including contemporaneous statements made by members of the decision making body."<sup>168</sup> The Court has not provided clear lines dictating how much weight to give each factor or how much legislative history is sufficient to demonstrate animus rather than neutrality.<sup>169</sup> Questions remain whether the threshold for finding animus is one contemporaneous statement, statements from a majority of legislators, every legislator, or somewhere in between. While Ohio's 2023 effort was likely clear enough to satisfy a 'know it when you see it' test, other statutes may not be. Because of the difficulty in proving animus and the lack of doctrinal clarity on how much legislative history is required to sufficiently demonstrate it, courts should also examine viewpoint discrimination claims when evaluating future statutes.

The Supreme Court's viewpoint discrimination doctrine holds that strict scrutiny is to be imposed for regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.<sup>170</sup> The same level of

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CLEVELAND.COM (Mar. 23, 2023), <https://www.cleveland.com/news/2023/03/spoiling-abortion-rights-amendment-a-great-reason-to-have-august-special-election-ohio-senate-president-matt-huffman-says.html> [<https://perma.cc/3TUG-LJCY>].

<sup>166</sup> Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1215, 1240-45 (2017) (arguing that the Supreme Court has not settled on a unified definition of animus).

<sup>167</sup> Joy Milligan, *Animus and Its Distortion of the Past*, 74 ALA. L. REV. 725, 726 (May 2023).

<sup>168</sup> *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 639 (2018) (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993)) (Listing relevant factors as "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.").

<sup>169</sup> See *Masterpiece*, 584 U.S. at 619. In *Masterpiece*, the Court merely found that "[i]n view of these factors the record here demonstrates that the Commission's consideration of Phillips' case was neither tolerant nor respectful of Phillips' religious beliefs." *Id.* at 639. Beyond analogizing from the factual record, this provides no explicit guidance or rule for future applications.

<sup>170</sup> See *Turner Broad. Sys. v. Fed. Comm'n Comm'n*, 512 U.S. 622, 642 (1994); *Simon & Schuster Inc. v. Members of NY State Crime Victims Bd.*, 502 U.S. 105, 112, 115, 125–

rigorous scrutiny is applied to laws that compel speakers to utter or distribute speech bearing a particular message.<sup>171</sup> Speech regulations that are unrelated to the content of the speech, however, are subject to an intermediate level of scrutiny.<sup>172</sup> The difficult task for courts, then, is determining whether a regulation is content based or content neutral. In making that determination, the “principal inquiry . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.”<sup>173</sup> This does not require an explicit showing of a content-based purpose. Furthermore, if a law discriminates on its face based on content, the mere assertion of a content-neutral purpose is not sufficient to save the law.<sup>174</sup>

One could argue that the Ohio statute imposes differential burdens upon speech because of its content. By specifically raising the approval threshold for ballot questions to a level above where abortion supporters polled and the vote share pro-choice causes had earned in other states, the Ohio legislature sought to make it effectively impossible for abortion rights supporters to win a ballot initiative. Ultimately, however, the statute likely does not discriminate based on content or viewpoint because it is not specifically targeted to abortion rights or supporters.<sup>175</sup> Had the statute explicitly increased the approval threshold to 60% or implemented the signature policy changes for reproductive rights questions only, it may be a different story. On those facts, combined with the legislative history clearly demonstrating that the legislature adopted the regulation because of ‘disagreement’ with the message, there would likely be a strong viewpoint discrimination claim.<sup>176</sup> While such direct targeting may seem unlikely, it would not be unprecedented. Utah imposes a two-thirds requirement on initiatives related to hunting, Arizona a 60% requirement for tax approvals, and Washington a 60% threshold for lottery related initiatives.<sup>177</sup>

More likely, however, is that states will seek to eliminate abortion as a subject matter from the ballot altogether. Of the twenty-six states that provide for citizen-initiated ballot measures, seven states currently have subject restrictions.<sup>178</sup> Massachusetts prevents, among other things, initiatives related to religion or religious institutions.<sup>179</sup> These subject matter restrictions have

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126 (1991) (Kennedy, J., concurring in judgment); *Perry Ed. Assn. v. Perry Loc. Educators’ Assn.*, 460 U.S. 37, 45 (1983).

<sup>171</sup> See *Riley v. Nat’l Fed’n for Blind of N.C., Inc.*, 487 U.S. 797, 797-98 (1998).

<sup>172</sup> See *Turner Broad. Sys.*, 512 U.S. at 642.

<sup>173</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

<sup>174</sup> See *Turner Broad. Sys.*, 512 U.S. at 642-43.

<sup>175</sup> See *Rosen*, *supra* note 127.

<sup>176</sup> See *Post*, *supra* note 138.

<sup>177</sup> *Supermajority Requirements for Ballot Measures*, BALLOTPEDIA, [https://ballotpedia.org/Supermajority\\_requirements\\_for\\_ballot\\_measures](https://ballotpedia.org/Supermajority_requirements_for_ballot_measures) [<https://perma.cc/VK3Z-BTPN>] (last visited Dec. 27, 2024).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

been the subject of litigation in circuits on both sides of the split. The D.C. Circuit in 2002 held that a statute preventing the District from using ballot initiatives on any law reducing penalties associated with marijuana did not constitute viewpoint discrimination and did not implicate any form of heightened scrutiny.<sup>180</sup> The judges reasoned that voters were still free to argue against and speak about the issue, they just lost the ability to vote for it in a ballot initiative. Because there is no constitutional right to vote on a particular proposition, there is no constitutional violation. The court reasoned that the amendment “silences no one; it merely shifts the focus of debate ... from the ... ballot initiative ... to Congress.”<sup>181</sup> The Tenth Circuit reached a similar holding in *Initiative & Referendum Institute v. Walker*, where it found that the First Amendment protected only political speech, not the right to make law.<sup>182</sup>

The First Circuit, however, used the *O’Brien* standard to apply heightened scrutiny to Massachusetts’ prohibition on ballot initiatives related to religious issues.<sup>183</sup> Although the First Circuit ultimately upheld the subject matter restriction, its application of heightened scrutiny is notable. The Supreme Court should follow the First Circuit and expose all subject matter restrictions to heightened scrutiny as viewpoint and content based legislation.

The First Circuit responded directly to the D.C. Circuit in *Wirzbarger*, writing that “we cannot agree with the D.C. Circuit’s finding that subject-matter exclusions from the initiative process ‘restrict no speech’ nor with its conclusion that this type of selective carve-out ‘implicates no First Amendment concerns.’”<sup>184</sup> For the First Circuit, the analysis was relatively simple: *Meyer* holds that an initiative process is core political speech and thus “manifests elements of protected expression.”<sup>185</sup> The law in question therefore directly restricted and regulated protected expression, implicating the First Amendment.<sup>186</sup> The First Circuit then applied *O’Brien* intermediate scrutiny rather than strict scrutiny because the statute at issue regulated which type of laws or amendments could be passed by initiative without any reference to who may speak or what message they may convey.<sup>187</sup>

The First Circuit is correct to find that restrictions on the subject matter available to a state initiative process burden protected political expression. The D.C. and Tenth Circuits may be correct that the First Amendment does not explicitly protect the right to make law because it is a nonspeech activity. Ending the inquiry there though, as a dissenting judge in the Tenth Circuit case

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<sup>180</sup> See *Marijuana Pol’y Project v. U.S.*, 304 F.3d 82, 85-86 (D.C. Cir. 2002).

<sup>181</sup> *Id.* at 86.

<sup>182</sup> *Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1099 (10th Cir. 2006) (en banc).

<sup>183</sup> See *Wirzbarger v. Galvin*, 412 F.3d 271, 278-279 (1st Cir. 2005).

<sup>184</sup> *Id.* at 278 (quoting *Marijuana Pol’y Project*, 304 F.3d at 85, 83).

<sup>185</sup> *Meyer v. Grant*, 486 U.S. 414, 403 (2005).

<sup>186</sup> *Wirzbarger*, 412 F.3d at 278-79.

<sup>187</sup> *Id.*

wrote, is “no more than foolhardy formalism.”<sup>188</sup> Initiative elections are so intertwined with speech that controlling the outcome of an election—or preventing the campaign from ever even beginning—inherently affects the speech rights of those participating in the election. Were one to accept the D.C. and Tenth Circuit’s conclusion that lawmaking is a non-speech activity, it would still be incorrect to see that as the end of the analysis. The First Amendment clearly protects the right to engage in expressive conduct. “When ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct,” a state may constrain that expressive conduct only in accordance with the *O’Brien* standard.<sup>189</sup> The use of a state initiative process comprises both speech (agenda setting, signature collecting, etc.) and nonspeech (lawmaking) elements.<sup>190</sup> Therefore, the *O’Brien* heightened scrutiny standard, not mere rational basis review, must govern any content-based exclusion from an initiative’s qualification for the ballot.

The First Circuit in *Wirzbarger* held that Massachusetts’ religious restriction did not fail the *O’Brien* standard because it found an important state interest in safeguarding the fundamental constitutional freedom of religion from popular initiatives.<sup>191</sup> That justification, however, would not hold up in the abortion context. State legislatures would have a difficult time establishing an important state interest in eliminating abortion rights alone from the initiative process. Most subject matter restrictions relate to specifically vested powers: dedicating revenue, creating courts, making appropriations, or protecting pre-existing constitutional rights.<sup>192</sup> The nature of a ballot initiative in this arena would likely be to specifically establish that abortion is a constitutional right. It therefore cannot be a pre-existing constitutional right or specifically vested power that the state has an important interest in safeguarding.

Textual and public meaning analyses support applying heightened scrutiny to legislation impacting the ballot initiative process. Where the text of a measure does not explicitly or implicitly discriminate based on viewpoint or content, the legislative history and political context surrounding its adoption can be used to demonstrate impermissible animus that will not survive judicial scrutiny. Potential state efforts to prevent abortion success at the ballot may well explicitly discriminate based on content in their text, though. If they do so through an

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<sup>188</sup> Initiative and Referendum Inst. v. Walker, 450 F. 3d 1082, 1112 (10th Cir. 2006) (en banc) (Lucero, J., dissenting).

<sup>189</sup> United States v. O’Brien, 391 U.S. 367, 376-77 (1968); see Texas v. Johnson, 491 U.S. 397, 406 (1989) (noting that expressive conduct is more susceptible to regulation than written or spoken communication).

<sup>190</sup> John Gildersleeve, Note, *Editing Direct Democracy: Does Limiting the Subject Matter of Ballot Initiatives Offend the First Amendment?*, 107 COLUM. L. REV. 1437, 1440 (2007).

<sup>191</sup> *Wirzbarger*, 412 F.3d at 279.

<sup>192</sup> *Subject Restrictions for Ballot Initiatives*, BALLOTPEDIA, [https://ballotpedia.org/Subject\\_restrictions\\_for\\_ballot\\_initiatives](https://ballotpedia.org/Subject_restrictions_for_ballot_initiatives) [<https://perma.cc/M86X-S4C6>] (last visited Dec. 27, 2024).

outright prohibition on initiatives related to the subject or by instituting a subject-specific supermajority requirement, the Supreme Court should follow the First Circuit and review such restrictions under heightened scrutiny.

C. *Heightened Scrutiny Respects Supreme Court Precedent*

Stare decisis is one of the most fundamental principles in American law and must be considered in any legal analysis, particularly one that seeks to impose a new standard or rule on an existing area of law. Stare decisis instructs courts to defer to its past decisions on the same issue and overturn their own precedent only when faced with compelling circumstances to do so.<sup>193</sup> The value of precedent as a mode of interpretation has shrunk recently.<sup>194</sup> For better or worse, the Roberts Court has not been afraid to overturn settled law and consider stare decisis in new ways.<sup>195</sup> Nevertheless, considering how applying a standard to a new situation abides by or differs from existing case law remains a crucial aspect of legal analysis. Here, precedent does not pose a barrier to applying heightened scrutiny to state regulations of the ballot initiative process.

The Supreme Court has never directly addressed the issue of what standard of review to apply to ballot initiative restrictions.<sup>196</sup> Thus, applying heightened scrutiny would not directly overturn any of the Court's precedent. Opponents of adopting heightened scrutiny would likely argue, though, that such a move would overrule the Court's jurisprudence granting states the sole power to govern their own elections and holding that there is no constitutional right to an initiative procedure.<sup>197</sup> Ending the analysis after determining that election administration is a traditional state power would be short-sighted. Instead, applying heightened scrutiny to ballot initiative manipulation would respect the Court's initiative rulings.

As the Court said in *Buckley*, while states have considerable leeway in managing their own elections, the First Amendment "requires vigilance in making those judgments."<sup>198</sup> The Court made this analysis explicit in *Meyer*. In *Meyer*, the Court reasoned that using a petition to achieve political change clearly invokes the First Amendment, which was designed to promote the "unfettered interchange of ideas for the bringing about of political and social

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<sup>193</sup> See Melissa Murray, *The Supreme Court, 2019 Term — Comment: The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308, 309-10 (2020) (discussing stare decisis in lower courts and at the Supreme Court).

<sup>194</sup> See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

<sup>195</sup> Murray & Shaw, *supra* note 12, at 749.

<sup>196</sup> See *Little v. Reclaim Idaho*, 140 S.Ct. 2616, 2616-17 (2020).

<sup>197</sup> See *Buckley v. Am. Const. L. Found. Inc.*, 525 U.S. 182, 183 (1998) ("States have considerable leeway to protect the integrity and reliability of the ballot-initiative process, as they have with respect to election processes generally."); *Meyer v. Grant*, 486 U.S. 421, 424 (1988) (finding no constitutional right to an initiative procedure).

<sup>198</sup> *Buckley*, 525 U.S. at 183.

changes desired by the people.”<sup>199</sup> Because it invokes the First Amendment, the Court held that petition circulation for means of a ballot initiative is “core political speech.”<sup>200</sup> The Court’s finding that petition circulation constitutes core political speech was rooted in its own precedent. That decision was largely based on extending a previous recognition that soliciting charitable donations involves protected speech and regulation of solicitation infringed on that speech.<sup>201</sup> Furthermore, the Court in *Meyer* dismissed the argument that because initiatives are not constitutionally required states can limit their exercise however they see fit: “the power to ban initiatives entirely [does not] include[] the power to limit discussion of political issues raised in initiative petitions.”<sup>202</sup>

In *Meyer*, the court struck down the regulation at issue because the state failed to sufficiently justify the burden its statute imposed on this protected communication.<sup>203</sup> While the court did not specify what standard of review it used to come to that ruling, the close examination of the burdens and competing state justifications that the court undertook more closely resembles heightened scrutiny than rational basis review. Colorado’s two justifications for the statute were “making sure that an initiative has sufficient grass roots support to be placed on the ballot” and “protecting the integrity of the initiative process.”<sup>204</sup> Both of these interests are certainly legitimate. Were the Supreme Court applying rational basis review, Colorado’s regulatory interests would have likely been sufficient to justify the restriction.<sup>205</sup> By carefully analyzing Colorado’s offered justifications, weighing them against the burdens imposed by the statute, and coming out against Colorado, the court’s analysis far more closely resembles heightened scrutiny under the *Anderson-Burdick* framework.<sup>206</sup> Therefore, it is a natural extension of the court’s leading ballot initiative precedent to apply heightened scrutiny, not rational basis review, to state efforts that do just what *Meyer* says they cannot: limit discussion of political issues raised in initiative petitions.

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<sup>199</sup> *Meyer*, 486 U.S. at 421 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

<sup>200</sup> *Id.* at 422.

<sup>201</sup> *Id.* at 422 n.5 (“Our recognition that the solicitation of signatures for a petition involves protected speech follows from our recognition in *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980), that the solicitation of charitable contributions often involves speech protected by the First Amendment and that any attempt to regulate solicitation would necessarily infringe that speech.”).

<sup>202</sup> *Id.* at 425.

<sup>203</sup> *Id.* at 426.

<sup>204</sup> *Id.* at 425.

<sup>205</sup> See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

<sup>206</sup> See *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick*, 504 U.S. at 434.



D. *Pragmatic Policy Arguments Favor Heightened Scrutiny in the Post-Dobbs Era*

History, tradition, and precedent cannot be the only considerations in shaping the law. Legal doctrines must also be evaluated in light of their effect on the real-world consequences to those impacted by each decision. Justice Stephen Breyer was particularly known for embracing this pragmatic approach to judicial review.<sup>207</sup> Without pragmatism, the law becomes insular and disconnected and fails to center the most important element of democracy: the people. As Justice Breyer put it, “[pragmatism] disavows a contrary constitutional approach, a more ‘legalistic’ approach that places too much weight upon language, history, tradition, and precedent alone while understanding the importance of consequences.”<sup>208</sup> Pragmatism and consideration of consequences strongly support stringent judicial review of state efforts to manipulate the ballot initiative process.

Granting state legislatures the near unfettered ability to keep abortion off the ballot—which rational basis review effectively does—will have devastating consequences for pregnant people across the country. The dissenters in *Dobbs* warned that “one result of today’s decision is certain: the curtailment of women’s rights, and of their status as free and equal citizens.”<sup>209</sup> That warning has become a reality. Fourteen states currently have near-total bans on abortion and many other states have such restrictive gestational limits as to make abortion practically impossible.<sup>210</sup> The devastating health effects of those bans are well-documented.<sup>211</sup> Ballot initiatives have proven to be an effective way to protect access to abortions and safe reproductive health care.<sup>212</sup> Restricting initiatives

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<sup>207</sup> See Cass Sunstein, *Justice Breyer’s Democratic Pragmatism*, 115 YALE L. J. 1719, 1720 (2006) (“One of Breyer’s major innovations lay in an insistence on evaluating traditional doctrines not in a vacuum, but in light of the concrete effects of regulation on the real world.”).

<sup>208</sup> *Pragmatic Justice*, HARV. L. TODAY, (Jan. 27, 2022) <https://hls.harvard.edu/today/pragmatic-justice/>.

<sup>209</sup> *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 362 (2022) (Breyer, Sotomayor, Kagan, dissenting).

<sup>210</sup> *Tracking Abortion Bans Across the Country*, N.Y. TIMES, (Jan. 8, 2024) <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> [<https://perma.cc/6TQE-KZPD>].

<sup>211</sup> See, e.g., Nadine El-Bawab et al., *Fighting for Their Lives: Women and the Impact of Abortion Restrictions in Post-Roe America*, ABC NEWS, (Dec. 14, 2023), <https://abcnews.go.com/US/fighting-lives-women-impact-abortion-restrictions-post-roe/story?id=105563174> [<https://perma.cc/KA6M-VC73>]; Isabelle Chapman, *Nearly Two Years After Texas’ Six-Week Abortion Ban, More Infants are Dying*, CNN, (July 20, 2023), <https://www.cnn.com/2023/07/20/health/texas-abortion-ban-infant-mortality-invs/index.html> [<https://perma.cc/Y847-46VE>]; Marty Schladen, *While In Effect, Ohio’s Abortion Ban Led to Chaos, Suffering, and Worse Health Care, Doctor Says*, OHIO CAP. J., (Nov. 4, 2022), <https://ohiocapitaljournal.com/2022/11/04/obstetrician-ohio-abortion-law-stymies-doctors-endangers-patients/> [<https://perma.cc/U22F-KUWY>].

<sup>212</sup> See *supra* Part I.

will limit access to abortion and have destructive consequences for pregnant people. Courts should take these consequences into account and more strictly review state efforts to restrict such initiatives. Heightened scrutiny will better protect reproductive health than rational basis review. Ultimately, that should be what matters most.

That is not, however, what matters most to many judges, including a majority of Supreme Court justices. Arguing for heightened scrutiny merely to protect abortion access will not persuade the judges responsible for stripping abortion of its constitutional protections in the first place. Another pragmatic argument that builds off Justice Alito's own words in *Dobbs* may be more successful, however.

Justice Alito justified the *Dobbs* decision largely through an appeal to democracy. The majority insisted that *Roe* and *Casey* disrupted democratic deliberation over abortion by imposing the Court's will on the issue, and that *Dobbs* was merely "return[ing] the issue of abortion to the people's elected representatives."<sup>213</sup> While this argument was a weak and disingenuous one in support of overturning *Roe* and *Casey*,<sup>214</sup> it strongly supports heightened scrutiny of state efforts to restrict or limit the ballot initiative process.

If the *Dobbs* majority is serious about democracy being the proper forum for determining abortion policy, then they should be serious about protecting democracy from un-democratic restrictions. Justice Scalia wrote in his *Casey* dissent, which Justice Alito cited in the *Dobbs* majority, "[t]he permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting."<sup>215</sup> Citizen-initiated ballot measures are a near paradigmatic example of citizens attempting to persuade one another on an issue and then voting. They are a purely democratic exercise and are therefore squarely the forum that Justices Alito, Scalia, and others have written is best suited to resolving the abortion issue. Restrictions of this fundamental exercise of democracy should thus not be permitted without passing heightened judicial scrutiny. A categorical restriction on abortion-related initiatives, for instance, would fully prevent citizens from "trying to persuade one another."<sup>216</sup> Ohio Republicans in 2023 blamed their failure in part on the perception that they were "taking power away from the people."<sup>217</sup> Taking decision-making power away from the people is

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<sup>213</sup> *Dobbs*, 597 U.S. at 232.

<sup>214</sup> See Murray & Shaw, *supra* note 12, at 748.

<sup>215</sup> *Dobbs*, 597 U.S. at 232 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in judgment in part and dissenting in part)).

<sup>216</sup> *Casey*, 505 U.S. at 979 (Scalia, J., concurring in judgment in part and dissenting in part).

<sup>217</sup> Emily Bazelon, *The Surprising Places Where Abortion Rights Are On the Ballot, and Winning*, N.Y. TIMES (Sept. 12, 2023), <https://www.nytimes.com/2023/09/12/magazine/abortion-laws-states.html> [<https://perma.cc/G9YB-7GHN>].

incompatible with Justice Alito's mandate to return the issue of abortion to the people.

Opponents would argue that Justice Alito in *Dobbs* specifically wrote of returning the abortion question to "the people's *elected representatives*."<sup>218</sup> He did not speak of returning it to the citizens themselves through direct initiatives. Under this argument, allowing elected representatives to freely manage their elections on the abortion issue as they see fit would satisfy Justice Alito's invocation of democracy. This argument, though, is yet another example of "foolhardy formalism."<sup>219</sup> First, Justice Scalia's statement that Justice Alito cited for his proposition spoke of citizens persuading one another, not merely of elected representatives. Justice Alito concluded the argument by writing "[t]hat is what the Constitution and the rule of law demand."<sup>220</sup> This sentence immediately followed his quotation of Scalia; the word "that" therefore refers to Justice Scalia's reference to citizens, not Justice Alito's reference to "elected representatives." Second, to interpret democracy as exercised only by elected representatives contradicts the Supreme Court's ballot initiative jurisprudence. The Court has made clear that once a state creates an initiative process, it may not impermissibly restrict its exercise.<sup>221</sup> Democracy thus does not have to include ballot initiatives, but once such initiatives are created, they must be treated the same as all other forms of democracy. Excluding them from that understanding of democracy would be illogical.

Granting state legislators an unfettered ability to restrict the ballot initiative process would have damaging consequences for the health of pregnant people and for democracy. These consequences must be considered in determining the appropriate level of scrutiny to review such restrictions. To achieve what the Supreme Court mandated in *Dobbs*, the Court must subject ballot restrictions to heightened scrutiny.

#### CONCLUSION

*Roe* and *Casey* are gone and will not be coming back any time soon. But that does not mean that courts are gone as a tool for protecting abortion access. When the Supreme Court overturned decades of precedent in 2022, it claimed that democracy demanded that result. In ways beyond the scope of this Note, such as through rampant partisan gerrymandering, the Court itself has sanctioned many efforts to thwart the democracy it claimed to prioritize.<sup>222</sup> One area that remains nearly purely democratic, however, is statewide ballot initiatives. It is in those initiatives that the impact of democracy has been felt most profoundly since *Dobbs*. In the eyes of many conservative state legislators, such as those in

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<sup>218</sup> *Dobbs*, 597 U.S. at 232 (emphasis added).

<sup>219</sup> *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1112 (10th Cir. 2006) (Lucero, J., dissenting).

<sup>220</sup> *Dobbs*, 597 U.S. at 232.

<sup>221</sup> *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

<sup>222</sup> See *Murray & Shaw*, *supra* note 12, at 776.

Ohio, citizens have been too responsive to the Court's mandate. Rather than listen to the wishes of those voters, they have sought to make democracy less democratic. The Supreme Court should follow its own reasoning in *Dobbs* and protect the exercise of direct democracy by subjecting restrictions on the initiative process to heightened scrutiny.

The Court has recognized that it will likely consider this issue soon.<sup>223</sup> Conservative state legislators will likely give them the opportunity to do so imminently. By presenting purposive, textual, public meaning, animus-based, and pragmatic arguments, this Note offers an ideologically diverse range of mechanisms for judges to analyze future restrictions on the exercise of this vital political tool.

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<sup>223</sup> Little v. Reclaim Idaho, 140 S.Ct. 2616, 2616 (2020).

# JAILS INTO ASYLUMS: HOW HARRIS COUNTY JAIL BECAME THE LARGEST MENTAL HEALTH FACILITY IN TEXAS AND WHY PEOPLE INCOMPETENT TO STAND TRIAL FACE INDEFINITE DETENTION

*J. Elizabeth Hergert\**

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## INTRODUCTION

Harris County Jail in Houston, Texas, is the largest mental health provider in the state. This is a concern because jails are not capable of effectively treating mental illness and inflict further harm on their inmates.<sup>1</sup> In 2019, Harris County Sheriff Ed Gonzalez described the significant presence of severe mental illness: “On a daily basis, our jail has more inmates on psychotropic medications than any single mental health hospital in Texas.”<sup>2</sup> The situation has worsened since his statement: as of November 25, 2024, there were over 3,000 inmates on psychotropic medication at Harris County Jail, representing about thirty percent of the jail’s total population of over 9,500 people.<sup>3</sup> Inmates on psychotropic medication can include defendants who have been determined incompetent to stand trial (IST) by a judge and committed to a state hospital for competency restoration treatment.<sup>4</sup> Meanwhile, there are just over 2,200 psychiatric hospital beds across Texas’ nine state hospitals, over 700 of which are not being used due

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<sup>1</sup> See Alex Stuckey & Maria De Jesus, *Texans with Mental Illnesses are Dying in Houston-Area Jails. They Didn’t Need to Be There.*, HOUS. LANDING (Feb. 8, 2023), <https://houstonlanding.org/texans-with-mental-illnesses-are-dying-in-houston-area-jails-they-didnt-need-to-be-there/> [https://perma.cc/X7V7-A6SU] (citing Houston Landing investigation which found that half of people who died of unnatural causes in jail custody in the Houston area had been previously flagged as mentally ill by jail or court staff); Ram Subramanian et al., *Incarceration’s Front Door: The Misuse of Jails in America*, VERA INST. OF JUST. (Feb. 2015), [http://www.antonioacasella.eu/nume/VERA\\_feb15.pdf](http://www.antonioacasella.eu/nume/VERA_feb15.pdf) [https://perma.cc/38YF-6VCZ] (detailing the inherent economic, social, and physical harms of jail).

<sup>2</sup> Hannah Zedaker, *Harris County Leaders Target Better Jail Diversion Programs*, CMTY. IMPACT (Apr. 9, 2019, 2:00 PM), <https://communityimpact.com/houston/spring-klein/city-county/2019/04/09/harris-county-leaders-target-better-jail-diversion-programs/#:~:text=%E2%80%9Con%20a%20daily%20basis%2C%20our,%5D%20for%20months%2C%20even%20years> [https://perma.cc/P2JF-PQ9S].

<sup>3</sup> *Jail Population*, HARRIS CNTY. TEX., <https://charts.hctx.net/jailpop/App/JailPopCurrent> [https://perma.cc/2ZWB-L5QJ] (last visited Nov. 25, 2024).

<sup>4</sup> See TEX. CODE CRIM. PROC. ANN. art. 46B.001 (West 2017) (defining competency restoration as “the treatment or education process for restoring a person’s ability to consult with the person’s attorney with a reasonable degree of rational understanding, including a rational and factual understanding of the court proceedings and charges against the person”); TEX. CODE CRIM. PROC. ANN. art. 46B.003 (West 2004) (defining incompetency as lacking sufficient present ability to consult with the person’s lawyer with a reasonable degree of rational understanding or lacking a rational and factual understanding of the proceedings against them); TEX. CODE CRIM. PROC. ANN. art. 46B.073 (West 2017) (committing defendant found IST to competency restoration). Some defendants found IST refuse to take psychotropic medication, but there is overlap between inmates on psychotropic medication and inmates who have been found mentally incompetent to stand trial. See Christopher Ponder, *‘Drugs Don’t Work in Patients Who Don’t Take Them’*, TEX. DIST. & CNTY. ATTY’S ASSOC. (Sept.-Oct. 2017), <https://www.tdcaa.com/journal/drugs-dont-work-in-patients-who-dont-take-them/> [https://perma.cc/J7LE-ZC4L] (outlining two-step process by which defendants found incompetent to stand trial may be forcibly medicated and statutory exceptions).

to healthcare staffing shortages.<sup>5</sup> Until a bed becomes available, defendants found IST remain in the custody of the county sheriff, and their trial is paused for competency restoration.<sup>6</sup>

In 2006, the Texas Health and Human Services Commission (HHSC) created the Forensic Clearinghouse Waiting List (“waitlist”) to track the allocation of beds to people committed for psychiatric treatment.<sup>7</sup> People on the waitlist are “denie[d] acceptance” into state hospitals until a bed becomes available.<sup>8</sup> Because state hospitals lack sufficient space to treat the number of people committed for competency restoration, waitlisted defendants are spending increased periods of time in jail; wait times have grown from days to years as the waitlist has soared from a then-record 970 people in October 2020 to peak at 2,540 people in September 2022.<sup>9</sup> The HHSC releases an update on the waitlist biannually, and as of May 2024, the number of people in Texas jails waiting for transfer to a state hospital is over 1,900.<sup>10</sup> Though the waiting list

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<sup>5</sup> Stephen Simpson, *Texas’ Shortage of Mental Health Care Professionals is Getting Worse*, THE TEX. TRIB. (Feb. 21, 2023), <https://texastribune.org/2023/02/21/texas-mental-health-workforce-shortage/> [https://perma.cc/79AK-M925]; Sara Willa Ernst, *Waitlist Grows for Psychiatric Beds at State Hospitals in Texas*, HOUS. PUB. MEDIA (Dec. 22, 2022), <https://www.houstonpublicmedia.org/articles/news/health-science/2022/12/22/439874/waitlist-grows-for-psychiatric-beds-at-state-hospitals-in-texas/> [https://perma.cc/WHF3-REUL].

<sup>6</sup> TEX. CODE CRIM. PROC. ANN. art. 46B.075 (West 2004). I use the term “defendant” to note that someone has been criminally charged, but once someone is found IST, their trial is paused, meaning that people on the waitlist are detained for lengthy periods of time without a conviction.

<sup>7</sup> See *Lakey v. Taylor*, 435 S.W.3d 309, 314 (Tex. App. 2014); Cate Graziani et al., *Texas Outpatient Competency Restoration Programs Evaluation Report*, HOGG FOUND. FOR MENTAL HEALTH (2015), [https://utw10282.utweb.utexas.edu/wp-content/uploads/2015/09/EvaluationReport\\_091815.pdf](https://utw10282.utweb.utexas.edu/wp-content/uploads/2015/09/EvaluationReport_091815.pdf) [https://perma.cc/F643-A4HN].

<sup>8</sup> See *Lakey*, 435 S.W.3d at 314.

<sup>9</sup> Michael Murney, *In Texas, The Waitlist For a Bed at State Mental Hospital Hits an All-Time High*, DALL. OBSERVER (Oct. 19, 2021), <https://www.dallasobserver.com/news/in-texas-the-waitlist-for-a-bed-at-a-state-mental-hospital-hits-an-all-time-high-12636706> [https://perma.cc/K9BU-TLCR] (reporting waitlist doubling from 970 in 2020 to 1,813 in 2021); David Barer & Josh Hinkle, *State Mental Hospital Backlog Grows, New Record Exceeds 2,500 Waiting in Jail*, KXAN (Oct. 25, 2022), <https://www.kxan.com/investigations/state-mental-hospital-backlog-grows-new-record-exceeds-2500-waiting-in-jail/#:~:text=State%20mental%20hospital%20backlog%20grows,waiting%20in%20jail%20%7C%20KXAN%20Austin> [https://perma.cc/4GHB-UCLD] (reporting new wait list record of 2,540).

<sup>10</sup> TEX. HEALTH AND HUM. SERVS. COMM’N, REPORT ON WAITING LISTS FOR MENTAL HEALTH SERVICES 5 (May 2024), <https://www.hhs.texas.gov/sites/default/files/documents/mhs-waiting-lists-may-2024.pdf> [https://perma.cc/4LXM-44W9] [hereinafter MAY 2024 REPORT ON WAITING LISTS] (reporting 1,249 people on the non-maximum security waiting list and 720 people on the maximum-security waiting list waiting an average of 200 and 530 days, respectively, in Q2).

has contracted, people found IST are still spending months to years in jail before receiving treatment, during which time their trial is paused.<sup>11</sup>

For this Note, Harris County Jail serves as a case study of the deficiencies in Texas incompetency law, which presents several concerns. The first is the conditions in which incompetent defendants are detained. The Jail has earned a reputation as a “troubled facility” due to its failure to maintain inmate safety.<sup>12</sup> According to both the Jail’s state regulatory board and anecdotal evidence from former inmates, conditions in the Jail are substandard.<sup>13</sup> After twenty-seven in custody deaths occurred at Harris County Jail during 2022, former inmates brought federal suit against Harris County for its unconstitutional failure to maintain the safety of its detainees.<sup>14</sup> Ultimately, people with mental illness who are detained in Harris County Jail while waiting to be transferred to a state hospital face notable risks of serious injury or death.

A secondary concern is that waitlisted defendants face potentially indefinite detention before they have been found guilty of a crime. The statutory limit on how long a defendant deemed IST may be detained is counted from the day the defendant is committed or the day that competency restoration treatment actually begins, whichever is later.<sup>15</sup> Counting from the day treatment begins means that there is not an effective limit on how long people found IST who are waiting for a state hospital bed may spend in jail while their trial is paused for competency restoration. In effect, the waitlist determines when an inmate will be released from jail. This is a concern because there are thousands of people on the waitlist, so defendants found IST are waiting months to years in jail before receiving treatment.<sup>16</sup> In jails like Harris County, inmates are also waiting without proper medical care or monitoring by jail staff.<sup>17</sup>

There is not a viable legal path for people found IST and placed on the waitlist to get out of jail. The Texas Code of Criminal Procedure prohibits interlocutory

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<sup>11</sup> *Id.*

<sup>12</sup> See Stuckey & De Jesus, *supra* note 1; TEX. COMM’N ON JAIL STANDARDS, NOTICE OF NON-COMPLIANCE HARRIS COUNTY JAIL (Feb. 20, 2024), [https://tjpprod.wpenginepowered.com/wp-content/uploads/2024/03/Harris\\_NC\\_202402.pdf](https://tjpprod.wpenginepowered.com/wp-content/uploads/2024/03/Harris_NC_202402.pdf) [<https://perma.cc/NJH2-75Q9>].

<sup>13</sup> See Stuckey & De Jesus, *supra* note 1; TEX. COMM’N ON JAIL STANDARDS, NOTICE OF NON-COMPLIANCE HARRIS COUNTY JAIL (Feb. 20, 2024), [https://tjpprod.wpenginepowered.com/wp-content/uploads/2024/03/Harris\\_NC\\_202402.pdf](https://tjpprod.wpenginepowered.com/wp-content/uploads/2024/03/Harris_NC_202402.pdf) [<https://perma.cc/QG5L-WB2G>].

<sup>14</sup> Wagner et al. v. Harris Cnty., No. 4:23-cv-02886, 2024 WL 2836332, at \*3 (S.D. Tex. June 4, 2024).

<sup>15</sup> TEX. CODE CRIM. PROC. ANN. art. 46B.0735 (West 2021). Note that the day treatment begins is necessarily later than the day a defendant is committed to receive such treatment.

<sup>16</sup> See MAY 2024 REPORT ON WAITING LISTS, *supra* note 10, at 10-11.

<sup>17</sup> TEX. COMM’N ON JAIL STANDARDS, SPECIAL INSPECTION REP., ANN. JAIL REP., INSPECTION REQUIREMENTS REVIEW AND NOTICE OF NON-COMPLIANCE HARRIS COUNTY JAIL (Mar. 8, 2023), <https://tjpprod.wpenginepowered.com/wp-content/uploads/2023/03/Harris-Co-Feb-2023-NONC.pdf> [<https://perma.cc/WX7G-LZHR>] (citing failures in medical care and monitoring inmates with known mental illness).



appeals of incompetency determinations.<sup>18</sup> Texas courts have consistently rejected habeas petitions from defendants in jail awaiting transfer to a state hospital.<sup>19</sup> When the Commissioner of the HHSC was sued for the Commission's waitlist practice, the Texas Court of Appeals ultimately held that the continued detention of waitlisted defendants is not unconstitutional because any unreasonable delay in transfer did not result from HHSC's policies or practices.<sup>20</sup>

The upshot is that Harris County Jail is the largest mental health provider in the state of Texas, at least in part because of the number of waitlisted defendants the jail holds. This is a problem because defendants found IST are being detained in jail for months to years before being transferred to a competency restoration program, long before they have been convicted of a crime.<sup>21</sup> The first concern is that jail is not a place for severely mentally ill people to be held for the purpose of regaining competency, and further, the plethora of problems inside Harris County Jail means that the Jail is not only ineffective but deadly for people found IST. The second concern is that people on the waitlist for transfer to a state hospital do not have a means of effectuating their liberty and are dependent on the slow process of the waitlist to receive treatment for their mental illness.

In Part I, I give an overview of the problem. I discuss the criminalization of mental illness, the development of the soaring waitlist, and Harris County Jail as an example of how people with mental illness are treated in Texas jails. In Part II, I detail the legal context that has allowed the problem to proliferate. I examine the statutory scheme of Texas incompetency law, the limits that the Supreme Court has placed on indefinite detention, and how Texas courts have affirmed the constitutionality of the waitlist and ensuing confinement. In Part III, I conclude with proposed interventions to the problem I have described. I first review existing efforts to solve the problem and then suggest alternative solutions to the possibility of indefinite detention and conditions of confinement.

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<sup>18</sup> TEX. CODE CRIM. PROC. ANN. art. 46.011 (West 2005).

<sup>19</sup> See, e.g., *Queen v. State*, 212 S.W.3d 619, 623 (Tex. App. 2006); *Ex parte Valero*, No. 08-22-00172-CR, 2023 Tex. App. LEXIS 901, at \*9-10 (Feb. 13, 2023); *Ex parte Flint*, No. 03-10-00852-CR, 2013 Tex. App. LEXIS 9090, at \*16 (July 25, 2013); see also *In the Best Interest & Prot. of D.B.*, No. 05-16-00381-CV, Tex. App. LEXIS 12429, at \*1 (Tex. App. Nov. 18, 2016) (interlocutory appeal from determination of incompetency rejected for lack of jurisdiction).

<sup>20</sup> *Lahey*, 435 S.W.3d. at 312.

<sup>21</sup> See MAY 2024 REPORT ON WAITING LISTS, *supra* note 10, at 10-11.

## I. OVERVIEW OF THE PROBLEM

Jails are not equipped to provide mental health care and pose further harm to their inmates.<sup>22</sup> Yet jails like Harris County are some of the largest mental health facilities in the United States.<sup>23</sup> In a process termed “transinstitutionalization,” many states, including Texas, closed their mental institutions and funneled mentally ill people into jails and prisons.<sup>24</sup> This transformation of mental health care created a gap in public services through which indigent people with mental health issues have been swept into jail.<sup>25</sup> Presently, the waitlist of people in jail who need to be transferred to a state hospital for competency restoration is extensive; defendants found IST are waiting months to years in jail without being convicted of the crime that placed them in detention.<sup>26</sup> Further, people routed to Harris County Jail may die during this wait because of the dangerous conditions within the jail.

A. *Criminalizing Mental Illness*

The entrapment of mentally ill people in jails can be traced to two separate but interrelated trends: the decline in public mental health care and the rise of mass incarceration.<sup>27</sup> The movement to deinstitutionalize mental healthcare in the 1960s led to the widespread closure of state mental hospitals.<sup>28</sup> While the population in Texas soared from over ten million people to twenty-eight million

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<sup>22</sup> See Stuckey & De Jesus, *supra* note 1 (citing Houston Landing investigation which found that half of people who died of unnatural causes in jail custody in the Houston area had been previously flagged as mentally ill by jail or court staff).

<sup>23</sup> Eric Westervelt & Liz Baker, *America's Mental Health Crisis Hidden Behind Bars*, NAT'L PUB. RADIO (Feb. 25, 2020), <https://www.npr.org/2020/02/25/805469776/americas-mental-health-crisis-hidden-behind-bars> [<https://perma.cc/TH6K-JLDDL>] (“Today the three biggest mental health centers in America are jails: LA County, Cook County, Ill. (Chicago) and New York City’s Rikers Island jail.”).

<sup>24</sup> See Ralph Slovenko, *The Transinstitutionalization of the Mentally Ill*, 29 OHIO N. U. L. REV. 641 (2002) (defining transinstitutionalization as the alternate routing of mentally ill people from mental health to criminal justice system such that prisons and jails now serve as large providers of mental health services).

<sup>25</sup> See Paul F. Stavis, *Why Prisons Are Brim-Full of the Mentally Ill: Is Their Incarceration a Solution or a Sign of Failure?*, 11 GEO. MASON U. C. R. L.J. 157 (2000) (concluding that there is a direct relationship between the closure of mental institutions and the rise of mentally ill incarcerates and proposing revisiting involuntary commitment instead).

<sup>26</sup> See MAY 2024 REPORT ON WAITING LISTS, *supra* note 10, at 10-11.

<sup>27</sup> See Cecil J. Hunt, *The Jim Crow Effect: Denial, Dignity, Human Rights, and Racialized Mass Incarceration*, 29 J. OF C. R. AND ECON. DEV. 15 (2016) (building on Michelle Alexander’s *The New Jim Crow*, Hunt argues that the explosive growth of the American carceral system is racialized in what he terms “The Jim Crow Effect”); Murney, *supra* note 9.

<sup>28</sup> Samantha Raphelson, *How The Loss of U.S. Psychiatric Hospitals Led to a Mental Health Crisis*, NAT'L PUB. RADIO (Nov. 30, 2017, 1:15 PM), <https://www.npr.org/2017/11/30/567477160/how-the-loss-of-u-s-psychiatric-hospitals-led-to-a-mental-health-crisis> [<https://perma.cc/MB66-QJBH>].

people between 1964 and 2016, the number of state hospital beds dropped from 14,921 to 3,013 during the same period.<sup>29</sup> States also adopted “order maintenance” policing, which focuses on arresting people engaged in low-level offenses as a means to search for or prevent more serious crimes.<sup>30</sup> In Texas, misdemeanor crimes like resisting arrest, trespassing, disorderly conduct, or criminal mischief often introduce people with severe mental illness into the criminal justice system.<sup>31</sup>

Meanwhile, the Texas legislature has increased spending on policing and incarceration at the cost of public health services.<sup>32</sup> Texas spends \$6.9 billion on the incarceration, probation, and parole of adults each biennium.<sup>33</sup> This investment has led to a 328% increase in the number of people incarcerated in Texas since 1983.<sup>34</sup> The increase in incarceration has not been applied equally; Black and Hispanic people are overrepresented in Texas prisons and jails.<sup>35</sup> In fact, Black people in Texas are incarcerated at a rate 3.3 times higher than white people in the state.<sup>36</sup> Further, the expenses required to aggressively police people of color are directly related to diminished public resources for mental health treatment.<sup>37</sup>

The proof is in the budget: Texas spends the most of any state on prisons and jails but ranks forty-ninth in the nation with regard to the capacity of its behavioral health care providers.<sup>38</sup> Although Texas already spends less than other states on health and welfare, the state has increased its allocations towards

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<sup>29</sup> Murney, *supra* note 9.

<sup>30</sup> Former federal prosecutor Paul Butler uses the term “the Chokehold” to describe how “order maintenance” policing and prosecution is used to physically and systemically oppress Black men. See PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 65 (2017).

<sup>31</sup> *Misdemeanors in Texas: Classifications and Penalties*, TEX. CRIM. DEF. GRP., <https://texascriminaldefensegroup.com/misdemeanors-in-texas-classification-penalties/> [<https://perma.cc/4SBJ-Z7TB>] (last visited Dec. 27, 2024).

<sup>32</sup> Alycia Castillo et al., *Spend Your Values, Cut Your Losses: Smart and Safe Justice System Solutions That Put Communities First*, TEX. CTR. FOR JUST. AND EQUITY 2 (Nov. 2020), <https://www.texascjc.org/system/files/publications/Spend%20Your%20Values%20Cut%20Your%20Losses%20Portfolio.pdf> [<https://perma.cc/V9SL-HCML>].

<sup>33</sup> *Id.*

<sup>34</sup> *Incarceration Trends in Texas*, VERA INST. OF JUST. 1 (Dec. 2019), <https://www.vera.org/downloads/pdffdownloads/state-incarceration-trends-texas.pdf> [<https://perma.cc/5MZA-A9QW>].

<sup>35</sup> See *Texas Profile*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/profiles/TX.html#:~:text=Texas%20has%20an%20incarceration%20rate,any%20democratic%20country%20on%20earth> [<https://perma.cc/42QF-XE2L>] (last visited Dec. 28, 2024).

<sup>36</sup> *Id.*

<sup>37</sup> See Sarah Reyes & Alycia Castillo, *Reversing the War on Drugs in Texas*, TEX. CTR. FOR JUST. AND EQUITY (Apr. 2022), <https://www.texascjc.org/system/files/publications/2022-04/reversing-war-drugs-texas-prioritizing-real-public-health-and-safety-texans.pdf> [<https://perma.cc/STC7-MBZG>].

<sup>38</sup> Castillo et al., *supra* note 32.

police and corrections budgets, necessarily decreasing its investment in public mental healthcare.<sup>39</sup> Over the past thirty years, Texas' spending on prisons and jails has grown five times faster than its spending on elementary and secondary education.<sup>40</sup> Spending in Harris County follows a similar pattern; of the city's total \$6.2 billion budget for fiscal year 2024, the City of Houston approved a \$1.6 billion budget for the Houston Police Department.<sup>41</sup> In sum, Texas' legislative bodies are allocating an increased amount of funding for incarceration while lowering spending on public health. As a result, people with mental illness are landing in jail instead of healthcare settings.

### B. *The Forensic Clearinghouse Waiting List*

The lack of sufficient state hospital space to treat all defendants found IST has produced the Forensic Clearinghouse Waiting List ("waitlist") for inpatient competency restoration services.<sup>42</sup> HHSC maintains two separate waitlists for state hospital beds for inpatient treatment of incompetent defendants: one for non-maximum security units and one for maximum security units.<sup>43</sup> Per HHSC's most recent report, there were 1,249 people on the waitlist for non-maximum security units, who spent an average of 200 days, or over six months, on the list.<sup>44</sup> For the maximum security waitlist, over 700 people on the list waited an average of over 500 days.<sup>45</sup>

Over the past decade, the waitlist has grown, lengthening the time that waitlisted defendants spend in jail. When the waitlist encompassed 354 people by September 2016, HHSC warned the Texas legislature that the list had "reached crisis levels."<sup>46</sup> Yet the problem has drastically worsened since then.

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Ashley Brown, *City of Houston Approves \$6.2 Billion Budget, Includes Employee Raises, Funding for Drainage Projects*, HOUS. PUB. MEDIA (Jun. 8, 2023, 3:48 PM), <https://www.houstonpublicmedia.org/articles/news/city-of-houston/2023/06/08/453997/city-of-houston-approves-6-2-billion-budget-includes-employee-raises-funding-for-drainage-projects/> [https://perma.cc/9GHV-NRYW].

<sup>42</sup> See *Competency Restoration*, TEX. HEALTH AND HUM. SERVS. COMM'N, <https://www.hhs.texas.gov/providers/behavioral-health-services-providers/competency-restoration> [https://perma.cc/WW44-NSN] (last visited Dec. 27, 2024).

<sup>43</sup> MAY 2024 REPORT ON WAITING LISTS, *supra* note 10, at 10-11; TEX. CODE CRIM. PROC. ANN. art. 17.032(a) (West 2017) (offenses which require maximum security placement: murder, capital murder, kidnapping, aggravated kidnapping, indecency with a child, assault, sexual assault, aggravated assault, aggravated sexual assault, injury to a child, elderly individual or disabled individual, aggravated robbery, continuous sexual abuse of young child or disabled individual, and continuous trafficking of persons).

<sup>44</sup> MAY 2024 REPORT ON WAITING LISTS, *supra* note 10, at 10-11.

<sup>45</sup> *Id.*

<sup>46</sup> JOINT COMM. ON ACCESS AND FORENSIC SERV., DEP'T OF STATE HEALTH SERV. & HEALTH AND HUM. SERVS. COMM'N, REPORT OF THE JOINT COMMITTEE ON ACCESS AND FORENSIC SERVICES FOR FISCAL YEAR 2016 1 (2016), <https://www.kxan.com/wp-content>

The waitlist nearly doubled from under 1,000 people in 2020 to 1,800 people by October 2021.<sup>47</sup> At that time, criminal magistrate Roxanne Nelson described how the waitlist system has deteriorated during her time as a judge:

When I started in March 2010, if I couldn't get someone into a bed within twenty-one days, I was upset. Because I thought twenty-one days is a long time for somebody to stay in a county jail with a mental illness. . . . I thought twenty-one days was [a] terribly long time for somebody to be stuck in our county jails. Now, if someone told me they could get someone a bed in twenty-one days, I'd be thanking the Lord.<sup>48</sup>

Just under a year later in September 2022, the waitlist hit an all-time high of over 2,500 people.<sup>49</sup> The average wait time for non-maximum security beds was almost 250 days, and wait times for maximum security beds was 699 days, or about two years.<sup>50</sup> As shown by average wait times, an overloaded waitlist forces people found IST to spend extended periods of time in detention.

A separate issue that has worsened waiting times is Texas' shortage of mental health professionals. The COVID-19 pandemic has exacerbated the staffing shortage such that state hospitals employed 25% fewer people at the end of 2022 as compared to 2019.<sup>51</sup> Over 700 of the 2,911 beds across state psychiatric hospitals are unavailable for use because of the staffing shortage.<sup>52</sup> The shortage of healthcare staff has been a persistent problem, but HHSC began reporting results from raises implemented in June 2022, showing an increase in applicants and improvements in filled positions.<sup>53</sup> Greater healthcare staffing is a cause for optimism, but as long as state hospital beds remain offline, recent growth should be viewed as an initial step in a longer campaign.

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/uploads/sites/40/2020/04/joint-comm-access-forensic-services-fy2016.pdf [https://perma.cc/UAX7-XFVM]; HOUSE SELECT COMM. ON MENTAL HEALTH, INTERIM REPORT TO THE 85TH TEXAS LEGISLATURE, at 88 (2016).

<sup>47</sup> Murney, *supra* note 9.

<sup>48</sup> *Id.*

<sup>49</sup> Barer & Hinkle, *supra* note 9.

<sup>50</sup> *Id.*

<sup>51</sup> Simpson, *supra* note 5.

<sup>52</sup> *Id.* (reporting 717 beds offline); Sara Willa Ernst, *Waitlist Grows For Psychiatric Beds at State Hospitals in Texas*, HOUS. PUB. MEDIA (Dec. 22, 2022), <https://www.houstonpublicmedia.org/articles/news/health-science/2022/12/22/439874/waitlist-grows-for-psychiatric-beds-at-state-hospitals-in-texas/> [https://perma.cc/785C-WZV5] (reporting 842 beds offline).

<sup>53</sup> See *Presentation to the House Services Committee on State Hospitals and the Forensic Waitlist*, TEX. HEALTH AND HUM. SERVS. COMM'N (Jun. 8, 2022), <https://www.hhs.texas.gov/sites/default/files/documents/presentation-to-the-house-human-services-committee.pdf> [https://perma.cc/P32W-UVGU] (report by Scott Schalchlin, Health and Specialty Care System Deputy Executive Commissioner).

### C. Case Study: Harris County Jail

Texas' jail regulatory body, the Texas Commission on Jail Standards ("TCJS"), has found Harris County Jail to be out of compliance with state standards on numerous occasions, almost twice per year since 2018.<sup>54</sup> As of August 2024, Harris County Jail is finally in compliance with minimum state standards after nearly two years of continuing deficiencies towards inmates with mental illness noted in August of the previous year.<sup>55</sup> The Jail's extended failure to correct these issues led to an "escalated and enhanced enforcement" by TCJS as well as a federal investigation and a lawsuit against Harris County regarding the deaths and serious injuries of former inmates.<sup>56</sup> Due to these persisting systemic problems, assigning defendants found IST to Harris County Jail is a potential death sentence.

#### 1. Harris County Jail is Overcrowded

Harris County Jail has recently come into compliance with minimum safety standards after a two-year streak of non-compliance.<sup>57</sup> Previous inspection

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<sup>54</sup> *Non-Compliant Jail Reports*, TEX. JAIL PROJECT, <https://www.texasjailproject.org/resources/texas-commission-on-jail-standards/non-compliant-jail-reports/> [https://perma.cc/F8YX-PSKD] (last visited Apr. 25, 2024) (Harris County Jail cited for supervision of inmates on August 23, 2018; sanitation and food service violation on November 26, 2018; health services violation on February 12, 2019; discipline, food service, health services, and sanitation violation on March 4, 2019; health services violation on December 2, 2019; supervision violation on December 4, 2020; health services and supervision violation on December 16, 2020; sanitation and supervision violation on November 15, 2021; admission violations in the booking area on September 7, 2022; life safety violation on October 5, 2022; health services violation on December 19, 2022; health services and supervision violation on March 8, 2023; supervision violation on April 17, 2023; supervision violation on August 18, 2023; health services and supervision violation on February 12, 2024; clothing, personal hygiene, and bedding and discipline and grievances violation on April 8, 2024).

<sup>55</sup> TEX. COMM'N ON JAIL STANDARDS, NOTICE OF NON-COMPLIANCE HARRIS CNTY. JAIL (Apr. 10, 2024), [https://tjpprod.wpenginepowered.com/wp-content/uploads/2024/04/Harris\\_Special\\_NC\\_202404.pdf](https://tjpprod.wpenginepowered.com/wp-content/uploads/2024/04/Harris_Special_NC_202404.pdf) (jail standards governing admission and release, classification and separation of inmates, health services, inmate supervision, clothing, personal hygiene, and bedding, sanitation, food services, discipline and grievances, recreation and exercise, education and rehabilitation programs, work assignments, and other miscellaneous rules).

<sup>56</sup> Monroe Trombly, *State Regulators: Harris County Jail Still Out of Compliance, Faces 'Escalated' Enforcement*, HOUS. LANDING (Aug. 3, 2023), <https://houstonlanding.org/state-regulators-harris-county-jail-still-out-of-compliance-faces-escalated-enforcement/> [https://perma.cc/ZP2G-BER7] [hereinafter Trombly, *State Regulators*]; Alex Nguyen, *FBI Announces Investigation into Deaths at Harris County Jail*, HOUS. LANDING (Feb. 13, 2023, 8:00 PM), <https://www.texastribune.org/2023/02/13/fbi-investigations-harris-county-jail-deaths/> [https://perma.cc/2C3S-2P42]; Wagner et al. v. Harris Cnty., No. 4:23-cv-02886, 2024 WL 2836332, (S.D. Tex. Aug. 7, 2023).

<sup>57</sup> See Monroe Trombly, *Finally in Compliance: Harris County Jail Passes State Inspection for the First Time in Two Years*, HOUS. LANDING (Aug. 28, 2024), <https://houston>

failures include processing delays of more than 48 hours during which people are kept in holding cells, failure to provide medical care, failure to properly monitor an inmate who died in jail, and staffing shortages.<sup>58</sup> Harris County Jail did not comply with minimum state standards for jail conditions from September 2022 onwards.<sup>59</sup> Finally, the Jail passed its August 2024 inspection, though not without several deficiencies: (1) the Sheriff's Office wrongly included emergency and transportation officers in its state mandated staffing ratio, (2) two fire alarm control panels need to be replaced, and (3) jail staff were late to several routine inmate checks.<sup>60</sup> The Sheriff's Office credits increased staff retention for its progress, noting that there are only ninety-nine staff openings,<sup>61</sup> in comparison to 180 officer openings earlier this year.<sup>62</sup> Though the Jail has made notable improvements, county regulators must set higher goals than continued understaffing and barely passing inspection.

In response to prior non-compliance, TCJS took a more aggressive approach to enforcement. In November 2023, TCJS ordered Harris County Sheriff's Office to create a plan to outsource inmates to other facilities by December 1.<sup>63</sup> For each month that the Sheriff's Office did not comply, the Jail would lose 144 of its total 500 variance beds that expand building capacity past its design.<sup>64</sup> This order resulted in a \$11.3 million contract with Tallahatchie Correctional Facility, a private prison near Tutwiler, Mississippi, to send 360 jail inmates for at least one year with an option to renew for up to four years.<sup>65</sup>

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landing.org/finally-in-compliance-harris-county-jail-passes-state-inspection-for-first-time-in-2-years/ [https://perma.cc/QXW4-GMD3] [hereinafter *Finally in Compliance*].

<sup>58</sup> See *id.*; TEX. COMM'N ON JAIL STANDARDS, *supra* note 17.

<sup>59</sup> See Trombly, *State Regulators*, *supra* note 56.

<sup>60</sup> Trombly, *Finally in Compliance*, *supra* note 57. If the Jail does not correct these deficiencies, they may not pass their next inspection. *Id.*

<sup>61</sup> Eileen Grench & Michael Zhang, *Sheriff's Office Reports Improvements in Harris County Jail as Scrutiny from State Continues*, HOUS. LANDING (Nov. 8, 2024), <https://houstonlanding.org/sheriffs-office-reports-improvements-in-harris-county-jail-as-scrutiny-from-state-continues/#:~:text=Seven%20people%20have%20died%20in,by%20the%20Landing%20on%20Thursday> [https://perma.cc/M7BW-3NXX] [hereinafter Grench & Zhang, *Sheriff's Office Reports Improvements*].

<sup>62</sup> Trombly, *Finally in Compliance*, *supra* note 57.

<sup>63</sup> See Monroe Trombly, *State Regulators Order Harris County Sheriff's Office to Outsource More Inmates*, HOUS. LANDING (Nov. 2, 2023), <https://houstonlanding.org/state-regulators-order-harris-county-sheriffs-office-to-outsource-more-inmates/> [https://perma.cc/L8XQ-L4BA].

<sup>64</sup> *Id.* ("Variance beds are beds placed in spaces not intended as sleeping quarters but renovated that way.").

<sup>65</sup> See McKenna Oxenden & Akhil Ganesh, *Harris County OKs \$11M Contract to Send 360 Inmates to Mississippi to Ease Overcrowding*, HOUS. LANDING (Nov. 14, 2023), <https://houstonlanding.org/harris-county-oks-11m-contract-to-send-360-inmates-to-mississippi-to-ease-jail-overcrowding/> [https://perma.cc/CF7S-LFRM].

The pressure to offload inmates continues as the Jail's population outpaces its capacity.<sup>66</sup> In November 2024, the Harris County Sheriff's Office reported that over 1,000 inmates are being held in "out-of-county" facilities.<sup>67</sup> Indeed, 100 inmates were transferred to Jefferson County, Texas, which borders Louisiana.<sup>68</sup> However, three of the four out-of-county facilities are also located outside of the state; in addition to the 360 people sent to Mississippi, 500 people were sent to LaSalle Correctional Center, and 99 people were moved to Natchitoches Parish Detention Center, both of which are in Louisiana.<sup>69</sup> The distance of these transfers removes inmates hundreds of miles from their community, complicating visitation for their loved ones and attorneys. And even after spending \$50 million on outsourcing, the total jail population remains above its capacity of 9,400 people.<sup>70</sup>

Harris County officials note that people selected for transfer outside of the county "generally . . . do not have a court date in the near future."<sup>71</sup> As such, it is reasonable to conclude that people on the waitlist, whose trials are paused for competency restoration treatment when they are found IST, likely make up a significant portion of transferred inmates. The stress involved with transfer, including potential disruption to medication, will be especially harmful for people found IST.<sup>72</sup>

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<sup>66</sup> Grench & Zhang, *Sheriff's Office Reports Improvements*, *supra* note 61 (reporting jail capacity of 9,400 and jail population of over 9,500).

<sup>67</sup> Trombly, *Finally in Compliance*, *supra* note 57.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Grench & Zhang, *Sheriff's Office Reports Improvements*, *supra* note 61 (reporting jail capacity of 9,400 and jail population of over 9,500); *Jail Population*, *supra* note 3 (current jail population of 9,655 people); Trombly, *Finally in Compliance*, *supra* note 57 (reporting \$50 million spent on outsourcing inmates to other jails).

<sup>71</sup> Oxenden & Ganesh, *supra* note 65.

<sup>72</sup> HEALTH & HUM. SERVS., TECHNICAL EXPERT PANEL EXECUTIVE SUMMARY: ADDRESSING THE HIV CARE NEEDS OF PEOPLE WITH HIV IN STATE PRISONS AND LOCAL JAILS 3 (n.d.) (sources last reviewed by the Department of Health & Human Services Oct. 2023) (noting that inmates needing HIV treatment may experience delays in access upon transfer); Byrhonda Lyons, Jocelyn Wiener & Erica Yee, *Mentally ill prisoners in California are three times likelier to get shuffled around*, CAL MATTERS (May 2, 2023), <https://calmatters.org/justice/2022/11/california-mentally-ill-prisoner-transfers/> ("Transfers for an inmate are disruptive," said Christopher Lisieski, the attorney representing Collier's mother in a federal lawsuit against several prison employees. "Disrupting someone's routine who's severely mentally ill is additional stress and strain and can worsen mental health symptoms."); Beatrix Lockwood & Nicole Lewis, *The Long Journey to Visit a Family Member in Prison*, THE MARSHALL Project (Dec. 18, 2019) <https://www.themarshallproject.org/2019/12/18/the-long-journey-to-visit-a-family-member-in-prison> (highlighting that visits from family help incarcerated person's mental health and the subsequent toll being in a facility far from loved ones has on mental health).



Further, the private facilities to which Harris County Jail outsourced inmates pose similar risks of injury and death. Louisiana has lower minimum jail standards than Texas, suggesting that inmates transferred from Harris County remain vulnerable to substandard conditions.<sup>73</sup> At least two people arrested in Harris County have died in Louisiana jails in 2024.<sup>74</sup> The exact number is unknown because jails in Louisiana do not have to report in custody deaths to the state attorney general.<sup>75</sup> Texas' requirement to report and investigate deaths that occur in jails and prisons does not extend to inmates who die out-of-state.<sup>76</sup>

LaSalle Corrections, the private prison company that operates LaSalle Correctional Center, has been sued over 100 times for inadequate provision of medical care.<sup>77</sup> CoreCivic, the private prison company that operates Tallahatchie Correctional Facility, possesses a similarly concerning record; CoreCivic has paid \$4.4 million since 2016 to settle complaints of mistreatment from former inmates of its Tennessee prisons, including at least twenty-two inmate deaths.<sup>78</sup> An audit of its Tennessee prisons in 2020 revealed inaccurate reporting of inmate deaths and allegations of sexual abuse by corrections staff.<sup>79</sup> Transferring inmates far from their community into private prisons rampant with abuse is a poor solution to Harris County Jail's substandard conditions.

## 2. Harris County Jail Has a Problem with Excessive Violence and Deaths

In custody deaths at Harris County Jail have spiked in recent years: at least nineteen people died in custody during 2023, following a record high of twenty-seven deaths in 2022.<sup>80</sup> As of November 2024, Harris County Jail has reported seven in custody deaths to the Texas Committee for Jail Standards.<sup>81</sup> Yet the Jail and its staff continue to face investigations and sanctions from deaths that occurred in 2021, suggesting that in custody deaths are outpacing the Jail's efforts to reform.

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<sup>73</sup> Pooja Salhotra, *When Texas Jail Standards Push Inmates to Lockups in Other States, Oversight Doesn't Follow*, THE TEX. TRIB. (Aug. 14, 2024), <https://www.texastribune.org/2024/08/14/texas-jaleen-anderson-harris-county-jail-overcrowding/> [<https://perma.cc/BJ2T-WXB3>].

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Jonathan Matisse et al., *Prison Operator Under Federal Scrutiny Spent Millions Settling Tennessee Mistreatment Claims*, ASSOC. PRESS (Oct. 13, 2024), <https://apnews.com/article/prison-settlement-tennessee-mistreatment-deaths-1c2b3cd5cd395a7f1453566e366fb415> [<https://perma.cc/5SV5-QSY5>].

<sup>79</sup> Oxenden & Ganesh, *supra* note 65.

<sup>80</sup> Vasquez, *supra* note 12; OFF. OF THE INSPECTOR GEN., 2021 MONTHLY COMPARISON AND PERFORMANCE REPORT (2021), <https://www.harriscountysoc.org/Documents/AboutUs/OIGReports/2021%20OIG%20Annual%20Performance%20Report.pdf> (reporting twenty-one jail deaths in 2021; fifteen jail deaths in 2020).

<sup>81</sup> Grench & Zhang, *Sheriff's Office Reports Improvements*, *supra* note 61.

In February 2023, the FBI announced a civil rights investigation into the deaths of Jaquarea Simmons and Jacoby Pillow in Harris County Jail.<sup>82</sup> After detainee Jaquarea Simmons died on February 17, 2021, Harris County Jail conducted an internal investigation that found multiple policy violations by Jail staff.<sup>83</sup> Two policy violations occurred when officers twice responded to an incident in Simmons' cell with force and did not document the use of force in either instance.<sup>84</sup> The internal investigation resulted in the sheriff's office terminating eleven employees and suspending six others.<sup>85</sup> The Houston Police Department conducted an independent criminal investigation into Simmons' death, and Harris County District Attorney charged a corrections officer, Eric Morales, with felony manslaughter.<sup>86</sup> Morales is the first former detention officer in Harris County to be charged with the death of an inmate.<sup>87</sup>

Regarding Jacoby Pillow's death, his sister, Octevia Wagner, is the first named plaintiff in a lawsuit filed with the District Court for the Southern District of Texas on behalf of twenty-seven individuals detained in Harris County Jail between 2021 and 2023.<sup>88</sup> Plaintiffs allege that their constitutional rights were violated by Harris County Jail's "longstanding culture of deliberate indifference" to the lives of its detainees, and the sheriff's unconstitutional failure to correct myriad issues of which he was aware that led to their deaths and injuries.<sup>89</sup> At least nine of the twenty-seven plaintiffs were booked in the jail with known mental illness or disability.<sup>90</sup> This pattern matches the trend of

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<sup>82</sup> See FBI Houston (@FBIHouston), TWITTER (Feb. 13, 2023, 6:17 PM), <https://twitter.com/FBIHouston/status/1625272942824157184> [<https://perma.cc/9SBW-L8L2>]; *FBI Agrees to Review Pair of Jail Deaths*, HARRIS CNTY. SHERIFF'S OFF. (Feb. 13, 2023, 1:28 PM), <https://nixle.us/E9G7D> [<https://perma.cc/Z4XF-4WF3>].

<sup>83</sup> See Cara Tabachnick, *FBI Launches Civil Rights Investigation into Two Inmate Deaths at Harris County Jail*, CBS NEWS (Feb. 15, 2023, 5:48 PM), <https://www.cbsnews.com/news/fbi-investigates-inmate-deaths-harris-county-jail-houston-texas-jaquarea-simmons-jacoby-pillow/> [<https://perma.cc/5D2H-JV52>].

<sup>84</sup> See Randy Wallace, *Eleven Employees Terminated, Six Suspended After Investigation into Harris County Jail Death*, FOX 26 (May 28, 2021, 3:08 PM), <https://www.fox26houston.com/news/11-employees-terminated-6-suspended-after-investigation-into-harris-county-jail-death> [<https://perma.cc/R8NQ-AM3N>].

<sup>85</sup> Tabachnick, *supra* note 83.

<sup>86</sup> *Id.*

<sup>87</sup> Jeff Ehling, *Former Jail Officer Eric Morales Becomes First in Harris County to be Charged For Inmate's Death*, ABC13 (Feb. 7, 2023), <https://abc13.com/jaquarea-simmons-inmate-death-harris-county-jail-fatalities-eric-morales-deputy-charged-ada-kimberly-clark/12781011/> [<https://perma.cc/FFK3-PQ5E>].

<sup>88</sup> See Complaint at 1, Wagner et al. v. Harris Cnty., Tex., No. 4:23-cv-02886, 2024 WL 2836332 (S.D. Tex. Aug. 7, 2023) (Wagner and other family members of former inmates have standing in the suit as heirs and representatives of their family member's estate).

<sup>89</sup> Plaintiff's First Amended Complaint at 58, Wagner et al. v. Harris Cnty., Tex., No. 4:23-cv-02886, 2024 WL 2836332 (S.D. Tex. Nov. 21, 2023).

<sup>90</sup> *Id.*

disproportionate violence faced by individuals with mental illness within Harris County Jail.<sup>91</sup>

The plaintiffs' stories illustrate the standard procedure—and excessive force—with which jail personnel respond to internal incidents. The lead plaintiff, Jacoby Pillow, landed in Harris County Jail on a misdemeanor trespassing charge, posted \$100 bond the next day, and should have been released soon after.<sup>92</sup> Instead, Pillow was kept in a medical holding cell and experienced an altercation with an officer.<sup>93</sup> Though multiple officers beat Pillow and put their weight on his chest and back, the Jail clinic cleared Pillow to return to his cell.<sup>94</sup> Pillow was left alone until he died from his injuries the next day.<sup>95</sup>

Bryan Johnson, represented in the suit by his mother Amanda Harris, was booked into Harris County Jail with known mental and physical disabilities and was similarly beaten by multiple officers during an interaction with jail staff.<sup>96</sup> Johnson was returned to his cell and beaten for a second time.<sup>97</sup> Johnson was not taken to the jail clinic until multiple days later, after which he was prescribed an inhaler for his difficulty breathing.<sup>98</sup> An officer took said inhaler and returned it empty.<sup>99</sup> Johnson continued to experience trouble breathing for weeks and made requests for medical care that were ignored until Johnson presented as unresponsive and died from his injuries.<sup>100</sup>

Evan Lee, represented in the suit by his mother Jacilet Griffin-Lee, was booked into Harris County Jail with severe mental illness and frequently was not provided with medication for his mental illness, high blood pressure, and diabetes.<sup>101</sup> Lee got into an altercation with another detainee that resulted in a brain bleed, but the Jail clinic returned him to his cell with no further examination or treatment.<sup>102</sup> Lee was eventually transferred to the hospital,

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<sup>91</sup> See Alex Stuckey, *Ten People Have Died in Harris County Jail in 2023. Five Were Identified as Mentally Ill*, HOUS. LANDING (Jul. 17, 2023), <https://houstonlanding.org/10-people-have-died-in-harris-county-jail-in-2023-five-of-them-identified-as-mentally-ill/> [<https://perma.cc/U4UT-JEGP>] [hereinafter Stuckey, *Ten People Have Died*] (reporting more than half of the eighteen people who died in custody at Harris County Jail in 2023 had previously been identified as mentally ill by jail or court staff); Stuckey & De Jesus, *supra* note 1; Vasquez, *supra* note 12.

<sup>92</sup> Plaintiff's First Amended Complaint at 15, *Wagner*, No. 4:23-cv-02886.

<sup>93</sup> *Id.* at 16.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 17.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 17-18.

<sup>99</sup> *Id.* at 18.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 19.

<sup>102</sup> *Id.*

where they found significant injuries and two brain bleeds; he passed away two days later.<sup>103</sup> Another plaintiff, William Curtis Barrett, who was booked into Harris County Jail with known mental health issues requiring medication, was assaulted in jail by another inmate.<sup>104</sup> The Jail failed to monitor Barrett's condition, and he died within three days of his initial booking.<sup>105</sup>

The rest of the deaths alleged in the lawsuit are remarkably similar: an inmate experiences an altercation with an officer or another inmate, multiple Jail officers respond with physical force, the inmate suffers obvious injury but is not taken to the Jail clinic or is given cursory treatment, and the inmate is returned to their cell where they are unmonitored until their death or hospitalization. The number of inmate deaths can perhaps be explained by excessive use of force: an astounding 51% of all police officer uses of force in Texas in 2022 occurred in Harris County Jail.<sup>106</sup>

Depending on the day, Harris County Jail is the largest mental health facility in the state of Texas. This is troublesome given that the Jail was out of compliance with state minimum standards for the past two years and has experienced about forty in custody deaths during that time. Due to its substandard conditions, the Jail poses a severe risk of harm to its inmates, and this risk is disproportionately amplified for inmates with mental illness. Despite its lethal failures, Harris County Jail is relied upon by Texas government to house people with mental illness awaiting competency restoration. This is a problem because jails, unlike hospitals, are not equipped to treat mental illness, and Harris County Jail poses an increased risk of harm to its inmates. While extreme, Harris County Jail provides one example of the substandard conditions in which defendants found IST across the state must wait.

## II. LEGAL BACKGROUND

While jails such as the one in Harris County are proving themselves to be incapable of administering mental healthcare, people found incompetent to stand trial continue to be housed in jails awaiting transfer to a competency restoration program. Upon a judicial determination that a defendant charged with a crime is not competent to stand trial, the court will either release the defendant on bail for outpatient competency restoration or commit them to a mental health facility.<sup>107</sup> A finding of incompetency and order of commitment places the defendant in custody of the sheriff for transportation to the facility where the defendant will receive competency restoration services.<sup>108</sup> Defendants who are IST may be released to an outpatient competency restoration program only if the

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<sup>103</sup> *Id.* at 20.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 20-21.

<sup>106</sup> *Id.* at 8-9.

<sup>107</sup> TEX. CODE CRIM. PROC. ANN. art. 46B.071 (West 2004).

<sup>108</sup> TEX. CODE CRIM. PROC. ANN. art. 46B.075 (West 2004).

court determines that they do not pose a danger to others and may safely be treated on an outpatient basis.<sup>109</sup>

Due to the limited number of state hospital beds available, many defendants spend months to years in jail awaiting transfer.<sup>110</sup> The statutory limit on the competency restoration period is counted from when a defendant is committed or when competency restoration begins, whichever is later, so the time spent in jail does not actually count against the limit.<sup>111</sup> In the meantime, defendants are prohibited by statute from appealing their competency determination, and writs of habeas corpus petitioning for release or transfer to state hospital have not been recognized by the Texas judiciary.<sup>112</sup>

#### A. *Texas Incompetency Law*

The Texas legislature codifies safeguards and procedure concerning defendants who are incompetent to stand criminal trial at Article 46B of the Texas Code of Criminal Procedure. Incompetency is statutorily defined as someone lacking (1) sufficient present ability to consult with their lawyer with a reasonable degree of rational understanding; or (2) a rational and factual understanding of the proceedings.<sup>113</sup> After a determination of incompetency has been made, a finding of incompetency may not be appealed.<sup>114</sup> Texas courts have affirmed and elaborated on the legislature's standard.<sup>115</sup> While the judiciary has recognized the potential due process issue inherent in disallowing appeal from a state determination of this kind, appeals have been steadfastly

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<sup>109</sup> TEX. CODE CRIM. PROC. ANN. art. 46B.071 (West 2017); TEX. CODE CRIM. PROC. ANN. art. 46B.072 (West 2017).

<sup>110</sup> MAY 2024 REPORT ON WAITING LISTS, *supra* note 10, at 10-11 (reporting average time spent on state hospital waiting list as 200 days for non-maximum-security beds and 531 days for maximum security beds).

<sup>111</sup> See TEX. CODE CRIM. PROC. ANN. art. 46B.0735 (West 2021).

<sup>112</sup> TEX. CODE CRIM. PROC. ANN. art. 46B.011 (West 2004) ("Neither the state nor the defendant is entitled to make an interlocutory appeal relating to a determination or ruling under Article 46B.005."); *see, e.g.*, In the Best Interest & Prot. of D.B., No. 05-16-00381-CV, 2016 Tex. App. LEXIS 12429, at \*5-6 (Nov. 18, 2016); *Ex parte* Thompson, No. 10-22-00162-CR, 2022 Tex. App. LEXIS 7415, at \*10 (Oct. 5, 2022).

<sup>113</sup> TEX. CODE CRIM. PROC. ANN. art. 46B.003 (West 2004) (presuming defendants competent to stand trial unless proved incompetent by preponderance of the evidence).

<sup>114</sup> TEX. CODE CRIM. PROC. ANN. art. 46B.011 (West 2004) ("Neither the state nor the defendant is entitled to make an interlocutory appeal relating to a determination or ruling under Article 46B.005.").

<sup>115</sup> See *Queen v. State*, 212 S.W.3d 619, 621 (Tex. App. 2006) (holding that the court lacked jurisdiction over an appeal from trial court determination of incompetency where the state legislature barred appeal of incompetency determinations); *In re D.B.*, 2016 Tex. App. LEXIS 12429, at \*5-6 (holding that the court lacked jurisdiction over defendant's interlocutory appeal of incompetency and commitment where the state legislature did not provide for interlocutory appeal).

rejected, sometimes with the caveat that such action would be better brought as a habeas corpus petition.<sup>116</sup>

Texas courts have elaborated on the standard by which defendants should be found IST.<sup>117</sup> Any “suggestion” of incompetency calls for an informal inquiry as to whether evidence exists to justify a formal competency trial.<sup>118</sup> Conducting a competency trial requires some evidence of the following: “1) that the defendant suffers some degree of debilitating mental illness, and that 2) he obstinately refuses to cooperate with counsel to his own apparent detriment, but also that 3) his mental illness is what fuels his obstinacy.”<sup>119</sup> Further, the correct inquiry should evaluate whether a defendant can

(1) understand the charges against him and the potential consequences of the pending criminal proceedings; (2) disclose to counsel pertinent facts, events, and states of mind; (3) engage in a reasoned choice of legal strategies and options; (4) understand the adversarial nature of criminal proceedings; (5) exhibit appropriate courtroom behavior; and (6) testify.<sup>120</sup>

While higher courts have set a clear standard to evaluate potentially incompetent defendants, recognizing mental illness in practice has proved challenging for Texas trial courts. Judges sometimes overlook evidence of mental illness where a defendant’s behavior appears merely irritable or obstinate.<sup>121</sup> As a result, trial courts may find defendants competent without conducting a formal competency trial.<sup>122</sup> Additionally, few appellate courts

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<sup>116</sup> *Queen*, 212 S.W.3d at 623 (“We recognize that Queen raises complaints of constitutional dimension, complaints that cannot be disregarded lightly. However, Queen or others in his position are not without remedy. Under these circumstances, claims such as Queen’s would seem more properly brought by way of a petition for writ of habeas corpus.”).

<sup>117</sup> *Turner v. State*, 422 S.W.3d 676, 696 (Tex. Crim. App. 2013) (setting three-part standard for formal competency inquiries: evidence of mental illness, evidence of obstinance with their own lawyers, and evidence that said obstinance was fueled by such mental illness).

<sup>118</sup> *Id.* at 692.

<sup>119</sup> *Id.* at 696.

<sup>120</sup> *Morris v. State*, 301 S.W.3d 281, 286 (Tex. Crim. App. 2009) (citing TEX. CODE CRIM. PROC. ANN. art. 46B.024).

<sup>121</sup> See *Dixon v. State*, No. 06-20-00123-CR, 2021 Tex. App. LEXIS 10086, at \*14-15, \*18, \*22 (Dec. 22, 2021) (holding that trial court did not abuse discretion by not conducting informal competency inquiry where defendant displayed “religious grandiosity and delusional episodes,” “paranoia and irrational fixation,” and insisted on representing himself); *Clark v. State*, No. 05-09-00004-CR, 2010 Tex. App. LEXIS 1951, at \*13 (Mar. 19, 2010) (holding that trial court did not err by failing to sua sponte conduct a competency inquiry where defendant testified to history of mental illness and displayed post-trial confusion) (“However, Clark’s post-trial statement shows only that Clark did not understand the terms of probation—not that Clark did not understand the nature of the proceedings against her.”).

<sup>122</sup> *Hartfield v. State*, No. 2-07-454-CR, 2008 Tex. App. LEXIS 9645, at \*2, \*8-9 (Dec. 23, 2008) (holding that court was not compelled to conduct formal competency hearing where defendant had diagnosable mental illness but did not display evidence of incompetency).

have overturned or remanded a trial court's competency determination.<sup>123</sup> The relevant standard of review is abuse of discretion, which is a high bar, perhaps explaining why appeals of one's status as competent are rarely successful.<sup>124</sup>

B. *The Problem of Indefinite Commitment*

The Supreme Court has held that indefinite commitment solely on account of incompetency to stand trial is unconstitutional.<sup>125</sup> However, the lack of urgency and clear guidelines regarding the use of jails as holding sites for the mentally ill has allowed the practice to proliferate. Criminally prosecuting a defendant who is not competent to stand trial is unconstitutional as a violation of due process under the Fourteenth Amendment.<sup>126</sup> In *Jackson v. Indiana*, the Supreme Court set a baseline that the period of confinement must bear "some reasonable relation" to its purpose, which is restoring a defendant's competency to stand trial.<sup>127</sup> For defendants unlikely to ever be able to stand trial, commitment based solely on incapacity must conform to the "reasonable period of time necessary" to determine whether the defendant will regain competency in the foreseeable future.<sup>128</sup> Further, courts have a responsibility to inquire into a defendant's competence where there is evidence that the defendant does not understand the nature of the proceedings or is not able to cooperate with counsel.<sup>129</sup>

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<sup>123</sup> See *Moralez v. State*, 450 S.W.3d 553, 560 (Tex. App. 2014) (holding that trial court properly found defendant competent to stand trial where state hospital superintendent reported that appellant was competent to stand trial and defendant failed to meet burden to establish incompetency by preponderance of the evidence); *Welch v. State*, No. 08-14-00116-CR, 2015 Tex. App. LEXIS 7589, at \*2-3 (Jul. 22, 2015) (holding that trial court did not abuse discretion by not conducting informal competency inquiry where evidence did not suggest defendant was incompetent) ("The trial court . . . appointed the psychiatrist who previously examined Welch. This time, she concluded that Welch was competent to stand trial because his mental illness was in remission due to the high doses of medication he was receiving in jail. But she warned that Welch had to 'remain on a high dose of antipsychotic medications in order for him to remain mentally competent.'").

<sup>124</sup> *Lawrence v. State*, 169 S.W.3d 319, 322 (Tex. App. 2005).

<sup>125</sup> See *Jackson v. Indiana*, 406 U.S. 715, 720 (1972) (holding that defendant's commitment to a mental health facility was unconstitutional where defendant was committed "until sane" and was unlikely to regain competency to stand trial).

<sup>126</sup> See *Medina v. California*, 505 U.S. 437, 439 (1992) ("It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial") (first citing *Drope v. Missouri*, 420 U.S. 162 (1975); and then citing *Pate v. Robinson*, 383 U.S. 375 (1966)); U.S. CONST. amend. XIV.

<sup>127</sup> *Jackson*, 406 U.S. at 738.

<sup>128</sup> *Id.*

<sup>129</sup> See *Pate*, 383 U.S. at 384-85 (holding that defendant was denied fair trial where trial court did not inquire into defendant's competency to stand trial and defendant displayed evidence of severe mental illness).

While the Supreme Court's holding instructed lower courts to ensure that defendants are competent to stand trial, the weak requirement that confinement bear "some reasonable relation" to restoring competency to stand trial has fueled the idea that jails can serve as sites of treatment for debilitating mental illness. Commitment for the purpose of competency restoration is statutorily limited to sixty days for misdemeanors and 120 days for felonies in Texas, but the competency restoration period does not begin until treatment begins.<sup>130</sup> As a result, the statute does not limit the amount of time that defendants may be held in jail while waiting for transfer to a state hospital.<sup>131</sup> In effect, the only limit on how long a defendant found IST will spend in jail pretrial is the waitlist. However, confinement while on the waitlist for competency restoration is reasonably related to restoring competency, so Texas' potentially indefinite commitment of defendants found IST is legal.<sup>132</sup>

### C. Texas Courts Affirm the Constitutionality of Confinement

The Texas Court of Criminal Appeals, the state's highest appeals court, has repeatedly affirmed the constitutionality of jailing defendants found IST while awaiting transfer to a state hospital for psychiatric treatment. The most prominent of such cases is *Lakey v. Taylor*, a class action lawsuit by Disability Rights Texas and nine other plaintiffs against the Commissioner of the Texas Department of State Health Services.<sup>133</sup> The plaintiffs involved in the suit were detainees required to wait in county jail while on the waitlist for weeks and months, some suffering from untreated mental illness.<sup>134</sup> Relying on *Jackson v. Indiana*, plaintiffs argued that there is a constitutional limit to the commitment of incompetent defendants such that the prolonged detention of defendants without any form of competency restoration treatment is a violation of due process.<sup>135</sup>

The court agreed that lengthy pretrial detention of incompetent defendants without treatment would violate a defendant's due process rights.<sup>136</sup> However, the court rejected the facial challenge to the Department's waitlisting practice, holding that delays in transfer cannot be blamed on Department policy or

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<sup>130</sup> See TEX. CODE CRIM. PROC. ANN. art. 46B.073(b)(2) (West 2003); TEX. CODE CRIM. PROC. ANN. art. 46B.0735 (West 2021).

<sup>131</sup> See TEX. CODE CRIM. PROC. ANN. art. 46B.073 (West 2003).

<sup>132</sup> See *id.* ("A defendant may be committed to a jail-based competency restoration program only if the program provider determines the defendant will begin to receive competency restoration services within 72 hours of arriving at the program.").

<sup>133</sup> *Lakey v. Taylor*, 435 S.W.3d at 309, 309 (Tex. App. 2014).

<sup>134</sup> *Id.* at 314.

<sup>135</sup> *Id.* at 319.

<sup>136</sup> See *id.* at 320-21 (holding that prolonged detention of incompetent defendants is not rationally related to a legitimate government interest where no progress is made towards the goal of competency restoration).



procedure.<sup>137</sup> Where defendants present a threat of danger or flight risk and are prohibited from being assigned to outpatient treatment, their continued confinement is justified on its own merit as a safety measure.<sup>138</sup>

An important crux of the court's holding is that wait times are not standardized and defendants may wait as few as three days on the waitlist prior to transfer.<sup>139</sup> While that may be true for some defendants, this portrayal of wait times falls dangerously far from the truth in light of circumstances detailed in Part I.<sup>140</sup> It is now a given that defendants will wait at least months, if not years, to be transferred to a state hospital, and the Department certainly shares responsibility for the delays in transfer caused by understaffing and poor management. However, Texas courts refuse to hold any state entity responsible for the waitlist backlog, rejecting the idea that inmates should be transferred to state hospital treatment with any particular speed.<sup>141</sup>

In that vein, Texas courts have routinely rejected habeas petitions brought by defendants committed to state hospital treatment and held in jail on the waitlist.<sup>142</sup> Courts have reasoned that habeas petitions are not cognizable where they cannot result in a defendant gaining liberty from confinement, and defendants committed to inpatient competency restoration cannot be released anywhere but to a state hospital bed. In one such case, defendant Nicholas Thompson petitioned for release or transfer to a suitable mental health facility within seventy-two hours after nine months of confinement for resisting arrest.<sup>143</sup> A Texas court of appeals affirmed the trial court's denial of writ, holding Thompson's claims not cognizable where the writ would not result in either his release or deprivation of the trial court's jurisdiction.<sup>144</sup> Specifically, the Court characterized Thompson's appeal as "asserting a fundamental due process right to being transferred to a mental health facility within a 'reasonable'

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<sup>137</sup> See *id.* at 322.

<sup>138</sup> See *id.* at 321 (citing TEX. CODE CRIM. PROC. ANN. Art. 46B.072).

<sup>139</sup> *Id.* at 322.

<sup>140</sup> See MAY 2024 REPORT ON WAITING LISTS, *supra* note 10, at 10-11 (average wait time for non-mandatory security units and maximum-security units of 200 days and 530 days, respectively).

<sup>141</sup> See *Ex parte* Flint, No. 03-10-00852-CR, 2013 Tex. App. LEXIS 9090 (July 25, 2013); *Ex parte* McVade, No. 03-17-00207-CR, No. 03-17-00208-CR, No. 03-17-00209-CR, 2017 Tex. App. LEXIS 9079 (Sept. 28, 2017).

<sup>142</sup> See *Ex parte* Valero, No. 08-22-00172-CR, 2023 Tex. App. LEXIS 901 (. 13, 2023) (affirming trial court denial of defendant's pretrial habeas application where defendant IST detained in jail while awaiting transfer to state hospital); *Ex parte* Burton, No. 02-23-00215-CR, 2023 Tex. App. LEXIS 8002 (Oct. 19, 2023) (holding that trial court did not abuse discretion by denying habeas petition where defendant IST detained in jail while awaiting transfer to state hospital).

<sup>143</sup> See *Ex parte* Thompson, No. 10-22-00162-CR, 2022 Tex. App. LEXIS 7415 (Oct. 5, 2022).

<sup>144</sup> *Id.* at \*8.

time” and denied that such a substantive right exists in the United States Constitution or has been identified by the Supreme Court.<sup>145</sup>

Another person found IST and challenging commitment, Divine Burton, filed a habeas petition for the period of over ninety days that she had spent in jail thus far.<sup>146</sup> On appeal, the court ruled that Burton’s claims were not cognizable because there is no fundamental right to being transported to a mental health facility “in a timely manner.”<sup>147</sup> Making similar findings for a defendant who was charged with more serious crimes, a Texas court of appeals affirmed the trial court’s denial of defendant Bobby McVade’s petition for habeas relief from confinement in Travis County Jail awaiting transfer to a mental health facility.<sup>148</sup> Courts have again affirmed denials of habeas writs where defendants have been found to pose a danger to themselves or others.<sup>149</sup>

For some defendants, however, competency is not a stable status, and reevaluations of a defendant’s ability to stand trial can sometimes interfere with their progression on the waitlist. One such defendant challenging confinement, Juan Valero, climbed from twenty-second in line to fourth by the time he was found competent to stand trial and transferred to court.<sup>150</sup> Upon pretrial examination, Valero was found incompetent to stand trial again and placed at the back of the waitlist.<sup>151</sup> When a Texas court of appeals took up his case, he had progressed from forty-second to thirty-ninth, where he stayed after his appeal was rejected.<sup>152</sup> Now that the waitlist has surpassed 2,000 people, defendants who are mistakenly deemed competent to stand trial may lose months to years of progress towards transferring to a state hospital.

Upon closer examination of the Texas Code of Criminal Procedure and associated case law, a problem of potentially indefinite confinement arises. The statutory limit on how long defendants found IST may be detained starts from when treatment begins, so the time that a defendant may spend in jail waiting to be transferred for competency restoration treatment is dependent on the length of the waitlist, which exists independent of any statutory mandate. Recent habeas petitions and appeals highlight the state’s ability to hold defendants in jail pending transfer to a mental health facility upon determination of

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<sup>145</sup> *Id.*

<sup>146</sup> *See Ex parte Burton*, 2023 Tex. App. LEXIS 8002.

<sup>147</sup> *Id.* at \*5, \*8.

<sup>148</sup> *Ex parte McVade*, No. 03-17-00207-CR, No. 03-17-00208-CR, No. 03-17-00209-CR, 2017 Tex. App. LEXIS 9079 (Sept. 28, 2017).

<sup>149</sup> *See, e.g., Ex parte Schmidt*, No. 09-11-00350-CR, No. 09-11-00351-CR, 2011 Tex. App. LEXIS 8884 (Nov. 9, 2011); *Ex parte Flint*, No. 03-10-00852-CR, 2013 Tex. App. LEXIS 9090 (July 25, 2013).

<sup>150</sup> *Ex parte Valero*, No. 08-22-00172-CR, 2023 Tex. App. LEXIS 901, at \*2, \*5 (Feb. 13, 2023).

<sup>151</sup> *Id.* at \*5.

<sup>152</sup> *Id.* at \*5-6.

incompetency to stand trial.<sup>153</sup> Finally, the Court of Criminal Appeals holds that the time someone spends on the waitlist is not the fault of any HHSC policy or procedure, so the agency cannot be held responsible for lengthy periods of detention before receiving competency restoration treatment. Hence, incompetent defendants who are held in jail while waiting for competency restoration do not have a clear path to attain either mental health treatment or freedom from detention.

### III. PROPOSED INTERVENTIONS

Harris County Jail houses a number of people waiting for competency restoration among nearly 3,000 inmates receiving psychotropic medication.<sup>154</sup> Indigent defendants who cannot bail themselves out and pay for competency restoration on an outpatient basis, as well as defendants determined to pose a danger to themselves or others, must remain in jail. There is no obvious legal recourse for being committed indefinitely without a conviction for a crime. As noted, the Texas Code of Criminal Procedure does not allow appeals of incompetency determinations, and the Texas judiciary does not accept habeas corpus petitions to release someone from jail or transfer them to state hospitals. In this section, I propose solutions to end indefinite confinement in jail as well as improve the conditions of Harris County Jail specifically.

#### A. *Evaluation of Existing Solutions*

The HHSC warned the legislature as early as 2016 that the state needed 1,800 more state hospital beds to solve the waitlist backlog.<sup>155</sup> The Texas legislature has appropriated over \$2.5 billion towards state hospital construction and renovation projects since 2017, though HHSC includes civil and juvenile beds in the construction cost estimate.<sup>156</sup> When the construction is complete, the state will add just under 800 beds to its state hospitals that can be used for competency restoration of committed defendants.<sup>157</sup> Though the additional beds are certainly

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<sup>153</sup> *Id.* (holding that there was no due process violation where defendant failed to prove indefinite holding period, that defendant held no right to an immediate or speedy transfer to a mental health facility, and that a writ of habeas was not cognizable where it would not result in release).

<sup>154</sup> *Jail Population*, *supra* note 3.

<sup>155</sup> JOINT COMM. ON ACCESS AND FORENSIC SERV., DEP'T OF STATE HEALTH SERVS. AND TEX. HEALTH AND HUM. SERVS. COMM'N, REPORT OF THE JOINT COMMITTEE ON ACCESS AND FORENSIC SERVICES FOR FISCAL YEAR 2016-10 (2016), <https://www.kxan.com/wp-content/uploads/sites/40/2020/04/joint-comm-access-forensic-services-fy2016.pdf> [<https://perma.cc/C9P6-Q4GH>].

<sup>156</sup> *Changes to Texas State Hospitals*, TEX. HEALTH AND HUM. SERVS. COMM'N (last visited Nov. 20, 2024), <https://www.hhs.texas.gov/about/process-improvement/improving-services-texans/changes-texas-state-hospitals> [<https://perma.cc/5VUA-ZQWU>].

<sup>157</sup> *Id.*

necessary, the investment in state hospital construction has not yet reduced the number of people on the waitlist for inpatient treatment.<sup>158</sup>

The Texas legislature appropriated \$50 million to HHSC to address maintenance needs.<sup>159</sup> While continued appropriation of funds enables HHSC to take up new projects, the amounts dedicated to HHSC are inadequate compared to its total \$1 trillion deferred maintenance needs and requested \$14 million for emergency repairs.<sup>160</sup>

In addition to hospital construction projects, the HHSC has implemented, with varying degrees of success, some solutions to the waitlist backlog.<sup>161</sup> First, HHSC is pursuing recruitment and retention efforts, including raises, bonuses, and employee engagement, to combat staffing shortages.<sup>162</sup> Second, HHSC and the Office of Forensic Coordination (OFC) are working with counties and external stakeholders to prevent people with mental illnesses from being swept into the criminal justice system.<sup>163</sup> OFC's services include clinical consultation for psychiatric stabilization, trial competency re-evaluation for those currently waitlisted, legal education on alternative case resolutions, and enhanced follow-ups for people restored to competency.<sup>164</sup>

OFC also launched the "Eliminate the Wait" campaign, which provides training and assistance to municipal county stakeholders surrounding competency restoration.<sup>165</sup> "Eliminate the Wait" assigns roles to local mental health treatment providers, police, sheriffs and jail administrators, judges and court staff, prosecutors, and defense attorneys to identify mental health needs as early as possible, prioritize diversion, consider alternatives to state hospital treatment, and continue serving defendants who have to wait for inpatient services.<sup>166</sup>

As for solutions pursued by Harris County Jail, an increase in funding has allowed the Jail to better distribute medication.<sup>167</sup> The correct and timely distribution of medication is part of Texas' minimum jail standards, so this measure should have been implemented in response to the infraction cited on

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<sup>158</sup> See MAY 2024 REPORT ON WAITING LISTS, *supra* note 10, at 10-12.

<sup>159</sup> *Changes to Texas State Hospitals*, *supra* note 156, at 12.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 11.

<sup>163</sup> *Id.* at 12.

<sup>164</sup> *Id.*

<sup>165</sup> TEX. JUD. COMM'N ON MENTAL HEALTH & TEX. HEALTH AND HUM. SERVS. COMM'N, ELIMINATE THE WAIT: THE TEXAS TOOLKIT FOR RIGHTSIZING COMPETENCY RESTORATION SERVICES 1 (1st ed. 2021).

<sup>166</sup> *Id.*

<sup>167</sup> Gabby Hart, *Harris County Jail Hit with Class Action Lawsuit Over Inmate Deaths, Injuries*, FOX 26 (Aug. 7, 2023, 9:32 PM), <https://www.fox26houston.com/news/harris-county-jail-hit-w-class-action-lawsuit-over-inmate-deaths-and-injuries> [<https://perma.cc/P36L-8BAG>].

December 12, 2022.<sup>168</sup> In response to the federal lawsuit, the Sheriff's Office pledged to implement body-worn cameras, which, while promising, nonetheless requires transparency from the Jail to enforce.<sup>169</sup> Finally, Sheriff Gonzalez will increase enforcement mechanisms for pre-existing drug bans, which have not been at issue in the Jail's noncompliance reports or lawsuit.<sup>170</sup> As previously noted, Harris County Jail has also outsourced 1,000 inmates to ease overcrowding, but the Jail is still over capacity.<sup>171</sup> Beyond the mediocrity of the solutions enacted by the Sheriff's office, this response fails to account for the culture of disregard for the Jail's mentally ill inmates. If Harris County Jail cannot be trusted to effectively address its problem of causing inmates deaths, it should not then be trusted to provide mental health care for inmates who are not competent to stand trial.

Amid the Jail's documented failures, Harris County Jail piloted its Jail Based Competency Restoration (JBCR) program in 2020 and doubled its capacity in February 2023.<sup>172</sup> JBCR programs are meant to replace transfer to a state hospital in order to reduce the waitlists from inside the Jail.<sup>173</sup> State Senator Kirk Watson explains that a defendant "may not need to be in a state hospital in order to have your competency restored, thus adding to the waitlines and problems."<sup>174</sup> Between September 2020 and August 2021, the JBCR pilot program treated fifty-six participants, thirty-three of whom were restored to competency and one of whose charges were dismissed.<sup>175</sup> During roughly the same time period, the state hospital waitlist soared from under 1,000 people in 2020 to 1,800 people by October 2021.<sup>176</sup> While the pilot program certainly

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<sup>168</sup> TEXAS COMM'N ON JAIL STANDARDS, REMEDIAL ORDER 1 (May 11, 2023), <https://tjpprod.wpenginepowered.com/wp-content/uploads/2024/04/10.-Harris-County-May-23-Remedial-Order.pdf> [<https://perma.cc/DHF2-YBP6>].

<sup>169</sup> Hart, *supra* note 167.

<sup>170</sup> *Id.*

<sup>171</sup> Grench & Zhang, *Sheriff's Office Reports Improvements*, *supra* note 61.

<sup>172</sup> TEX. HEALTH AND HUM. SERVS. COMM'N, REPORT ON THE JAIL-BASED COMPETENCY RESTORATION PILOT PROGRAM 2 (2021), <https://www.hhs.texas.gov/sites/default/files/documents/jail-based-competency-restoration-pilot-program-2021.pdf> [<https://perma.cc/P3QB-YZBD>] [hereinafter REPORT ON COMPETENCY RESTORATION PROGRAM]; Alex Stuckey, *Lina Hidalgo Pledges Funds for Jail Program, Citing Investigation by Houston Landing*, HOUS. LANDING (Feb. 9, 2023), <https://houstonlanding.org/lina-hidalgo-pledges-funds-for-jail-program-citing-investigation-by-houston-landing/> [<https://perma.cc/G427-TVLV>] [hereinafter *Hidalgo Pledges Funds*].

<sup>173</sup> David Barer, *Thousands Waiting in Jail for State Hospital Beds, Is Help Coming?*, KXAN (Jan. 18, 2023), <https://www.kxan.com/investigations/thousands-waiting-in-jail-for-state-hospital-beds-is-help-coming/>.

<sup>174</sup> David Barer, *Solutions to Restore Inmates' Mental Health and Get Them to Trial*, KXAN (May 17, 2020), <https://www.kxan.com/locked-in-limbo-stories/explore-solutions-alternatives-for-texas-inmates-competency-restoration/> [<https://perma.cc/C4YM-TYBP>].

<sup>175</sup> REPORT ON COMPETENCY RESTORATION PROGRAM, *supra* note 172, at 6.

<sup>176</sup> Murney, *supra* note 9.

does necessary work to restore competency, its results pale in comparison to the growing number of people who sit in jail not receiving treatment.<sup>177</sup> Further, the expansion of the JBCR program amid growing problems within Harris County Jail casts doubt on the effectiveness of competency restoration that occurs in such an environment.<sup>178</sup>

The variety of strategies and agencies involved may give the impression that the Texas government is effectively addressing the waitlist problem. However, the HHSC's solutions are "not doing a darn thing for the people that are on the waitlist now," as stated by Jim Allison, member of the Joint Committee on Access and Forensic Services. "We don't seem to grasp that there is a crisis here."<sup>179</sup> Allison's words speak to ineffective solutions pursued by Texas government agencies, such as OFC's "Eliminate the Wait" campaign. OFC's suggested interventions, such as identifying mental health needs early or continuing to serve defendants on the waitlist, do not impose new or different responsibilities on system actors towards incompetent defendants. Further, the interventions are only triggered after someone has been arrested or charged with a crime and thus are incapable of reducing contact with the justice system for people with mental illness. Overall, the solutions enacted in response to the waitlist backlog have not significantly impacted the lengthy pretrial detention of mentally ill Texans awaiting competency restoration.

#### B. *Solving Indefinite Confinement*

Given the multi-faceted nature of this problem, a range of solutions, including financial and legal measures, should be pursued. The most glaring answer to this problem is to fund more state hospital psychiatric beds. Funding existing state hospitals to their full capacity of required personnel would provide the state with a few hundred additional beds, with no additional construction costs required.<sup>180</sup> The understaffing of state hospitals certainly has multiple causes, but research suggests that the large number of nurses leaving the profession during the COVID-19 pandemic have not yet been replaced by graduates from Texas nursing schools.<sup>181</sup> This cause suggests multiple solutions: increased recruitment and graduation rates from nursing schools but also improving

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<sup>177</sup> *Jail Population*, *supra* note 3 (showing 3,029 inmates on psychotropic medication).

<sup>178</sup> *Hidalgo Pledges Funds*, *supra* note 172; Moriah Ballard, *Harris Co. Jail Saw Record Number Deaths in 2022 After New Case Reveals 31-Year-Old Died by Homicide While in Custody*, CLICK2HOUSTON.COM (Dec. 18, 2022, 5:17 PM), <https://www.click2houston.com/news/local/2022/12/18/harris-co-jail-saw-record-number-deaths-in-2022-after-new-case-reveals-31-year-old-died-by-homicide-while-in-custody/> [https://perma.cc/X3XA-8PFE].

<sup>179</sup> Barer & Hinkle, *supra* note 9.

<sup>180</sup> Simpson, *supra* note 5 (reporting that seven hundred out of 2,911 funded state psychiatric hospital beds cannot be used due to workforce shortages).

<sup>181</sup> See Luann Glowacz, *Tackling the Great Staffing Shortage*, TEX. HOSP. ASS'N (Mar. 2022), <https://www.tha.org/news-publications/texas-hospitals-magazine/2022-issues/march-april-2022/tackling-the-great-staffing-shortage/> [https://perma.cc/45XQ-8TGL].

Texas' public health approach to the pandemic to protect existing hospital staff.<sup>182</sup>

Ultimately, appropriating funds to the state hospital system will not fix the legal framework that routes mentally ill people who have not been convicted of a crime towards potentially indefinite jail time. The bloated waitlist has prompted habeas petitions from people confined in jail waiting for transfer to state hospital.<sup>183</sup> In response, the Texas judiciary has held that speedy or timely transfer to a state hospital is not a substantive right.<sup>184</sup> In effect, the judiciary has punted the problem to the legislature to solve. Indeed, the legislature is uniquely situated to address the needs of the thousands of people on the waitlist dispersed in jails of varying conditions.

In situations like the present, where there are thousands of people on the waitlist for state hospital competency restoration, the legislature should enact a more drastic solution. One of the reasons that people land on the waitlist is not being able to afford outpatient treatment. I propose that people on the waitlist should be treated in private hospital settings until the need for the waitlist is eliminated, or at least until the waitlist is no longer in crisis. Much like government contracts with private detention centers to move jail detainees offsite, HHSC could contract with local hospitals to provide competency restoration treatment to people in jails across the state. For example, incompetent defendants waiting in Harris County Jail would be treated by hospitals in the Houston medical center with the funds otherwise spent on the jail-based competency restoration program. Because the state is responsible for holding people on the waitlist in jail, the state legislature should bear the cost of bringing treatment to incompetent defendants who cannot be treated on an outpatient basis.

### C. *Solving the Conditions of Confinement*

Finally, Harris County Jail needs dedicated reform. Though the Jail recently passed inspection, this was achieved only with technical assistance from inspectors.<sup>185</sup> As previously discussed, jail-specific reforms have thus far failed to address one of the most pressing issues: violence directed at mentally ill inmates.<sup>186</sup> Government agencies do not seem to be incentivizing the Jail to

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<sup>182</sup> *Id.*

<sup>183</sup> See, e.g., *Ex parte Valero*, No. 08-22-00172-CR, 2023 Tex. App. LEXIS 901 (Feb. 13, 2023); *Ex parte Burton*, No. 02-23-00215-CR, 2023 Tex. App. LEXIS 8002 (Oct. 19, 2023); *Ex parte Thompson*, No. 10-22-00162-CR, 2022 Tex. App. LEXIS 7415, at \*8 (Oct. 5, 2022); *Ex parte McVade*, No. 03-17-00207-CR, No. 03-17-00208-CR, No. 03-17-00209-CR, 2017 Tex. App. LEXIS 9079 (Sept. 28, 2017).

<sup>184</sup> See, e.g., *Ex parte Valero*, 2023 Tex. App. LEXIS 901; *Ex parte Burton*, 2023 Tex. App. LEXIS 8002; *Ex parte Thompson*, 2022 Tex. App. LEXIS 7415, at \*8; *Ex parte McVade*, 2017 Tex. App. LEXIS 9079.

<sup>185</sup> *Finally in Compliance*, *supra* note 57.

<sup>186</sup> See *Ten People Have Died*, *supra* note 91.

reform its conditions. As suggested by John Rappaport, insurers may be able to hold police accountable by imposing stringent requirements to renew liability coverage.<sup>187</sup> Harris County faces mounting liability with the number of lawsuits filed on behalf of people harmed by the jail.<sup>188</sup> Perhaps the jail would be forced to reform its conditions and officers' use of force if Harris County refused to pay settlements for corrections officer misconduct.<sup>189</sup>

Secondly, the continued criminalization of mental illness means that Houston's \$1 billion police force will continue arresting mentally ill people.<sup>190</sup> Harris County Jail cannot keep pace; despite outsourcing hundreds of defendants, the jail is still over capacity.<sup>191</sup> Providing mental health treatment before someone becomes a target of the police would be far more effective in reducing the flow of severely mentally ill people into jail.<sup>192</sup> In other words, funding public institutions other than jails and prisons where people can receive psychiatric treatment would cut down on the number of mentally ill people being funneled into jails. If this situation continues with no intervention, Harris County Jail will continue to fill with people who desperately need help that the jail is not equipped to provide, and inmates, overwhelmingly those with mental illness, will continue to die at the hands of jail personnel.

#### CONCLUSION

In Texas, people with severe mental illness are in danger of being indefinitely confined in jail. Once someone has been determined incompetent to stand trial, the proceedings are paused, and the defendant is committed to competency restoration treatment. Due to insufficient state hospital space, defendants waiting for inpatient treatment are held in jail pending transfer. At this point, defendants found IST wait months to years before being transferred to a state hospital. Texas courts have rejected habeas petitions and interlocutory appeals of incompetency, leaving incompetent defendants in jail with no clear legal path

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<sup>187</sup> See generally John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539 (2017); BUTLER, *supra* note 30, at 55.

<sup>188</sup> See Eileen Grench, "A Place of Torment": 22 Families, Former Inmates Sue Harris County Over Jail Conditions, HOUS. LANDING (Aug. 7, 2023), <https://www.texastribune.org/2023/08/07/harris-county-jail-deaths-injuries-lawsuit/> [https://perma.cc/9FR9-H7SG] (reporting fifty-one lawsuits filed against Harris County for jail conditions).

<sup>189</sup> See BUTLER, *supra* note 30, at 55 (suggesting that larger cities self-insure against police brutality by building settlements into the budget, so the city would need to restrict its own budget).

<sup>190</sup> Brown, *supra* note 41 (reporting \$1.6 billion Houston Police Department budget for Fiscal Year 2024).

<sup>191</sup> Grench & Zhang, *Sheriff's Office Reports Improvements*, *supra* note 61.

<sup>192</sup> Buzz McClain, *Study: To Reduce Jail Populations, Increase Mental Health Services in Communities*, GEO. MASON U. SCHAR SCH. POL'Y AND GOV'T (Aug. 25, 2022), <https://schar.gmu.edu/news/2022-08/study-reduce-jail-populations-increase-mental-health-servicescommunities#:~:text=The%20study's%20conclusions%20point%20to,reduce%20prison%20and%20jail%20populations> [https://perma.cc/6HEA-FELG].



to release. The problem reaches crisis proportions in a place like Harris County Jail, where inmates with mental illness are vulnerable to physical harm and substandard conditions.

Using Harris County Jail as a case study, I first argue that jails are not appropriate places to hold people with severe mental illness. Second, I suggest that Texas incompetency law allows potentially indefinite confinement on the basis of being incompetent to stand trial. To address the waitlist problem, the Texas legislature should contract with private hospitals for competency restoration services for the 2,000 people waiting in jails across the state. This can be an emergency measure that ends once the state hospital construction projects are completed and hospital staffing is back to normal levels. As for the conditions of confinement, Harris County Jail is in need of an intervention. Considering that past attempts to force the Jail to come into compliance have produced insufficient solutions, reform may require the city or state to threaten to withhold funding. For the dozens of people who have died in Harris County Jail, some while waiting for competency restoration, drastic solutions are long overdue.





