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From Property Ownership Requirements and Pauper Exclusions to Residency Requirements: How the United States Systematically Disenfranchises the Homeless Population

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> Who are to be the electors . . . ? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of the people of the United States.[1]

I. INTRODUCTION

"Homelessness is a reality for too many Americans."[2] Every night, over half a million people in the United States experience homelessness.[3]

[1] THE FEDERALIST No. 57 (James Madison or Alexander Hamilton).
[2] City of Grants Pass v. Johnson, 603 U.S. 520, 564 (2024) (Sotomayor, J., dissenting).
[3] *Id.* Ben Zimmer, *'Unhoused:" Without a Home but Without the Stigma,* THE WALL ST. J. (April 26, 2024, 8:57 AM), https://www.wsj.com/politics/policy/unhoused-without-a-home-but-without-the-stigma-ff8add87 (This author acknowledges that the term "homeless," while still generally acceptable according to the 2020 Associated Press Stylebook, is becoming less favored in advocacy circles who are instead opting for the term "unhoused" or "unhoused persons," which is seen "as a more accurate and humanizing because it suggests more of a temporary condition to be addressed than in innate characteristic). Ann E. Marimow and Reis Thebault, *Supreme Court divided over homeless ban and rights. of the unhoused*, THE WASHINGTON POST (April 22, 2024), https://wapo.st/4jYymzH (The press uses

The problem of homelessness is only getting worse:[4] more people than ever are experiencing homelessness for the first time,[5] and there are too few shelter beds to house all homeless individuals.[6] While homelessness happens for a myriad of reasons, many of which are outside of the homeless individual's control,[7] homeless individuals are "often overlooked, misunderstood, and marginalized."[8]

Federal, state, and local governments face the difficult task of "addressing the underlying causes of homelessness," while also "providing for public health and safety."[9] As the rates of homelessness increase across the country, "the number of homeless encampments across the country ha[ve] increased . . . 'in a number not seen in almost a century."[10] With increased number of encampments comes significant public health and safety concerns, such as "'a heightened risk of disease associated with living outside without bathrooms or washbasins,'" as well as "'deadly

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the terms "homeless" and "unhoused" somewhat interchangeably). Zimmer, *supra*. Oral Argument at 18:23, City of Grants Pass v. Johnson, 603 U.S. 520 (2024), https://www.oyez.org/cases/2023/23-175 (Justice Brown Jackson used the word "unhoused" in an oral argument, "They have to eat in public because they're unhoused and they can't afford to go to a restaurant."). *Id.* at 565. (The Supreme Court defined homelessness as the "lack 'a fixed, regular, and adequate nighttime residence." For the purpose of this paper, the term "homeless" will be used to be consistent with Supreme Court precedent).

[4] Daniel Soucy, Makenna Janes & Andrew Hall, *State of Homelessness: 2024 Edition,* THE NAT'L ALL. TO END HOMELESSNESS (Aug. 5, 2024), https://endhomelessness.org/resources/research-and-analysis/state-of-homelessness-2024-edition/ (When referring to the "problem" of homelessness, this author is speaking on the frequency, duration, and expanding numbers of homelessness rates in the United States. For example, in 2023, there was a record high of 653,104 people experiencing homelessness on a single night). *Id.* (This was a 12.1% increase in the number of individuals experiencing homelessness from the previous year). *Id.* (At the time of writing, the most up-to-date statistics come from 2023, as the 2024 National Alliance to End Homelessness's State of Homelessness report is not yet published).

[5] Soucy, *supra* note 4. (Between 2022–2023, there was a 23% increase of individuals entering emergency shelters for the first time).

[6] Soucy, *supra* note 4. (A record high of 256,610 individuals, or 39.3% of all people experiencing homelessness, did not have a shelter in 2023).

[7] Grants Pass, 603 U.S. at 565–566. *Id.* at 528–529 (The economy plays a large role in the number of individuals experiencing homelessness). *Id.* at 566 (for example, "Every $100 increase in median rental price is associated with about a 9 percent increase in the estimated homelessness rate."). *Id.* at 529 (Some homeless individuals and families "have been forced from their homes to escape domestic violence and other forms of exploitation"). *Id.* at 529 (Other homeless individuals "struggle with drug addiction and mental illness . . . [b]y one estimate, perhaps 78 percent of the unsheltered suffer from mental-health issues, while 75 percent struggle with substance abuse"). Grants Pass, 603 U.S. at 566 (Veterans make up a large portion of the homeless population particularly "those with a history of mental health conditions, including post-traumatic stress disorder (PTSD)"). *Id.* at 566 (Almost 60 percent of women "experiencing homelessness report that fleeing domestic violence was the 'immediate cause"). *Id.* at 566–567 (Many youth and young adults are homeless as"'[f]amily dysfunction and rejection, sexual abuse, juvenile legal system involvement, 'aging out' of the foster care system, and economic hardship' make them particularly vulnerable to homelessness"). *Id.* at 567 (There is a large Native American homeless population for which "policies of removal and resettlement in tribal lands' have caused displacement, resulting in 'a disproportionately high rate of housing insecurity and unsheltered homelessness"). *Id.* (Individuals with disabilities also face homelessness which create unique challenges as "[l]ess than 5% of housing in the United States is accessible for moderate mobility disabilities, and less than 1% is accessible for wheelchair use").

[8] Jennie Miller & Peter Gonzales, *"I Matter! I Vote!": Overcoming the Disenfranchisement of Homeless and Formerly Homeless Voter*s, 11 TEMP. POL. & CIV. RTS. L. REV. 343, 343. (2002).

[9] Grants Pass, 603 U.S. at 567.

[10] *Id.* at 529. *Id.* at 565 (In Justice Sotomayor's dissent, she argues Justice Gorsuch's majority opinion underplays the factors that lead to homelessness, "The majority paints a picture of 'cities across the American West' in 'crisis; that are using criminalization [of homelessness] as a last resort . . .. That narrative then animates the majority's reasoning. This account, however, fails to engage seriously with the precipitating causes of homelessness, the damaging effects of criminalization, and the myriad [of] legitimate reasons people may lack or decline shelter").

fires' from efforts to prepare food and create heat sources."[11] Additionally, with increased levels of homelessness comes "violen[t] crime, and drug distribution and abuse."[12]

To combat the negative effects of homelessness, while also trying to balance addressing the root cause of homelessness, federal, state, and local governments have placed specific regulations on where, when, and how homeless individuals may live.[13] However, many of these regulations have had a secondary effect of restricting homeless individuals' ability to exercise their fundamental right to vote. [14]

This paper will discuss how the United States has systematically disenfranchised the homeless population. The "system" that works to create disenfranchisement is voter registration forms that require an individual to list an address to prove their residence, which this paper will hereinafter refer to as "the residency requirement."[15]

To understand the systematic disenfranchisement of the homeless today, it is critical to first examine the history and the development of registration requirements in the United States. In Section II, this paper will analyze the development of two property-based requirements to qualify for suffrage: the property-ownership qualification and the pauper exclusion. This paper will then turn to the impact of the post-Civil War Fourteenth and Fifteenth Amendments and the Voting Rights Act of the civil rights era on expanding sovereignty for the homeless population. In Section III, this paper will outline how voter registration residency requirements systematically disenfranchises the homeless population. To do so, this paper will examine successful cases of combating residency requirement laws and suggest causes of action to expand homeless suffrage. Finally, in Section IV, this paper will discuss two new federal actions and their potential negative effects on the continuing the systematic disenfranchisement of homeless individuals.

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[11] *Id.* at 567.
[12] *Id.*
[13] *See infra* Section III(B)–(D) for a continued discussion of specific policies federal, state, and local governments have created to address the homelessness problem. These sections will examine how regulations have a secondary effect of systematic disenfranchisement of the homeless population.
[14] *See infra* Section II(B)–(C) for continued discussion on the specific dynamics of the right to vote in the United States; *see infra* Section III–(A) for continued discussion on the standard of review courts apply to state election laws that regulating the fundamental right to vote.
[15] *Resident*, BLACK'S LAW DICTIONARY (11th ed. 2019) (Black's Law Dictionary defines "resident" as "[s]omeone who lives permanently in a particular place," specifically, "a person who has established domicile in a given jurisdiction.") For the purpose of this paper, the "residency requirement" is the requirement many jurisdictions place as pre-requisite to voter registration. These policies state an individual must list a home address, or a "residence" to be able to register. As this paper discusses, there is no federal definition of what qualifies as a "residence" for voter registration purposes. This issue has not been addressed by the United States Supreme Court. Instead, state and local election codes control their definition of sufficient "residence," leading to vastly inconsistent requirements. There is no consistent definition among these regulations for "residence" or "resident."

II. HISTORY AND DEVELOPMENT OF THE RESIDENCY REQUIREMENT: AN EXAMINATION OF PROPERTY OWNERSHIP REQUIREMENTS AND PAUPER EXCLUSIONS

A. From the Revolutionary War to the Civil War

1. The Property-Ownership Exclusion

At the dawn of the American colonies in the mid-eighteenth century every colony, except for one,[16] adopted "property qualifications for suffrage."[17] Colonialists and writers of the time explained the rationale of property-ownership requirements for suffrage came out of the idea of dependence and personal autonomy.[18] Blackstone was heavily cited author, cited by both Alexander Hamilton[19] and John Adams,[20] for supporting this emphasis on personal autonomy, writing in 1765:

> The true reason of requiring any qualification, with regard to property, in voters, is to exclude such persons as are in so mean a situation that they are esteemed to have no will of their own. If these persons had votes, they would be tempted to dispose of them under some undue influence or another. This would give a great, an artful, or a wealthy man, a larger share in elections than is consistent with general liberty.[21]

This conception of propertyless individuals as lacking personal autonomy continued through the American Revolution.[22] However, while the notion that "all men are created equal"[23] was a founding tenant of the United States, "In the decades after the Revolution, hardly anyone disputed

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[16] Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 339–40 (1989). (By the Revolutionary War, South Carolina was the sole colony that did not have a property exclusion). *Id.* (In every other colony, the "election laws excluded the propertyless from the suffrage without distinction.")

[17] Miller, *supra* note 8 at 347–348.

[18] Steinfeld, *supra* note 16 at 340 ("Those who owned no property were powerless and dependent; they were nearly always subject to the will of those who commanded resources. Because they were not their own men, they lacked political capacity . . .. They would always be compelled to do the bidding of the wealthy.").

[19] *Id.* at 341. (citing ALEXANDER HAMILTON, THE FARMER REFUTED (1775), *represented in* 1 A. HAMILTON, THE PAPERS OF ALEXANDER HAMILTON 81, 106 (H. Syrett & J. Cooke eds. 1961)) (The Blackstonian idea that "those without property lacked autonomy and would inevitably fall under the sway of others," since only 'free agents' could be allowed to vote, the propertyless could not be enfranchised," was cited by Alexander Hamilton).

[20] Steinfeld, *supra* note 16 at 341. In 1776, John Adams wrote, "Such is the frailty of the human heart. . . . that very few men who have no property, have any judgment of their own. They talk and vote as they are directed by some man of property, who has attached their minds to his interest . . . [They are] to all intents and purposes as much dependent upon others, who will please to feed, clothe, and employ them, as women are upon their husbands, or children on their parents." *Id.* (citing Letter from John Adams to James Sullivan (May 26, 1776), *in* 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS 375, 376–377 (C. Adams ed. 1864) (alterations in original)).

[21] Steinfeld, *supra* note 16 at 340 (citing I WILLIAM BLACKSTONE, COMMENTARIES 171).

[22] *Id.* at 351.

[23] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

the proposition that property ownership was necessary for personal independence."[24] Thus, "if independence was a prerequisite for political participation, as many Americans thought it should be, then those who owned no property could not reasonably expect to participate in political life."[25] The property-ownership exclusion continued "[f]or the better part of the first century of the new republic."[26]

2. The Pauper Exclusion

In the early to mid-nineteenth century, the nascent states began to adopt pauper[27] exclusions[28] to suffrage. The rationale behind the pauper exclusion was nearly identical to the rationale behind the property-ownership exclusion, "[t]he legal right to self-government [was] the primary test for separating those who were entitled to franchise from those who would continue to be disenfranchised."[29]

Paupers were viewed as lacking legal self-government because of their dependence on public resources as "they were legally obligated to obey the reasonable commands of their providers . . . [Paupers] could not dispose of their energies according to their own desires, [and] their labor was property of their providers."[30] Thus, because paupers depended on state resources and did not profit solely from their own labor, they were seen as significantly lacking autonomy and were therefore undeserving of suffrage under this Blackstonian-esque conception.[31]

At the same time pauper exclusions were becoming favored by the states, many states began to relax their property-ownership qualifications.[32] This shift away from property-ownership exclusions toward pauper exclusions was the result of changing conceptions of personal autonomy.[33]

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[24] Steinfeld, *supra* note 16 at 342.
[25] *Id.*
[26] Miller, *supra* note 8 at 347–348.
[27] *Pauper*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/pauper (last visited May 4, 2025) ("a person destitute of means except such as are derived from charity," who specifically "receives aid from funds designated for the poor."). The modern-day homeless individual is analogous to the paupers of this era.
[28] Steinfeld, *supra* note 16 at 335. ("In 1792, the state of New Hampshire amended its constitution to exclude 'paupers' from the suffrage," later followed by "South Carolina (1810), Massachusetts (1821), Virginia (1829), Delaware (1831), Rhode Island (1842), and New Jersey (1844) . . .. By the end of the nineteenth century, fourteen states had excluded either 'paupers' generally or inmates of poorhouses from the suffrage"). *Id.* (As late as 1934, all of these states continued to do so").
[29] Steinfeld, *supra* note 16 at 362.
[30] *Id.* at 361. (For example, in Connecticut, as late as 1884, "towns were . . . still assigning the rights of their labor . . .. 'The keeper of the town poor' still operated 'under written contract [by which he] reciev[ed] an annual compensation . . . and the services of the paupers' during those years").
[31] *See infra* notes 19–21 for a description of this Blackstonian ideal.
[32] Steinfeld, *supra* note 16 at 353. *Id.* at 338 (The expanding franchise to propertyless and expanding restrictions for paupers lead to a debate that lasted much of the nineteenth century). *Id.* ("On the one hand, Americans continued to adhere to the classical republican rotation that only property ownership conferred independence on the man," while "[o]n the other hand, [Americans] also had come to believe that 'all men were by nature equally free and independent and had certain inherent and inalienable rights").
[33] *Id.* at 361–362. (Even wage-earnings, although propertyless, were considered to gain legal independence because of their ability to enter into contracts for employment and "[t]he employment relationship no longer took the form of a legal relationship of dependence" so that "wage earners [were] legally autonomous" while paupers remained "legally depend on and bound").

Around this time, wage-earners, although propertyless, were considered to gain legal independence as "[t]he employment relationship no longer took the form of a legal relationship of dependence."[34] This meant "wage earners [were] legally autonomous"[35] while paupers remained "legally depend on and bound."[36] Thus, while paupers could not depend on their own labor, wage-earners who could contract for their own employment, although propertyless, gained suffrage as society accepted this more expansive view of "self-autonomous."

While property-ownership restrictions on suffrage continued to decrease at the turn of the nineteenth to mid-nineteenth century, pauper exclusions continued to be popular well into the late nineteenth century.[37]

B. From the Civil War to the Civil Rights Movement

After the Civil War, as the United States entered into the "Jacksonian world of the nineteenth century," the bright-line test for suffrage could no longer be explicitly race-dependent, but was still largely based on the Blackstonian distinction, the critical question for suffrage being "whether a person supported himself by earning wages or was dependent on poor relief."[38]

Some states began to decrease their use of the pauper and property exclusions as they became more difficult to delineate, "[t]he realities of cyclical and seasonal unemployment, and of poor relief, made it very difficult to keep the two categories of the propertyless-independent wage earners and dependent paupers-sealed tightly in separate compartments."[39] Thus, "the tendency of the bright line to blur posed the danger,"[40] that the Blackstonian-esque "universe constructed by the opposition of independent wage earner and dependent pauper might collapse back into a world of the undifferentiated propertyless and the propertied."[41]

Some state courts began to relax pauper exclusions, allowing for paupers to escape their disenfranchisement if they were able to successfully support themselves.[42] For example, in 1878, the Massachusetts Supreme Court ruled that and individual who was once a pauper, but had since been "able to earn more than enough to support himself and had found an employer," was no longer considered a pauper.[43] Thus, the court held, paupers should be disenfranchised only "so long as they were in actual receipt of assistance, and no longer."[44] However, for

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[34] Steinfeld, *supra* note 16 at 361–362.
[35] *Id.*
[36] *Id.*
[37] *Id.* at 373.
[38] Steinfeld, *supra* note 16 at 364.
[39] *Id.* at 370.
[40] *Id.*
[41] *Id.*
[42] *Id. See also* Hutchings v. Thompson, 64 Mass. 238, 241 (1852).
[43] Steinfeld, *supra* note 16 at 373 (citing Opinion Justices, 124 Mass. 596, 597 (1878) (advisory opinion)).
[44] *Id.* at 373.

the remainder of the nineteenth century until the passage of the Fourteenth and Fifteenth Amendments, the debate over pauper suffrage continued.[45]

1. The Fourteenth and Fifteenth Amendments

The Fourteenth Amendment to the United States Constitution was ratified in 1868.[46] The Amendment created a fundamental protection for *all* citizens of the United States:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[47]

The Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment have been used by litigants to "challenge unfair state suffrage laws,"[48] as "[t]he Equal Protection and Due Process Clauses are interpreted as guaranteeing fundamental principles of fairness, liberty, and self-government."[49] Specifically, the Equal Protection Clause "prevents governments from adopting laws that invidiously discriminate between persons."[50]

In 1886, only two years after the Amendment's passage, the Supreme Court "referred to 'the political franchise of voting' as a 'fundamental political right,"[51] stating "[t]hough not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because [it is] preservative of all rights."[52] Thus, while the Supreme Court did not explicitly say that the right to vote was a fundamental right, the Court suggested that the right to vote was considered a right that came from the penumbra of the Fourteenth Amendment.

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[45] *Id.* at 375.
[46] SAM R. GARRETT, CONG. RSCH. SERV., RL47520, THE VOTING RIGHTS ACT: HISTORICAL DEVELOPMENT AND POLICY BACKGROUND (2023). While the Amendment was ratified in 1868 and called for universal suffrage and "supersed[ed] previous 'three-fifths' apportionment for congressional representation," suffrage did not extend to women or those under 21 years of age. *Id.* Women did not receive suffrage until the ratification of the Nineteenth Amendment in 1920. H.R.J. RES. 1, 66TH CONG. (1919).
[47] U.S. CONST. amend. XIV, § 1.
[48] Miller, *supra* note 8 at 348–49.
[49] *Id.*
[50] Grants Pass, 603 U.S. at 541; *see also* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 (1966).
[51] Reynolds v. Sims, 377 U.S. 533, 562 (1964) (citing Yick Wo. v. Hopkins, 118 U.S. 356, 370 (1886)).
[52] Yick Wo, 118 U.S. 356, 370. (Yick Wo also spoke on as-applied discriminatory impact of election regulations, stating that if a law is "applied and administered by a public authority with an evil eye and an unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. This principle of interpretation has been sanctioned by this court.") *Id.* at 373–374.

The Fifteenth Amendment, ratified in 1870, explicitly enumerates the United States citizen's voting right protections,[53] "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[54] The Amendment provides for "[t]he concept of political equity in the voting booth . . . [that] extends to all phases of state elections."[55] While the Fifteenth Amendment was motivated by racial protections, it remains a helpful cause of action and tool litigants have used to challenge impermissible voter qualifications and procedures.[56] These challenges continued through the nineteenth and to the mid-twentieth century.[57]

While the Fifteenth Amendment has been specifically used to overturn methods of explicit voter suppression, case law challenging voter qualifications on the basis of discrimination are largely brought as Fourteenth Amendment Equal Protection Clause challenges rather than Fifteenth Amendment challenges.[58]

With the establishment of these acts, any *explicit* pauper exclusions would be unconstitutional under the Equal Protection Clause, because pauper exclusions "invidiously discriminate" against those who are poor and depend on public aid,[59] the stigma that followed the pauper, which is today analogous to the homeless individual, remained engrained in the minds of society.

The creation of suffrage under the Fourteenth and Fifteenth Amendments also did not guarantee pauper *access* to voting. The Fifteenth Amendment's language was specific: it protected against voter discrimination based "of race, color, or previous condition of servitude."[60] Paupers, and the homeless of today, are not a protected class[61] and do not fall under one of these three explicit categories. Thus, paupers remained subject to secondary effects of impermissible voter qualifications and

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[53] The Fifteenth Amendment was specifically created to grant African American men the right to vote after the Thirteenth Amendment prohibited slavery and the Fourteenth Amendment granted former slaves citizenship. Gen. Rep. of the U.S. Gov't Nat'l Archives, THE HOUSE JOINT RESOL. PROPOSING THE FIFTEENTH AMEND. TO THE CONST. at 11 (Enrolled Acts and Resol. of Congress Print 1789–1999). While the Amendment was motivated by racial protections, it is a helpful cause of action and tool litigants have used to challenge impermissible voter qualifications and procedures, such as later literacy tests and grandfather clauses.

[54] U.S. CONST. amend. XV, § 1.

[55] Gray v. Sanders, 372 U.S. 368, 380 (1963) (citing Terry v. Adams, 345 U.S. 461 (1953)).

[56] GEN. REP. OF THE U.S. GOV'T NAT'L ARCHIVES REP. 11, *supra* note 49. Some impermissible voting qualifications and procedures that have been struck down as unconstitutional under the Fifteenth Amendment, including the requirement of literacy tests and the use grandfather clauses. *Id.*

[57] *See infra* Section II(2) on the fundamental role the Voting Rights Act of 1965.

[58] *See infra* Reynolds v. Sims, 377 U.S. 533 (1964); Pitts v. Black, 608 F. Supp. 696, (S.D.N.Y. 1984); Collier v. Menzel, 176 Cal. App. 3d 24 (1985).

[59] Grants Pass, 603 U.S. at 541.

[60] U.S. CONST. amend. XV, § 1.

[61] "Protected classes" for the purpose of this paper are sub-groups of individuals who are specifically enumerated under the Voting Rights Act of 1965 as most recently amendment in 2006. *Section 2 of the Voting Rights Act*, U.S. DEP'T OF JUST., CIV. RTS. DIV. (April 5, 2023), https://www.justice.gov/crt/section-2-voting-rights-act. Protected classes under Section 2 of the Voter Rights Act, and as defined in Section 4(f)(2) of the voter rights act are race, color, or membership in a language-minority group. *Id.* The VRA does not protect *specifically* against discrimination based on socioeconomic statutes or need for public assistance and housing. *Id.*

procedures through the twentieth century up until the Voting Rights Act of 1965.[62]

2. The Voting Rights Act

Congress passed the Voting Rights Act ("VRA") in 1965, "abolishing all remaining deterrents to exercising the right to vote."[63] The Act supports the Fifteenth Amendment's mission by, "prevent[ing] states from enforcing discriminatory tactics designed to keep [minorities] from voting."[64] Section 2 specifically addresses denial of the right to vote because of impermissible voter qualification standards, "No voting qualifications or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of *any citizen* of the United States to vote . . . ."[65] This section addresses "the denial or abridgment of the right to vote in any part of the country."[66]

Section 202, added with the 1970 Amendment of the VRA, directly addresses *durational* residency requirements.[67] Durational residency requirements[68] are impermissible under Section 202 if they require a citizen of the state to be a resident of that state for more than 30 days prior to a presidential and vice-presidential election."[69]

Thus, while the VRA does explicitly discuss *durational* residency requirements as an infringement on the right to vote, "residence" is not defined by the VRA. Instead, states have been left to define "residence," leading to inconsistent requirements and standards, many systematically disenfranchised homeless individuals who cannot meet the requirements.[70]

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[62] *See infra* Section III(C)(A) for a discussion of post-Voting Rights Act franchise.
[63] GEN. REP. OF THE U.S. GOV'T NAT'L ARCHIVES REP. 11, *supra* note 48.
[64] Miller, *supra* note 8 at 348. The Act has since been amended by Congress in 1970, 1975, 1982, 1992, and 2006. Garrett, *supra* note 46; *see also* Brnovich v. Democratic National Committee, 594 U.S. 647 (2021). The only part of the Voting Rights Act that has been struck down, which was struck down by the Supreme Court in 2013, was the "provision of [the] act involving federal oversight." GEN. REP. OF THE U.S. GOV'T NAT'L ARCHIVES REP. 11, *supra* note 48.
[65] *Brnovich*, 594 U.S. at 656–57 (citing 79 Stat. 437) (emphasis added). The Voting Rights Act of 1965 is codified at 52 U.S.C. § 10502; *see also* 52 U.S.C. §§ 10502(a)(1), 10502(a)(4) and 10502(a)(6).
[66] *Brnovich*, 594 U.S. at 656.
[67] 52 U.S.C. § 10502(a).
[68] Durational residency requirements are distinct from the residency requirements at issue in this paper. Durational residency requirements are permissible time limits placed on the amount of time a voter must live in the state they are trying to vote in. Dunn v. Blumstein, 405 U.S. 330, 344 (1972). The residency requirement at issue in this paper is the requirement of listing an address to a residence on a voter application form.
[69] *Dunn*, 405 U.S. at 344. In amending this Section, Congress "made a specific finding that durational residency requirements and more restrictive registration practices do 'not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections. *Id.* (citing 42 U.S.C. § 1973aa-1(a)(6)). The Supreme Court later held that this provision of the Voting Rights Act was constitutional.
[69] Dunn, 405 U.S. at 334.(citing Oregon v. Mitchell, 400 U.S. 112, 144 (1970)). Additionally, it is key to note that this was not the ban of all durational residency requirements, but rather subsection (c) of Section 202 is only violated "if the durational residency requirement bars a citizen from voting for president." N.C. All. for Retired Ams. v. Hirsch, 741 F. Supp. 3d 318, 341 (E.D.N.C 2024) (citing 52 U.S.C. § 10502(c)).
[70] Hirsch, 741 F. Supp. at 341. For example, North Carolina, "voter registration application requires an applicant to attest that he or she 'will have lived at the residence identified on this form for 30 days before the date of the election which [he or she] intends[s] to vote." *Id. at 343.*; *see* Pitts v. Black, 608 F. Supp. 696 (S.D.N.Y. 1984).

C. Franchise After the Voting Rights Act

While "[t]he right to vote is not explicitly granted in the U.S. Constitution," the right to vote "is an implied right found in the terms of Article IV, 4, which guarantees to every state 'a Republic Form of Government' and in Article I, 2."[71] The right to vote is a fundamental right.[72] This right to vote is personal.[73] Thus," [u]ndeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections."[74]

Implicit within the penumbra of the right to vote is "the right of qualified voters within a state to cast their ballots and have them counted."[75] As the United States Supreme Court articulated in *Reynolds v. Sims*, 377 U.S. 533 (1964):

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.[76]

While *Reynolds* discussed apportionment, the Court's language can be aptly applied to the discussion of protections for the homeless right to vote. Specifically, the Court emphasized that where an individual resides should not inhibit their fundamental right to vote, "[T]here is no indication in the Constitution that *homesite* or occupation affords a permissible basis for distinguishing between qualified voters within [a] State."[77]

III. THE VOTER REGISTRATION RESIDENCY PROBLEM

As discussed above, an examination of the development of voter qualifications over the nation's two-hundred-fifty year history shows two seemingly mutually exclusive, yet concurrent, truths emerge: (1) every citizen in the United States has a constitutionally protected fundamental right to vote, while (2) "[p]ersons who are homeless experience unique challenges to the voting process," [78] such as significant procedural and administrative hurdles in registering to vote. These hurdles "are often most apparent during voter registration, when an address is primarily used as an

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[71] Miller, *supra* note 8 at 347. This provision states "which states that 'the House of Representatives shall be composed of Members chosen every second Year by the People of the several States.'" U.S. CONST. art. I § 2.
[72] Reynolds v. Sims, 377 U.S. 533, 554 ("A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have the constitutionally protected right to vote. . . and to have their votes counted.").
[73] United States v. Bathgate, 246 U.S. 220, 227 (1918).
[74] *Reynolds*, 377 U.S. at 554; *see also Gray*, 372 U.S at 380.
[75] United States v. Classic, 313 U.S. 299, 315 (1941).
[76] 377 U.S. at 561–62.
[77] *Id.* at 558 (citing *Gray*, 372 U.S. at 380) (emphasis added).
[78] Miller, *supra* note 8 at 344.

identifying element."[79] The effect of these address and residency requirements "have left homeless people marginalized"[80] and systematically disenfranchised. Yet, only a few cases in recent history have addressed this issue.

A. The Residency Requirement: Standard of Review

The Supreme Court has "articulated a 'flexible standard,'" much like rational basis review, to apply to challenges of state election law.[81] Under this standard, the court:

> 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 interest put forward by the States 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.'[82]

However, the court applies a strict scrutiny when the regulation infringes on the fundamental right to vote. For example, in *Dunn v. Blumstein*, 405 U.S. 330 (1972), the petitioner challenged the constitutionality of a Tennessee Election law's imposition of a one-year residency requirement in order to vote in Tennessee.[83] The Court held, after concluding that strict scrutiny applies, that the durational residency requirement was not "necessary to further a compelling state interest," thus the durational residency requirement was unconstitutional.[84]

The Court found that strict scrutiny applied in this case, and in future durational residency requirement cases, stating "durational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are 'necessary to promote a compelling governmental interest.'"[85] Thus, "[i]t is not sufficient for the State to show that durational residence requirements further a very substantial state interest . . . . [T]he State cannot choose means that unnecessarily burden or restrict constitutionally protected activity" so that "[i]f it acts at all, it must choose 'less dramatic means.'"[86]

Recently, in *N.C. All. for Retired Ams. v. Hirsch*, 741 F. Supp. 3d 318 (E.D.N.C 2024), the Eastern District of North Carolina upheld a 30-day durational residency requirement as constitutional under the Fifth and Fourteenth Amendments and Section 202 of the Voting Rights Act.[87] In

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[79] *Id.*
[80] *Id.*
[81] Ne. Ohio Coal. for the Homeless v. Husted, 837 F.3d 612, 630 (6th Cir. 2016).
[82] *Id.* (citing Burdick v. Takushi, 504 U.S. 428, 434 (1992)).
[83] *Dunn*, 405 U.S. at 331.
[84] *Id.* at 360.
[85] *Id.* at 342 (citing Shapiro v. Thompson, 394 U.S. 618, 634 (1969)); (citing Kramer v. Union Free Sch. Dist., 395 U.S. 621, 627 (1969)).
[86] *Dunn,* 405, U.S. at 343 (citing Shelton v. Tucker, 364 U.S. 479, 488 (1960)).
[87] *Hirsch*, 741 F. Supp at 335.

Hirsch, the District Court outlined the Fourth Circuit's test for evaluating a state election law. The Fourth Circuit created what is known as the *Anderson-Burdick* framework,[88] through the analysis of two Supreme Court precedents. Under the *Anderson-Burdick* framework, when a court is reviewing a challenged election law, courts should balance the burden placed on the plaintiff with the state's justifications for that burden."[89] A reviewing court needs only to balance these factors and should not subject these rules and regulations to strict scrutiny.[90]

However, under the *Anderson-Burdick* framework, strict scrutiny does apply once the regulation reaches a critical tipping point.[91] The distinction is "whether the statute at issue imposes a substantial burden on the associational rights or voting rights at stake."[92] If the court determines a "substantial burden" exists, the challenge has reached the strict scrutiny tipping point, and thus "the restrictions on the right to vote must serve a compelling state interest and be narrowly tailored to serve that state interest."[93]

Thus, it appears consistent among courts that there is a critical point at which an analysis of voting regulations changes from rational basis review to strict scrutiny review. While the Supreme Court has not reviewed any challenge to a state's definition of "residence" in the voter registration context, both the articulated standards act as a guide to interpret which standard of the review Court may apply.

B. Challenging the Residency Requirement

1. Federal Legislation Protecting the Homeless Right to Vote

Homelessness has been a long-standing significant socio-political issue in the United States, but only entered the cultural zeitgeist in the 1970s "when homelessness emerged as a social crisis on a national scale,"

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[88] *Id.* While the plaintiffs in this case challenged the *Anderson-Burdick* framework's denial of the applicability of strict scrutiny by using the Supreme Court's holding in Dunn, the District Court points out that *Dunn* predated both *Anderson* and *Burdick*. *Id.* at 336–37. Thus, "after *Anderson-Burdick*, *Dunn* demonstrates that a three-month or year-long durational residency requirement is a 'severe' burden warrant strict scrutiny, but a 30-day durational residency requirement is a 'modest' burden warranting 'less-exacting review.'" *Id.* at 337 (citing *Libertarian Party of Va.*, 826 F.3d at 716-17).

[89] *Hirsch*, 741 F. Supp at 335 (citing Anderson v. Celebreze, 460 U.S. 780). In Anderson v. Celebreze, 460 U.S. 780, 789 (1983), the Supreme Court stated, "Constitutional challenges to specific provisions of a State's election laws" courts "must resolve such a challenge by an analytical process that parallels ordinary litigation" where the court "must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" and then must "identity and evaluate the precise interests put forward by the State as justifications for the burden imposed by the rule." It is only with balancing these two factors that "the reviewing court is in a position to decide whether the challenged provision is unconstitutional." *Anderson*, 460 U.S at 789.

[90] *Hirsch*, 741 F. Supp at 335. In Burdick v. Takushi, 504 U.S. 428, 433 (1992), the Supreme Court analyzed the *Anderson* framework and rejected the argument that strict scrutiny must be applied to state election laws burdening the right to vote, explaining that, "Common sense, as well as constitutional law, compels the conclusion that the government must play an active role in structuring elections; as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Burdick*, 504 U.S at 433.

[91] *Hirsch*, 741 F. Supp. at 338.

[92] *Id.* (citing Greidinger v. Davis, 988 F.2d 1344, 1352 (4th Cir. 1993)).

[93] *Id.* (citing Greidinger v. Davis, 988 F.2d 1344, 1352 (4th Cir. 1993)).

leading to "state and local governments. . . le[a]d[ing] the way in grassroots responses to one of the most complex and seemingly intractable urban problems."[94]

Throughout the 1980s, "most programs to address the problems associated with homelessness were created, funded, and administered at the grassroots level." The Reagan Administration viewed the issue best solved by state and local governments who were "better equipped than the federal government to handle their own homeless problem."[95] A federal task force on homelessness was created in 1983 to "provide information to local governments and interested parties on how to obtain surplus federal property."[96]

In 1987, Congress passed what is now known as the McKinney-Vento Homeless Assistance Act, which "provide[d] the best first step to address the needs of a population that is, by and large, unknown and underrepresented." Congress acknowledged in the passing of this act that the lack of a residence, which Congress deemed as "a national crisis" was also a "major barrier for people when it comes to voting,"[97] but did not provide any explicit protections for the homeless right to vote in the Act.[98]

In 1997, Representative John Lewis introduced to the House the Voting Rights of Homeless Citizens Act of 1997.[99] While this bill did not pass the House of Representatives,[100] it acts as a strong example of what protections the federal government can impose to protect the homeless right to vote. Section 2 of the act articulated specific language to protect the homeless right to vote, for example, "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because that citizen resides at or in a nontraditional abode."[101]

Today, "[w]ithout a binding piece of federal legislation, the states are free to determine residential criteria for eligible voters."[102] With this lack of federal guidance, from state to state "laws vary on rules that affect whether or not a homeless person may vote."[103] Many states specifically use residency requirements to "disenfranchise homeless voters, arguing that granting the right to vote to individuals who do not have a permanent residence increases the risk of voter fraud and is administratively unfeasible."[104]

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[94] Miller, *supra* note 8 at 345.
[95] *Id.*
[96] *Id.*
[97] *Id.* at 346.
[98] *Id.*
[99] H.R. 74, 105th Cong. (1997) (as reported by S. Comm. on the Constitution, Jan. 28, 1997).
[100] *Id.* The Act did not pass the House of Representatives. Miller, *supra* note 8 at 349.
[101] H.R. 74, 105th Cong. (1997). The Act defined "nontraditional abode" as: "(1) A supervised publicly or privately operated shelter designated to provide temporary living accommodations (including welfare hotels, congregate shelters, and traditional housing for the mentally ill); and (2) a public or private place not designated for, or ordinarily used as, regular sleeping accommodations for human beings." *Id.*
[102] Miller, *supra* note 8, at 349.
[103] *Id.*
[104] *Id.*

2. Administrative Remedies

There are two primary exemplary cases in the early 1980s that addressed the administrative issues of the residency requirement. In both cases, two local Board of Elections created new definitions of "residence" to increase suffrage for the homeless populations.

First, in 1984 the District of Columbia Board of Election and Ethics changed their definition of "residence," extending the meaning so that "'intent to reside in a place could constitute a place of residence for voting purposes.'"[105] This policy "allowed a homeless person to use the location where they slept as a residence, but required that the person identify the actual location and provide a mailing address for a place where they had sufficient ties."[106]

Second, also in 1984, the Philadelphia Board of Elections settled a class action lawsuit brought by four individuals who alleged that they were "denied the right to register after listing street corners . . . as places of residence."[107] In reviewing this claim, the District Court for the Eastern District of Pennsylvania held that "'any applicant who is homeless shall be deemed to have satisfied the residency requirements . . . by declaring on the Voter Registration Application the address of the shelter with which the applicant has an established relationship . . . and which accepts . . . mail for the applicant."[108]

The Philadelphia policy is similar to the District of Columbia's policy, however the Philadelphia policy "requires a person who is experiencing homelessness to use a shelter for both an actual residence and a mailing address when registering."[109] Both the District of Columbia and Philadelphia cases have hence been seen as two shining examples of distinct systems the government can use to address the issue of the residency requirement for homeless individuals in the voter registration process.[110]

3. Equal Protection Clause Remedies

In *Pitts v. Black*, 608 F. Supp. 696 (S.D.N.Y. 1984), the Southern District of New York faced a challenge from a class of homeless individuals, arguing that the City's denial of their voter registration application, because they lacked a permanent residence, was a violation of the their rights under the Equal Protection Clause of the Fourteenth Amendment.[111] Specifically, the plaintiffs argued "but for the fact that they do not live in traditional residences," the plaintiffs "meet the statutory

[105] *Id.* at 350 (citing In re Application for Voter Registration of Willie R. Jenkins (D.C. Bd. Of Elections and Ethics (June 7, 1984) [hereinafter *Jenkins*]).
[106] Miller, *supra* note 8, at 350 (citing *Jenkins*).
[107] Miller, *supra* note 8, at 350 (citing Comm. for Dignity and Fairness for the Homeless v. Tartaglione, 1984 U.S. Dist. LEXIS 23612 (E.D. Pa. Sept. 14, 1984)).
[108] Miller, *supra* note 8, at 350 (citing *Tartaglione*, 1984 U.S. Dist. LEXIS at 23612).
[109] Miller, *supra* note 8, at 350 (citing *Tartaglione*, 1984 U.S. Dist. LEXIS at 23612).
[110] *See, e.g.,* Pitts v. Black, 608 F. Supp. 696 (S.D.N.Y. 1984).
[111] *Id.* at 697.

requirements for eligibility to register to vote in all other respects,"[112] and thus sought a permanent injunction and declaratory judgment "prohibiting the present practice of the New York City Board of Elections . . . from applying the New York State Election Law in such a manner as to completely disenfranchise the plaintiff class."[113]

To assess the constitutionality of the statute, the District Court had to analyze New York City's definition of "residence" under New York Election Law Section 1-104(22).[114] The term "residence" was defined as "'that place where a person maintains a fixed, permanent and principal home and to which he, whether temporarily located, always intends to return.'"[115]

The plaintiffs viewed "residence" as "the act of being in one geographical locale, where one performs the usual functions of sleeping, eating, and living in accordance with one's lifestyle, and a place to which one, 'wherever temporality located' always intends to return."[116]

Defendants argued that the term "residence" "necessarily implies the occupancy of a fixed premises" meaning that it was the defendants' contention that the homeless who did not reside in a shelter or welfare hotel could not register to vote.[117]

The District Court held for the plaintiffs, ruling that the New York Election Law was in violation of the Fourteenth Amendment and 42 U.S.C. § 1983 and thus permanently enjoined defendants from "refusing to allow homeless individuals to register to vote on the ground that they fail to inhibit traditional residences."[118]

Likewise, the court concluded on what the term "residence" means, stating that "[h]omeless individuals identifying a specific location within a political community which they consider their "home base," to which they return regularly, manifest an intent to remain for the present, and a place from which they can receive messages and be contacted, satisfy the more stringent domicile standard and should not be disenfranchised solely because they lack a non-traditional residence."[119]

In reaching this conclusion, the Court stated that strict scrutiny applied.[120] In applying strict scrutiny, the District Court looked to expert testimony discussing both the District of Columbia and Philadelphia systems as examples of "more narrowly tailored means to bring about the legitimate government interest of verifying elections."[121]

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[112] *Id.*
[113] *Id.*
[114] *Id.* at 698.
[115] *Pitts*, 608 F. Supp. at 698.
[116] *Id.*
[117] *Id.* Betty Dolan, Executive Director of the New York City Board of Elections, testified to this fact. *Id.*
[118] *Id.* at 710.
[119] *Id.*
[120] *Pitts*, 608 F. Supp. at 699.
[121] *Id.* at 709. During trial, the plaintiffs called an expert witness on voting practices who discussed successful plans to protect suffrage of the homeless population in Washington D.C. and Philadelphia. *Pitts*, 608 F. Supp. at 701. In Washington D.C., the plan "permits the homeless person to use as his voting

Since the decision in *Pitts*, the case has been largely cited across the country to support broadening residency requirements to protect the homeless right to vote. For example, in *Collier v. Menzel,* 176 Cal. App. 3d 24 (1985), the California Court of Appeals heard a challenge brought by a class of homeless individuals, arguing that rejection of their voter registration, because plaintiffs listed an improper residence of a public park, was a violation of their fundamental right to vote under the Equal Protection Clause. [122] While the plaintiffs listed a public park as their residence, they did also list a post office box number.[123]

The Court of Appeals agreed, holding that the plaintiffs were "unjustifiably deprived of their right to vote on an equal basis with other citizens,"[124] stating:

> Whether people sleep under a bush or a tree or in the open air is immaterial regarding their right to vote. The type of place a person calls home has no relevance to his/her eligibility to vote if compliance with registration has been achieved, that is, the designation of a fixed habitation, the declaration of an intent to remain at that place and to return to it after temporary absences, and the designation of an address where mail can be received.[125]

Thus, both *Pitts* and *Collier* show successful uses of the Equal Protection Clause to protect franchise of homeless individuals. When analyzing *Pitts* and *Collier* together, it is clear that district courts and state courts can use the Philadelphia and District of Columbia policies as examples of less restrictive means policymakers may utilize to increase franchise of the homeless population. *Collier* and *Pitts* also exemplify the application of these standards in two distinct scenarios showing the diverse applicability of the Philadelphia and District of Columbia policies.

In *Collier*, the court adopts the Philadelphia model of thinking. Because California required a mailing address, the plaintiffs were able to meet the residency requirements, showing a mere failure in review of the system. *Collier* shows these policies can be used to protect *individuals* subject to incidental failures of a functioning system.

However, in *Pitts*, the court uses both Philadelphia and District of Columbia policies as proof of alternative residency requirement systems to

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address the place where he sleeps, whether it is a park bench or any other non-traditional accommodation." *Id.* In Philadelphia, the plan "requires that a homeless person designate a particular shelter, regardless of where he sleeps, as a voting address." *Id.* Election districts align with place of residence, meaning in Washington D.C., "the location of the park bench would designate the election district," whereas in Philadelphia, "the location of the shelter would designate the election district." *Id.* The expert then testified that Philadelphia-style system could be adopted in New York "by having the homeless person designate a shelter (in which he would not be required to live) for receipt of mail and voting," which would provide a "verifiable nexus for the homeless person to a given locale." *Id.*

[122] Collier v. Menzel, 176 Cal. App. 3d 24, 29-30 (1985). For example, one member of the class listed a city park as his residence, which was denied as an improper residence. *Id.*

[123] *Id.* at 32.

[124] *Id.* at 30.

[125] *Id.* at 35 (citing Cal. Elec. Code, § 200(b)) (internal citations omitted).

hold the city's restrictive system, because of its definition of residence, unconstitutional. Thus, *Pitts* shows these policies can also be used to gain injunctive relief to *change* an unconstitutional voter registration system.

While *Pitts*, *Collier*, the District of Columbia ruling, and the Philadelphia ruling are all positive examples of using legislation to change election law to be more inclusive of homeless individuals, it is key to note that all four of these actions took place between 1984–1985. In the four decades following this critical line of decisions, there has been little to no case law specifically discussing overly restrictive or unconstitutional voter residency requirements as applied to the homeless population. Thus, for continuing analysis of the effects of residency requirements on homeless franchise, it is key to look at recent policies and case law that may have a secondary effect of continuing to systematically disenfranchise homeless individuals.

C. The Continuing Challenge of the Residency Requirement: The Trump Era

While the residency requirement remains a systematic issue for homeless individuals, new federal legislation, executive orders, and a conservative Supreme Court have created even more challenges for the homeless who seek to exercise their fundamental right to vote, as anti-camping laws work to criminalize homelessness and standards of proof of residency may soon get extremely strict.

1. City of Grants Pass v. Johnson

Recently, in *City of Grants Pass v. Johnson*, 603 U.S. 520 (2024), the Supreme Court determined whether the Cruel and Unusual Punishment Clause of the Eighth Amendment prohibited the enforcement of public-camping laws.[126] The Supreme Court held that public-camping laws were constitutional, overturning the Ninth Circuit's holding in *Johnson v. City of Grants Pass*, 50 F.4th 787 (9th Cir. 2022), which held that under *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2018),[127] that "the City of Grants Pass

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[126] *Grants Pass*, 603 U.S. at 557. *Id.* at 537 (Specifically, the challenged public-camping law was the Grants Pass Municipal Code § 5.61.010, which prohibited: "sleeping 'on public sidewalks, streets, or alleyways;'" "[c]amping on public property;" and "'[c]amping' and '[o]vernight parking' in the city's parks.")(alterations in original). *Id.* (Under Ore. Rev. Stat §§164.245, 161.615(3), 161.635(1)(c) (2023), an initiation violation of the statute results in a fine whereas multiple violations can lead to "barring from city parks for 30 days" and violations of the orders "can constitute criminal trespass, punishable by a maximum of 30 days in prison and a $1,250 fine").

[127] Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2018). In *Martin*, the Ninth Circuit ruled that a public-camping ordinance that "made it a misdemeanor to use 'streets, sidewalks, parks, or public places' for 'camping'" was a violation of the Eighth Amendment's Cruel and Unusual Punishments Clause and prohibited the City of Boise, Idaho from "enforcing its public-camping ordinance against homeless individuals who lacked 'access to alternative shelter.'" *Grants Pass*, 603 U.S. at 533–34. *Id.* (citing *Martin*, 920 F.3d at 599–602) (The Ninth Circuit later denied a rehearing of Martin en banc, with many judges writing in dissent. *Id.* Specifically, Judge Bennett "argued Martin was inconsistent with the Cruel and Unusual Punishment Clause" because this Clause "prohibits certain methods of punishment a government may impose after conviction, but it does not 'impose [any] substantive limits on what con-

cannot, consistent with the Eighth Amendment, enforce anti-camping ordinances against homeless persons for the mere act of sleeping outside with rudimentary protection from the elements, or for sleeping in their car at night, when there is no other place in the City for them to go."[128]

The Court addressed the problem of homelessness and emphasized that the important interest states have in managing the effects of homelessness on the population. Specifically, the discussed the dangers encampments can bring, "With encampments dotting neighborhood sidewalks, adults and children . . . are sometimes forced to navigate around used needles, human waste, and other hazards to make their way to school, the grocery store, or work."[129] Additionally, " Those with physical disabilities report th[ese dangers] can pose a special challenge for them, as they may lack the mobility to maneuver safely around the encampments."[130] To address these issues that "provide for public health and safety,"[131] the Court emphasized that "local governments need a wide latitude, including to regulate when, where, and how homeless people sleep in public."[132]

The majority framed anti-camping laws as a useful tool many cities employ across the nation, "[b]y one count, 'a majority of cities have laws restricting camping in public spaces,' and nearly forty percent 'have one or more laws prohibiting camping citywide.'"[133] The majority stated, "[T]hese public-camping regulations are not usually deployed as a front-line response 'to criminalize homelessness,'" but instead "they are used to provide city employees with the legal authority to address 'encampments that pose significant health and safety risks' and to encourage their inhabitants to accept other alternatives like shelters, drug treatment programs, and mental-health facilities."[134]

The majority reasoned that the Eighth Amendment was the improper provision to bring these challenges under as "[t]he Cruel and Unusual

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duct a state may criminalize.'") (alterations in original). *Grants Pass*, 603 U.S. at 533–34 (citing *Martin*, 920 F.3d at 599–602) (Additionally, Judge Smith argued "Martin had 'shackle[d] the hands of public officials trying to redress the serious societal concern of homelessness" which he predicted "would 'wrea[k] havoc on local governments, residents, and business.'") (alterations in original).

[128] Johnson v. City of Grants Pass, 50 F.4th 787, 813 (9th Cir. 2022). Before going to the Supreme Court, the Ninth Circuit remanded to the district court to "narrow its injunction to the anti-camping ordinances and enjoin enforcement of those ordinances *only* against involuntarily homeless person[s] for engaging in conduct necessary to protect themselves from the elements when there is no shelter space available." *Id.* The Ninth Circuit found that "everyone without a shelter in Grants Pass was 'involuntarily homeless' because the city's total homeless population outnumbered its 'practically available' shelter beds." *Grants Pass,* 603 U.S. at 539.

[129] *Grants Pass*, 603 U.S. at 530 (internal citations omitted).

[130] *Id.* (internal citations omitted).

[131] *Id.* at 564.

[132] *Id.* at 532 (The majority notes additional policies states have taken to address "challenges associated with homelessness" including: "reinvest[ing] mental health and substance-abuse treatment programs;" "train[ing] employees in outreach tactics designed to improve relations between governments and the homeless they serve'" and, as challenged here, "pair[ing] these efforts with the enforcement of laws that restrict camping in public places, like parks, streets, and sidewalks").

[133] *Id.* at 532.

[134] *Grants Pass*, 603 U.S.at 532–33. *Id.* at 533 (citing 6 CFR §§7.96(i), (j)(1) (2023))(The majority points out that the federal government is "not alone in pursuing this approach," as "[t]he federal government also restricts 'the storage of . . . sleeping bags,' as well as 'sleeping activities' on park lands"). *Id.* ("And, it too, has exercised that authority to clear certain 'dangerous' encampments").

Punishment Clause focuses on the question what 'methods or kind of punishment' a government may impose after a criminal conviction, not the question whether a government may criminalize particular behavior in the first place or how it may go about securing a conviction of that offense."[135] Here, reasoned the Court, "[n]one of the city's sanctions qualifie[d] as cruel because none [were] designed to 'superad[d]' 'terror, pain, or disgrace.'"[136] Additionally, the majority reasoned, the city's anti-camping laws are not "unusual, because similar punishments have been and remain among 'the usual mode[s]' for punishing offenses throughout the country."[137]

Additionally, the majority refused to apply *Robinson v. California*, 370 U.S. 660 (1962), where the Supreme Court "addressed a challenge to a criminal conviction under a California statute providing that '[n]o personal shall . . . be addicted to the use of narcotics.'"[138] The *Robinson* Court reasoned the Cruel and Unusual Punishments Clause did apply, holding that California's law made "the 'status' of narcotic addiction a criminal offense" thus making "the mere status of being an addict a crime."[139] The majority found that *Robinson* did not apply because "[u]nder the city's laws, it makes no difference whether the charged defendant is homeless, a backpacker on vacation passing through town, or a student who abandons his dorm room to camp out in protest on the lawn of the municipal building."[140] Thus, the City of Grant Pass's ordinances "parallel those found in countless jurisdictions across the country"[141] and "do not criminalize mere status,"[142] meaning "*Robinson* is not implicated."[143]

After *Grants Pass*, homeless individuals must now worry about being arrested for being victims of their own circumstance and sleeping outside while also having a lack of access to the ability to establish themselves as residents of their districts and states in order to register to vote.

Justice Sotomayor, in dissent, called out the majority's reasoning and the negative impact this holding will have on the homeless population, stating, "Grants Pass's Ordinances criminalize being homeless."[144] Thus, Justice Sotomayor explains, while "[t]he majority protests that the Ordinances 'do not criminalize mere status'. . . . Saying so does not make it so."[145] Instead, "Every shred of evidence points the other way," as "[t]he

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[135] *Id.* at 542–43 (citing Powell v. Texas, 392 U.S. 514, 531–32 (1968) (plurality opinion)).
[136] *Grants Pass*, 603 U.S. at 543 (citing Bucklew v. Precynth, 587 U.S. 119, 130 (2019)).
[137] *Grants Pass*, 603 U.S. at 543 (citing Pervear v. Commonwealth, 72 U.S. 475 (1867)).
[138] *Grants Pass*, 603 U.S. at 544 (citing Robinson v. California, 370 U.S. 660, n. 1. (1962)).
[139] *Grants Pass*, 603 U.S. at 544 (citing *Robinson*, 370 U.S. at 666–667). *Grants Pass*, 603 U.S. at 564 (The plaintiffs and the dissent argued that, as in Robinson, the public-camping laws operate to criminalize the status of being homeless, arguing this is impermissible criminalization of a status under the Cruel and Unusual Punishment Clause of the Eighth Amendment, "Punishing people for their status is 'cruel and unusual' under the Eighth Amendment").
[140] *Id.* at 546–547
[141] *Id.*
[142] *Id.*
[143] *Id.* (internal citations omitted).
[144] *Id.* at 575. *Grants Pass*, 603 U.S. at 575 (Justice Sotomayor further explains how these ordinances criminalize being homeless, explaining, "The status of being homeless (lacking available shelter) is defined by the very behavior singled out for punishment (sleeping outside)").
[145] *Id.*

Ordinance's purpose, text, and enforcement confirm that they target status, not conduct."[146] Thus, for a homeless individual to comply with the anti-camping ordinances, "the only way to comply . . . is to leave Grants Pass altogether."[147]

2. The SAVE Act

Beyond *Grants Pass*, a second recent barrier to the ability of the homeless to register to vote is developing at the time of writing. On April 10, 2025, the United States House of Representatives passed the Safeguard American Voter Eligibility Act ("SAVE Act").[148]

The SAVE Act's stated purpose is "[t]o amend the National Voter Registration Act of 1993 to require proof of United States citizenship to register an individual to vote in elections for Federal office."[149] In Section 2, the SAVE Act details how the federal government plans to "ensure only citizens are registered to vote in elections for federal office," by specifically detailing what documentary proof of United States citizenship will now be required when registering to vote.[150] The Act directs the states specifically that "[u]nder any method of voter registration in a State, the State shall not accept and process an application to register to vote in an election for Federal office unless the applicant presents documentary proof of United States citizenship with the application."[151]

Section 2(e)(2) discusses that there is a notification requirement that would presumably require a mailing address for a voter registering to vote in a federal election, "[u]pon receiving an otherwise completed mail voter registration application form . . . the appropriate election official shall transmit a notice to the applicant of the requirement to present documentary proof of United States citizenship under this subsection, and shall include in the notice instructions to enable the applicant to meet the requirement."[152]

3. Future Implications of City of Grants Pass and the SAVE Act

While the implications of these two new federal restrictions are not yet clear, it is clear they will have a substantive impact on the franchise of homeless individuals.

First, the Supreme Court's holding in *Grants Pass* practically makes sleeping outside illegal. This holding allows state and local governments to make homeless individuals, who do not have access to shelters, criminals because of their unfortunate circumstances. If banning sleeping outside and anti-camping ordinances are now constitutionally permissible, the rate of

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[146] *Id.*
[147] *Id.* (internal citations omitted).
[148] *See* H.R. Res. 22, 119th Cong. (2025). While the House has passed the Act, the Act is currently sitting in the Senate waiting for approval. If the senate passes the SAVE Act, it will then go to the President to sign into law. *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*

arrests of homeless individuals for being victims of their circumstance will take away a vast amount of personal autonomy as they will have to constantly work to try and find *permissible* shelter when it is that shelter that they cannot gain access to.

And what effect on suffrage? If a homeless individual is required to list an address to register to vote, and they cannot access a shelter, and they are no longer legally to sleep outside in previously held permissible places, such as public parks,[153] the result is disenfranchisement. When the homeless individual is disqualified from being able to register to vote because of their lack of legally permissible residence, they cannot then exercise their fundamental right to vote, leading to systematic disenfranchisement of the entire homeless population who cannot find space in a shelter, particularly in a national system that has 218,118 too few beds.[154]

The effect of *Grants Pass* is likely to be drastic, increasing mass amounts of incarceration of an incredibly vulnerable population. It appears the Supreme Court is now valuing state interests over the criminalization of being homeless, which is sure to have drastically negative effects on franchise in the coming years.

Second, while the SAVE Act has passed the House of Representatives but has yet to pass the Senate,[155] if the SAVE Act is signed into law by President Trump, the impact will likely be drastic for homeless populations.

Additionally, given *Grants Pass*, "[w]hen a homeless person is arrested" they are "separated from their property,"[156] and items are "frequently destroyed,"[157] such as "personal documents needed for accessing jobs, housing, and services such as IDs, driver's licenses, financial documents, birth certificates, and benefits cards."[158] Therefore, *Gates Pass* allows for, and will increase the frequency of, the destruction of the documents that would be required for the homeless individual to prove citizenship under the SAVE Act's standards,[159] resulting in denial of voter registration. With the compounding effects of the Act's increased restrictions with the Supreme Court's new policy of constitutionalizing the criminalization of homelessness, the barriers to exercise the right to vote

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[153] *Pitts*, 608 F. Supp. at 706. The plaintiff in *Pitts* lived in a public park in New York City, which he considered his home. *Id.*

[154] TANYA DE SOUSA ALYSSA ANDRICHIK, ED PRESTERA, KATHERINE RUSH, COLETTE TANO, AND MICAIAH WHEELER & ABT ASSOCIATES U.S. DEP'T OF HOUS. AND DEV.: ANN. HOMELESSNESS ASSESSMENT REP. TO CONG. (2023). In 2023, there were 218,118 too few beds in shelters to accommodate the national homeless population. *Id.*

[155] H.R. Res. 22, 119th Cong. (2025); CONG. RSCH. SERV., ALL ACTIONS: H.R.22—119TH CONG. (last visited May 5, 2025), https://www.congress.gov/bill/119th-congress/house-bill/22/all-info.

[156] *Grants Pass*, 603 U.S. at 568.

[157] *Id.*

[158] *Id.*

[159] H.R. Res. 22 § 2(b)(3)(b), 119th Cong. (2025) ("Requiring applicants to present documentary proof of United States citizenship.—Under any method of voter registration in a State, the State shall not accept and process an application to register to vote in an election for Federal office unless the applicant presents documentary proof of United States citizenship with the application."); *see also id.* at § 2(b)(1)–(5) (detailing the specific documents that would certify United States citizenship for the purposes of the SAVE Act).

are increasing drastically. The likely result is the increased systematic disenfranchisement of the homeless population.

These two new prohibitive barriers only work to re-emphasize the pattern of systematic disenfranchisement of the homeless by changing the nature of the "qualified" voter, thus working systematically to prevent the "most vulnerable in our society"[160] from exercising their fundamental right to vote.

IV. CONCLUSION

It is critical to protect the homeless right to vote as the population has faced systematic and administrative barriers in exercising franchise for two-hundred-fifty years. While "[i]ndividually, homeless people are often overlooked, misunderstood, and marginalized,"[161] history has shown "[w]hen the right to participate in the democratic process is fully granted, homeless and formerly homeless people have proven to be invaluable in shaping public policies that promote real solutions to homelessness . . . . The process begins with the right to vote."[162]

The solution to protecting homeless franchise will take systematic support, with all sectors of society working together. As Justice Sotomayor wrote in dissent of *Grants Pass*:

> I remain hopeful that our society will come together to 'address the complexities of the homelessness challenges facing the most vulnerable among us . . . . That responsibility is shared by those vulnerable populations, the States and cities in which they reside, and each and every one of us. It is only after we begin to see a street as our street, a public park as our park, a school as our school, that we can become engaged citizens, dedicating our time and resources for worthwhile causes.[163]

Federal and state governments must not turn an eye to the issue of homeless disenfranchisement. The government must "enact laws that guarantee the right to vote regardless of one's housing situation."[164] These efforts must be combined with "grassroots support that emphasizes voter education and registration."[165] This public support is critical as "[v]oter

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[160] *Grants Pass*, 603 U.S. at 566.
[161] Miller, *supra* note 8 at 343.
[162] *Id.* at 358. *Id.* at 343–44 (For example, in the 1999 mayoral elections in Philadelphia, "the homeless community organized the city's first Mayoral Candidates Forum for Housing, Jobs, and Services." Because of these efforts, "over 800 homeless people, service providers, and advocates attended the forum," and was the "best-attended forum of that primary." Consequently, the newly elected mayor "appointed the first-ever Mayoral Transition Team on Homelessness in Philadelphia . . . . [W]hich included City officials, business leaders, homeless service providers, advocates, and formerly homeless individuals").
[163] *Grants Pass*, 603 U.S. at 343–44 (citing Matthew Desmond, Evicted: Poverty and Profit in the American City 294 (2016)).
[164] Miller, *supra* note 8, at 357.
[165] *Id.* at 351.

education, registration, and mobilization are necessary to help the homeless overcome . . . disenfranchisement."[166]

With the current socio-political culture under the Trump Administration of cracking down on "voter fraud," which is "exceedingly rare but constantly cited by [President] Trump as a reason he lost the 2020 election,"[167] expected regulations, such as the SAVE Act, work to combat the progress evidenced in this paper from the ratification of the Fourteenth Amendment in 1868 through the 1980s line of cases explicitly protecting the homeless right to vote through expansive interpretations of the residency requirement.

Additionally, with a conservative Supreme Court holding protections as unconstitutional, secondary effects are likely to significantly impact the homeless voter's ability to participate in upcoming elections, only amplifying the historic systematic disenfranchisement of the homeless population in the United States. While much is up in the air, one thing remains perfectly clear: the homeless have the fundamental right to vote which must be protected.

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[166] *Id.* at 351.

[167] Erica L. Green, *"Trump Signs Order Calling for Citizenship Proof to Vote in Federal Elections*," N.Y. TIMES (Mar. 25, 2025), https://www.nytimes.com/2025/03/25/us/politics/trump-elections-executive-order.html. The claims by President Trump that "illegal votes contributed to his losing the 2020 election and the popular vote in 2016" are false. *Id.*

Privacy and Propaganda

WES HENRICKSEN*

I. THE FEDERAL RIGHT TO PRIVACY PROVIDES CERTAIN PROTECTIONS AGAINST GOVERNMENT INTRUSION INTO PRIVATE LIFE, INCLUDING "DECISIONAL AUTONOMY"

The United States Constitution contains a litany of enumerated individual rights.[1] These include, for instance, the right to free speech, the right to be free from unreasonable searches, and the right to equal protection of the laws.[2] The right to privacy, however, is not among these enumerated rights.[3] Nowhere in the Constitution can the words "right to privacy," or any variation on that phrase, be found.[4] Nevertheless, today it is beyond question that there is, indeed, a federal constitutional right to privacy.[5] This is based on the principle that "[t]he Supreme Court has . . . created a sphere of protectable interests, emanating from those rights explicitly set forth in the Bill of Rights, that are 'implicit in the concept of ordered liberty,' or are 'so rooted in the traditions and conscience of our people as to be ranked fundamental.'"[6] These are rights that are not explicitly stated in the Constitution, but that are nevertheless interpreted by the Supreme Court as being grounded in the Constitution. One such right is the right to privacy,[7] which "appears early and often in Supreme Court jurisprudence."[8]

As noted by Professor Eugene McCarthy, the right to privacy "arises in relation to issues across the spectrum of constitutional law: search and seizure, choosing what and where to teach children, the ability to marry whom we choose, the right to die, and, of course, our reproductive rights relating to sex, contraception, and abortion."[9] Of course, the Supreme Court's "centuries-long articulation of the right to privacy…culminate[d] in

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[1] *See, e.g.*, U.S. CONST. amends. I, IV, XIV (enumerating the individual rights of Freedom of Speech, Free Exercise of Religion, Freedom Against Unreasonable Searches and Seizures, Due Process, and Equal Protection).

[2] *See id.*

[3] *See* U.S. CONST. amends. I–IX (no right to privacy in the Bill of Rights); Childers v. Dallas Police Dep't, 513 F. Supp. 134, 145 (N.D. Tex. 1981) ("The Constitution does not on its face enumerate a substantive right to privacy.").

[4] U.S. CONST. amends. I–IX; *Childers*, 513 F. Supp. at 145.

[5] Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

[6] *Childers*, 513 F. Supp. at 145–46 (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

[7] *See supra* note 5.

[8] Eugene McCarthy, *In Defense of* Griswold v. Connecticut*: Privacy*, *Originalism*, *and the Iceberg Theory of Omission*, 54 WILLAMETTE L. REV. 335, 338 (2018).

[9] *Id.* (internal footnotes omitted) (citing Boyd v. United States, 116 U.S. 616 (1886); Katz v. United States, 389 U.S. 347 (1967); Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y Sisters, 268 U.S. 510 (1925); Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990); Lawrence v. Texas, 539 U.S. 558 (2003); Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973)).

Griswold v. Connecticut, the case that officially—and controversially—established a constitutional right to privacy in 1965."[10]

Writing for a 7–2 majority in *Griswold v. Connecticut*, Justice William O. Douglas asserted that a general right to privacy is present in the "penumbras," or zones, created by the specific liberty interests enumerated in several amendments in the Bill of Rights, including the First, Third, Fourth, and Ninth Amendments.[11] Famously, Justice Douglas wrote:

> Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.[12]

Justice Douglas then emphasized that "[t]he Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'"[13] This set the stage for recognizing unenumerated rights, including the right to privacy. The Court later added that, "[t]o some extent, the Fifth Amendment too 'reflects the Constitution's concern for . . .' . . . the right of each individual 'to a private enclave where he may lead a private life.'"[14]

The federal right to privacy covers and protects two distinct spheres of privacy interests: (1) "informational privacy" and (2) "decisional autonomy."[15] Informational privacy includes the "individual interest in avoiding disclosure of personal matters."[16] Decisional autonomy, in contrast, is "the interest in independence in making certain kinds of important decisions."[17] This decisional autonomy protection has been extended to "basic decisions" "about family, parenthood, and bodily integrity."[18] The U.S. Supreme Court has held that this decisional autonomy right protects the right of married and unmarried couples to access and use

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[10] McCarthy, *supra* note 8, at 338.
[11] *Griswold*, 381 U.S. at 483–84.
[12] *Id.* at 484.
[13] *Id.*
[14] Whalen v. Roe, 429 U.S. 589, 608 (1977).
[15] Doe v. Att'y Gen. of the United States, 941 F.2d 780, 795 (9th Cir. 1991) (citing Whalen v. Roe, 429 U.S. 589, 599–600 (1977)) (informational privacy); Carey v. Population Serv. Int'l, 431 U.S. 678, 684 (1977) (decisional autonomy).
[16] *Doe*, 941 F.2d at 795.
[17] *Carey*, 431 U.S. at 678, 684 (1977).
[18] *State Constitutional Right to Privacy*, Cal. Prac. Guide Privacy Law Ch. 2-A (Westlaw) (citing People of the State of Cal. v. FCC, 75 F.3d 1350, 1361 (9th Cir. 1996)).

contraceptives[19]; the right to engage in same-sex relationships and to enter into same-sex marriage[20]; and the right to be free from compelled intrusion into the body for blood, breathalyzer, and urine tests.[21] The decisional autonomy protection covered the right to choose to have an abortion from 1973 to 2022.[22]

More recently, in the *Dobbs v. Jackson Women's Health*[23] decision, the Court overruled *Roe*[24] and *Casey*,[25] thereby holding that a woman's right to choose whether to have an abortion is not protected by the right to privacy.[26] Or rather, within the decisional autonomy realm of the right to privacy, laws infringing on the right to choose to have an abortion are no longer subject to strict scrutiny, but rather are now subject to rational basis review.[27] What is unclear is whether rational basis review applies to other laws affecting "decisional autonomy" rights.[28] In the *Dobbs* decision, the majority noted that the *Roe* decision was, in the Court's words, "remarkably loose in its treatment of the constitutional text."[29] "It held," the Court added, "that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned."[30] As noted by others, "the *Dobbs* decision is somewhat inaccurate in its description of the legal issue at play in the case."[31] The *Dobbs* majority's cavalier attitude toward the right to privacy, which it emphasized "was also not mentioned" in the Constitution's

[19] Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (married couples); Eisenstadt v. Baird, 405 U.S. 438, 454 (1972) (unmarried couples).
[20] Lawrence v. Texas, 539 U.S. 558, 578 (2003); Obergefell v. Hodges, 576 U.S. 644, 675 (2015).
[21] Skinner v. Ry. Lab. Exec. Ass'n, 489 U.S. 602, 616–17 (1989).
[22] *See* Roe v. Wade, 410 U.S. 113 (1973).
[23] Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).
[24] Roe v. Wade, 410 U.S. 113 (1973).
[25] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).
[26] *Dobbs*, at U.S. 231 (2022).
[27] In overruling *Roe*, the Court held there is no federal constitutional right to abortion. *Dobbs,* at U.S. 302 (2022). What *Dobbs* may mean for other "decisional autonomy" rights is unclear. The majority limited its decision to "the constitutional right to abortion and no other right," and emphasized that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion." *Id.* at 290. As noted by the dissent, the majority's rationale could apply to other rights. *Id*. at 2319 (Breyer, J., dissenting) ("The lone rationale for what the majority does today is that the right to elect an abortion is not 'deeply rooted in history' … The same could be said, though, of most of the rights the majority claims it is not tampering with"). As if to underscore the point, Justice Thomas, in his concurring opinion, stated the Court has a "duty" to reconsider and overrule its "substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*" and a "duty to 'correct the error' established in those precedents." *Id*. at 2301–02 (Thomas, J., concurring). *Dobbs* makes clear that laws "regulating abortion, like other health and welfare laws," are subject to rational basis review. *Id*. at 301; *see also* Raidoo v. Moylan, 75 F.4th 1115, 1121 (9th Cir. 2023) (applying *Dobbs* and holding Guam's abortion law requiring in person informed consent subject to rational basis review).
[28] *Dobbs*, 597 U.S. at 393 (Breyer, J., and Sotomayor & Kagan, JJ. dissenting); *see also* L.W. v. Skrmetti, 73 F.4th 408, 417 (6th Cir. 2023) (applying *Dobbs* and categorizing Tennessee law prohibiting gender-affirming surgeries and certain medical treatments for transgender minors as "health and welfare" legislation).
[29] *Dobbs*, 597 U.S. at 235.
[30] *Id.*
[31] Layne Huff, *The Ninth Amendment: An Underutilized Protection for Reproductive Choice*, 37 J.L. & HEALTH 105, 120 (2024).

text, "tends to imply that the right to privacy is of dubious origin rather than established by over a hundred years of Supreme Court jurisprudence."[32]

What the *Dobbs* decision means for other "decisional autonomy" rights is not clear. The Court's majority opinion limited its holding to "the constitutional right to abortion and no other right," and it emphasized that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion."[33] However, the dissent noted that the majority's rationale could apply to other rights.[34] Moreover, in his concurring opinion, Justice Thomas asserted that the Court has a "duty" to reconsider and overrule its "substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*," as well as a "duty to 'correct the error' established in those precedents."[35]

Not surprisingly, *Dobbs* "has widely been taken to spell doom for the constitutional 'right to privacy.'"[36] However, as noted by Professors Carmel Shachar and Carleen Zubrzycki, "there is another important—and underexplored—strand to the Supreme Court's right-to-privacy jurisprudence, which *Dobbs* expressly left untouched: the right to informational, rather than decisional, privacy."[37] The Dobbs majority opinion distinguished between "two very different meanings of the term [privacy]: the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference."[38] "The latter, the Court suggested, is at risk after *Dobbs* (and was eliminated in the abortion context), but the former remains viable."[39] Thus, although the Court could eliminated the right to privacy wholesale, it declined to do so. Instead, the majority distinguished two distinct species of privacy, and clarified that the abortion issue only implicates one.[40] As a result, as noted by Professors Shachar and Zubrzycki, it appears that at least informational privacy is still protected under the *Dobbs* ruling.[41] Of course, "[p]ost-*Dobbs*, the constitutional right to privacy in the United States is heavily reliant on the disposition of the Court."[42] But the ultimate ramifications for dimensions of the federal right to privacy, particularly

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[32] *Id.* Notably, Professor Mary Anne Franks asserted that *Roe* was, from inception, "a fundamentally flawed decision" because it "made the mistake of framing the right against forced birth as a right of privacy instead of a right to bodily integrity;" Mary Anne Franks, *The Supreme Court as Death Panel: The Necropolitics of Bruen and Dobbs*, 98 N.Y.U. L. REV. 1881, 1897 (2023).
[33] *Dobbs*, 597 U.S. at 290.
[34] *Id*. at 362–63 (Breyer, J., dissenting) ("The lone rationale for what the majority does today is that the right to elect an abortion is not 'deeply rooted in history' … The same could be said, though, of most of the rights the majority claims it is not tampering with.").
[35] *Id.* at 332 (Thomas, J., concurring).
[36] Carmel Shachar & Carleen Zubrzycki, *Informational Privacy After Dobbs*, 75 ALA. L. REV. 1, 2 (2023).
[37] *Id.*
[38] *Dobbs*, 597 U.S. at 273.
[39] Shachar & Zubrzycki, *supra* note 36, at 2 (citing *Dobbs*, 597 U.S. at 273).
[40] *Id.*
[41] *Id.*
[42] Note, *Human Rights Devolution: Integrating International Law into State Abortion Governance*, 137 HARV. L. REV. 2342, 2359 (2024).

those other than "informational privacy," are difficult to nail down without further guidance from the Court, and are therefore being hotly debated.[43]

II. FLORIDA'S RIGHT TO PRIVACY PROVIDES STRONGER PROTECTIONS THAN ITS FEDERAL COUNTERPART

A. States, including Florida, have an express constitutional right to privacy

Although the federal Constitution does not provide for an explicit "right to privacy,"[44] and indeed does not even refer to "privacy" anywhere in the whole of the document,[45] eleven states have explicitly included a right to privacy in their respective state constitutions.[46] Many of these states have explicitly provided for a right to privacy stronger and more broadly-applicable than is available under the federal constitution.[47] Under applicable federalism principles, states are empowered to do this. As one court clarified, "[s]tates may place more rigorous restraints on governmental intrusions than those imposed by Federal Constitution, and in any given state, Federal Constitution represents floor for basic freedoms, and State Constitution the ceiling."[48]

States that have passed their own constitutional right to privacy provisions include Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, Washington, and New Hampshire.[49] For example, Art. I, Section 1 of California's state constitution provides, "All people are by nature free and independent and have inalienable rights. Among these are . . . pursuing and obtaining . . . privacy."[50] Likewise, Montana's constitution, in Article II, Section 10, provides, "The right of

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[43] *See, e.g.*, Jacob Wenner, *Without Due Process of Law: The Dobbs Decision and Its Cataclysmic Impact on the Substantive Due Process and Privacy Rights of Ohio Women*, 37 J.L. & HEALTH 187 (2024); Mikayla Domingo, *One Nation, Under Dobbs: How Dobbs v. Jackson Women's Health Impacts Data Privacy for All*, 15 U. CHI. L. SCI. & TECH. J. 35 (2024); Monika Jordan, *The Post-Dobbs World: How the Implementation of Fetal Personhood Laws Will Affect in Vitro Fertilization*, 57 UIC. CHI. L. REV. 249 (2024); Rebecca Feinberg, *The Future of IVF Post Dobbs*, 37 J.L. & HEALTH 35 (2023).

[44] *See supra* note 3.

[45] *See* DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 34 (Rachel E. Barkow, Erwin Chemerinksy, Richard A. Epstein, Ronald J. Gilson, James E. Krier, Tracy L. Meares, Richard K. Neumann, Jr., Robert H. Sitkoff, David Alan Sklansky eds., 8th ed. 2024) (noting that "the United States Constitution does not specifically mention privacy.").

[46] Joanna Gardner, *Refusing to Hew to the Federal Floor-Florida Supreme Court Finds Mandatory Waiting Period Prior to Abortion Unconstitutional. Gainesville Woman Care, LLC v. State, 210 So. 3d 1243 (Fla. 2017)*, 71 RUTGERS U.L. REV. 1277, 1282 n.24 (2019).

[47] *See infra* notes 49–54.

[48] Singletary v. Costello, 665 So.2d 1099, 1103 (Fla. Dist. Ct. App. 1996).

[49] *See* ALASKA CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23; HAW. CONST. art. I, §§ 6–7; ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5; MONT. CONST. art. II, § 10; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7; N.H. CONST. art. 2-b (as of December 2018). *See also Privacy Protections in State Constitutions,* NAT'L CONF. OF STATE LEG. (last visited Nov. 7, 2018), http://www.ncsl.org/research/telecommunications-and-information-technology/privacy-protections-in-state-constitutions.aspx; Ken Gormley & Rhonda G. Hartman, *Privacy and the States*, 65 TEMP. L. REV. 1279, 1282 (1992) ("Five states–California, Alaska, Montana, Hawaii, and Florida–added fundamental personal decision privacy language to their constitutions between the years of 1972 and 1980, directly in response to the national mood swing following Griswold [v. Connecticut] and Roe [v. Wade]." (footnotes omitted)); N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 619, 674 n.6 (Fla. 2003) (collecting cases where the right to privacy has been "implicated in a wide range of matters dealing with personal privacy"); Gardner, *supra* note 46.

[50] CAL. CONST. art. I, § 1.

individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."[51]

Each state crafts its own particular wording for its own right to privacy. Some additional examples of state right to privacy constitutional provisions. Arizona's constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."[52] Louisiana's constitution provides, "Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court."[53] And Alaska's constitution provides, "The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section."[54] Accordingly, some state right to privacy clauses tie the right more closely to the right against unreasonable searches and seizures, such as Louisiana's right to privacy,[55] while others take a broader approach, creating a right to privacy that encompasses a wider range of conduct and circumstances, such as the right to privacy under Arizona's and Alaska's state constitutions.[56]

Florida's constitutional right to privacy, which will be a principal focus of the analysis and argument made in this article, is contained in Article I, Section 23. That section provides, "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."[57] The first sentence of the section sets out the state's right to privacy. It, like the privacy right contained in other state constitutions, encompasses a greater breadth of privacy interests, and covers more protection to individuals in those interests, than the federal Constitution.[58] That is, it is broader in scope than the protection provided in the United States Constitution.[59]

Florida's right to privacy encompasses at least two different categories of interest. The first is "the individual interest in avoiding disclosure of personal matters," while the second is "the interest in independence in making certain kinds of important decisions."[60] Like other constitutional rights, Florida's right to privacy is not absolute. Under it, the

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[51] MONT. CONST. art. II, § 10.
[52] ARIZ. CONST. art. II, § 8.
[53] LA. CONST. art. I, § 5.
[54] ALASKA CONST. art. I, § 22.
[55] *See* LA. CONST. art. I, § 5.
[56] *See* ALASKA CONST. art. I, § 22; ARIZ. CONST. art. II, § 8.
[57] FLA. CONST. art. I, § 23.
[58] *See* Vazzo v. City of Tampa, 415 F. Supp. 3d 1087 (M.D. Fla. 2019).
[59] *See id.*
[60] G.P. v. State, 842 So. 2d 1059, 1062 (Fla. Dist. Ct. App. 2003).

government may intrude on a person's right to privacy, including their "right to be let alone and free from governmental intrusion into the person's private life," if the government has a compelling interest for doing so.[61] To decide whether the right to privacy has been impacted, the individual's subjective expectation and the values of privacy that our society aims to promote are considered.[62]

B. Florida's right to privacy protects against government intrusion into private life and individual autonomy

According to the Florida Supreme Court, since the people of the state "enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution."[63] This enumerated individual right[64] was approved by Florida voters and added to the state constitution in 1980.[65] It provides, in relevant part: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein."[66] This privacy clause contains no express standard of review for evaluating government intrusions into a person's private life.[67] But the state supreme court subsequently adopted the same strict scrutiny standard that applies to violations of federal fundamental rights, including the federal right to privacy; accordingly, an intrusion into a person's private life, in violation of Florida's privacy right, will be struck down as unconstitutional unless the government can show the law or government action was narrowly tailored to achieve a compelling government purpose.[68]

"The Florida Supreme Court has adopted a test to assess the claim of an article I, section 23 privacy violation."[69] "First, courts must determine whether the individual possesses a legitimate expectation of privacy in the information or subject at issue."[70] "If so, the burden shifts to the State to show (a) that there is a compelling state interest warranting the intrusion into the individual's privacy and (b) that the intrusion is accomplished by the least intrusive means."[71] By way of example, two cities' juvenile curfew ordinances were challenged as violating the article I, section 23 right to privacy. There, the court held the ordinances were not narrowly tailored to achieve a compelling governmental purposes of protecting

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[61] *See* Thomas v. Smith, 882 So. 2d 1037, 1044 (Fla. Dist. Ct. App. 2004) (quoting Florida Bd. of Bar Examiners Re: Applicant, 443 So. 2d 71, 74 (1983)).
[62] *See id.*
[63] Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regul., 477 So. 2d 544, 548 (Fla. 1985).
[64] *See* Adelman v. Boy Scouts of America, 276 F.R.D. 681, 694 (S.D.Fla. 2011).
[65] FLA. CONST. art. I, § 23.
[66] *Id.*
[67] *Id.*
[68] Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d 544, 547 (Fla. 1985).
[69] State v. Tamulonis, 39 So. 3d 524, 528 (Fla. Dist. Ct. App. 2010).
[70] *Id*. (citing Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regul., 477 So. 2d 544, 547 (Fla. 1985).
[71] *Id*. (citing Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regul., 477 So. 2d 544, 547 (Fla. 1985).

juveniles from crime and reducing juvenile criminal acts.[72] The ordinances violated the juveniles' constitutional right to privacy (and right to freedom of movement).[73] The court reached this conclusion based on four findings. First, statistical data failed to establish the necessary nexus between governmental interest and classification created by one city's ordinance.[74] Second, broad city-wide coverage of both cities' curfews included otherwise innocent and legal conduct by minors, even where they had permission of their parents. Third, curfew the cities' ordinances imposed criminal penalties on juveniles and parents for second and subsequent curfew violations.[75] And finally, one city's ordinance imposed criminal penalties on business operators knowingly permitting juveniles on their premises during curfew hours.[76]

Because Florida's privacy right is explicitly enumerated in its constitution, it should be unsurprising that "[w]hile both the state and federal constitutions protect individuals from arbitrary and unreasonable governmental interference with a person's right to life, liberty, and property, the state constitution embraces more privacy interests, and extends more protection to those interests than its federal counterpart."[77] Florida's Article I, Section 23 does this by "by declaring that an individual in the state has the right to be let alone and free from governmental intrusion into the person's private life."[78] In adopting this explicit constitutional right, "Floridians opted for more protection from governmental intrusion than was afforded under the federal constitution."[79] Accordingly, "[t]he state constitutional right to privacy is much broader in scope, embraces more privacy interests, and extends more protection to those interests than its federal counterpart."[80]

Florida is permitted to expand privacy protections to its citizens above and beyond those available under the federal constitution. As explained by the Florida Supreme Court, "in any given state, the federal Constitution thus represents the floor for basic freedoms; the state constitution, the ceiling."[81] What this means in practical terms is that while "states may not limit personal freedoms beyond that which the federal constitution permits," "it is a clear tenet under our system of government that . . . states *may* place more rigorous restraints on government intrusion than required

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[72] State v. J.P., 907 So. 2d 1101 (Fla. 2004).
[73] *Id.*
[74] *Id.* at 1119.
[75] *Id.* at 1106–07.
[76] *Id.* at 1118.
[77] 10A Fla. Jur. 2d Constitutional Law § 361 (citing D.M.T. v. T.M.H., 129 So. 3d 320 (Fla. 2013)); Vazzo v. City of Tampa, 415 F. Supp. 3d 1087 (M.D. Fla. 2019); Green v. Alachua County, 323 So. 3d 246 (Fla. 1st DCA 2021); Wakeman v. Dixon, 921 So. 2d 669 (Fla. 1st DCA 2006); Board of County Comm'rs of Palm Beach County v. D.B., 784 So. 2d 585 (Fla. 4th DCA 2001); State v. J.P., 907 So. 2d 1101 (Fla. 2004); Von Eiff v. Azicri, 720 So. 2d 510 (Fla. 1998).
[78] 10A Fla. Jur. 2d Constitutional Law § 361 (citing D.M.T. v. T.M.H., 129 So. 3d 320 (Fla. 2013)); *see also* FLA. CONST. art. I, § 23.
[79] Wakeman v. Dixon, 921 So. 2d 669, 671–72 (Fla. Dist. Ct. App. 2006) (internal quotation marks omitted).
[80] Von Eiff v. Azicri, 720 So. 2d 510, 514 (Fla. 1998).
[81] Singletary v. Costello, 665 So. 2d 1099, 1103 (Fla. Dist. Ct. App. 1996) (quoting Traylor v. State, 596 So.2d 957, 962 (Fla. 1992)).

by the federal constitution, statutes, or case law."[82] Like the federal right of privacy, Florida's right is an individual one.[83] It "was not intended to provide absolute guarantee against all governmental intrusion into private life of individual."[84] But it "includes a fundamental right to the sole control of one's person, which covers an individual's control over or the autonomy of the intimacies of personal identity and a physical and psychological zone within which an individual has the right to be free from intrusion or coercion, whether by government or by society at large."[85] Moreover, Florida's "constitutional right of privacy ensures that individuals are able to determine for themselves when, how, and to what extent information about them is communicated to others."[86] It also "encompasses a person's right to the sole control of his or her person and the right to determine what shall be done with his own body"[87]—though this component of the right was later curtailed in *Planned Parenthood of Southwest and Central Florida*[88]—as well as "family privacy."[89] Just how far Florida's privacy protections extend has not been fully clarified or articulated by Florida courts. But it is clear from the guidance available that the protections are, in some areas, broad in scope, while in others they are clearly no more expansive than the rights under the federal right of privacy.

The right to family privacy is one area where Florida's privacy protection is broader than its federal counterpart. The federal privacy right, of course, protects certain "fundamental interests as marriage, procreation, contraception, family relationships, and the rearing and educating of children."[90] Moreover, "[p]reserving the family and raising one's children is also a constitutionally protected interest under [Florida] state law."[91] Unlike the federal privacy right, however, "[t]he privacy provision of the Florida Constitution includes specific protection against state interference, either via the judicial system or legislation, in parents' fundamental right to raise their children, except in those cases where the child is threatened with harm."[92] Of course, while Florida's constitution does, indeed, "protect the right of parents to raise their children free from unwarranted governmental interference, that state right is subordinate to the directives of the Federal Constitution under the Supremacy Clause."[93]

The right to abortion, by contrast, stands as an example of a component of the right to privacy where Florida's protections appear no broader than those under the federal Constitution. Although the supreme

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[82] State v. Washington, 114 So. 3d 182, 186 (Fla. Dist. Ct. App. 2012) (emphasis added).
[83] *See Adelman*, 276 F.R.D. at 694.
[84] Florida Bd. of Bar Exam'r Re: Applicant, 443 So.2d at 74.
[85] Green v. Alachua Cnty., 323 So. 3d 246, 253 (Fla. Dist. Ct. App. 2021).
[86] Weaver v. Myers, 229 So. 3d 1118, 1126 (2017).
[87] Burton v. State, 49 So. 3d 263, 265 (2010) (quotation marks omitted).
[88] Planned Parenthood of Sw. & Cent. Fla. v. State, 384 So. 3d 67, 87–88 (Fla. 2024).
[89] Tallahassee Mem'l Reg'l Med. Ctr., Inc. v. Petersen, 920 So. 2d 75, 80 (Fla. 2006).
[90] 10A Fla. Jur. 2d Constitutional Law § 364.
[91] *Id.*
[92] *Id.* (footnotes omitted) (citing D.M.T. v. T.M.H., 129 So. 3d 320 (Fla. 2013); Kazmierazak v. Query, 736 So. 2d 106 (Fla. Dist. Ct. App. 1999); Von Eiff v. Azicri, 720 So. 2d 510 (Fla. 1998); P.B. v. Fla Dep't. of Child. and Fams., 335 So. 3d 804 (Fla. Dist. Ct. App. 2022); Forbes v. Chapin, 917 So. 2d 948 (Fla. Dist. Ct. App. 2005); D.M.T. v. T.M.H., 129 So. 3d 320 (Fla. 2013).
[93] 10A Fla. Jur. 2d Constitutional Law § 364.

court of Florida held that the state right to privacy under article I, section 23 protected the right to choose to have an abortion prior to the Supreme Court's 2022 *Dobbs* decision,[94] that protection evaporated along with the federal right under the *Dobbs* decision. To show just how radical of a curtailing of privacy rights this was, it requires a glimpse of the Florida Supreme Court's championing of the right to choose to have an abortion prior to *Dobbs*. In *In re T.W.*, for instance, the Florida Supreme Court asserted unambiguously that "Florida's privacy provision is clearly implicated in a woman's decision of whether or not to continue her pregnancy."[95] "We can conceive of few more personal or private decisions," the court continued, "concerning one's body that one can make in the course of a lifetime, except perhaps the decision of the terminally ill in their choice of whether to discontinue necessary medical treatment."[96] The court then quoted Professor Laurence Tribe:

> Of all decisions a person makes about his or her body, the most profound and intimate relate to two sets of ultimate questions: first, whether, when, and how one's body is to become the vehicle for another human being's creation; second, when and how—this time there is no question of "whether"—one's body is to terminate its organic life.[97]

The Florida Supreme Court was not done. It went on to clarify that "[t]he decision whether to obtain an abortion is fraught with specific physical, psychological, and economic implications of a uniquely personal nature for each woman."[98] The court then, citing the Supreme Court, added that "[t]he Florida Constitution embodies the principle that '[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision ... whether to end her pregnancy. A woman's right to make that choice freely is fundamental.'"[99]

Then, *Dobbs* happened. Shortly thereafter, in 2024, the Florida Supreme Court overturned its 1989 decision that the state's Constitution protected the right to abortion.[100] The court ruled that the Constitution's "right to be let alone" under article I, section 23 does not cover abortion.[101] To reach this conclusion, the Florida Supreme Court analyzed newspapers, dictionaries, and other sources from the era when the privacy amendment was adopted, 1980.[102] The court concluded that the amendment was not intended or thought to cover abortion.[103] Accordingly, the state legislature

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[94] In re T.W., 551 So. 2d 1186, 1187 (Fla. 1989).
[95] *Id*. at 1192.
[96] *Id*.
[97] *Id*. (quoting LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1337–38 (2d ed. 1988)).
[98] *In re* T.W., 551 So. 2d 1187, 1193 (Fla. 1989) (citing *Roe,* 410 U.S. at 153).
[99] *Id.* (quoting Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747 (1986)).
[100] Planned Parenthood of Sw. & Cent. Fla., *supra* note 88 at 67.
[101] *Id.* at 71.
[102] *Id.* at 86–88.
[103] *Id.* at 87–88.

had the authority to regulation abortion, which it did with a 15-week abortion ban.[104] Subsequently, on May 1, 2024, Florida's six-week abortion ban went into effect.[105] This ban has few exceptions, such as rape and incest, and doctors who perform abortions face severe penalties, including imprisonment and loss of medical licenses.[106] The voters of Florida had an opportunity to enshrine a constitutional right to choose to have an abortion when they voted on Amendment 4 in November 2024.[107] However, the amendment did not obtain the 60 percent needed to pass, receiving only 57 percent of the vote.[108]

On balance, then, it appears clear from the Florida jurisprudence on this issue that although the state's Constitution (1) contains an explicit right to privacy in article I, section 23, which the Federal Constitution lacks, and (2) that explicit right to privacy contains language that could be more expansively interpreted, it has not, to date, generally been so expansively interpreted. Rather, it is construed slightly more broadly in some contexts, such as with regard to the right to raise one's own children,[109] and no more broadly at all in others, such as with regard to the right to choose to have an abortion.[110] Accordingly, although the existence and express terms of Florida's constitutional right to privacy set it apart from its federal counterpart, its precise contours and scope are apparently not necessarily settled and clear. However, given the existence and express terms of article I, section 23,[111] there exists room to argue for a somewhat more expansive scope of the right of privacy in Florida, and this article is exploring one such potential zone of coverage. That is, given that the section, by its terms, guarantees "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life,"[112] this necessarily implicates the need to define what the freedom encompasses. Does "the right to be let alone and free from governmental intrusion" include some protections against coercive or manipulative state-sponsored messages? Might it protect state residents from intentional false messages communicated by the government for the purpose of deceiving, or even harming, them? The answer to these questions might well be, ultimately, in the negative. But even if it is, that does not obviate the need to at least explore these questions to determine what protections are encompassed by article I, section 23, and just what safeguards, if any, it might provide against government propaganda, defined as "the

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[104] *Id.* at 87.
[105] Jennifer D. Oliva, *Expecting Medication Surveillance*, 93 FORDHAM L. REV. 509, 521 (2024).
[106] FLA. STAT. § 390.0111 (2024); Elizabeth S. Scott, *Comment on Part 4 Essays: Goodwin and Dailey and Rosenbury*, 91 U. CHI. L. REV. 633, 637–38 n.34 (2024).
[107] Brandon Girod, *Florida's Amendment 4 on Abortion Failed with 57% of Votes. What Happened?*, PENSACOLA NEWS JOURNAL (Nov. 6, 2024, 11:14 AM), https://www.pnj.com/story/news/politics/elections/2024/11/06/florida-amendment-4-failed-despite-support-what-happened/76090647007/.
[108] *Id.*
[109] 10A Fla. Jur. 2d Constitutional Law § 364.
[110] Planned Parenthood of Sw. & Cent. Fla. v. State, 384 So. 3d 67, 87 (Fla. 2024).
[111] FLA. CONST. art. I, § 23.
[112] *Id.*

government's knowing or reckless propagation of verifiably false or misleading statements of fact on matters of public concern."[113]

III. PROPAGANDA INVADES PEOPLE'S AUTONOMOUS THOUGHTS, BELIEFS, AND DECISIONS

If an express constitutional safeguard against "government intrusion into [a] person's private life" is to be taken to mean what it says, it must be interpreted to protect against state interference with an individual's "private" behaviors and choices, which are in many ways the core essence of one's private life.[114] "Private life," after all, encompasses a great swath of our own individual existence that we consider to be of our own domain and not open to the public.[115] Just how broad is the term "private life"? So broad, in fact, that some assert it is "neither possible nor necessary" to precisely define it.[116] To give an idea of its scope, however, let us look at one attempt at a definition:

> ***Private life*** means the personal and family life of a person, his living environment consisting of a person's dwelling with its private territory and other private premises which the natural person uses for his economic, commercial or professional activities as well as the mental and physical inviolability of the natural person, his honour and reputation, secret personal facts, the natural person's photographs or other images, his personal health information, private correspondence or other communications, personal views, convictions, habits and other data which may be used only with his consent.[117]

That is, it encompasses what the two words that make up the term plainly mean—the first component being "life," which involves an individual's existence and everything that includes, and the second component being "private," which separates out those parts of a person's existence that can be considered public and which are held out to and shared with the wider world.[118] Of course, the term "private life" is "a very broad and by no means exhaustive notion."[119] As a result, "[d]octrine and jurisprudence generate from time to time and case by case new elements that can be included in the private life of [individuals] and this fact makes

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[113] Caroline Mala Corbin, *The Unconstitutionality of Government Propaganda*, 81 OHIO ST. L.J. 815, 818 (2020) (This article adopts Professor Corbin's definition of the term "government propaganda," set out in her article, *The Unconstitutionality of Government Propaganda*. *Id.* at 818, 826–37).
[114] Frederick Schauer, *Free Speech and the Assumption of Rationality*, 36 VAND. L. REV. 199, 204 (1983) (quoting FRANKLYN S. HAMAN, SPEECH AND LAW IN A FREE SOCIETY 6–7 (1981)).
[115] *Private Life Definition*, LAW INSIDER, https://www.lawinsider.com/dictionary/private-life (last visited Jan. 26, 2025).
[116] Sohail Aftab, *Reconciling the Freedom of Expression with the Right to Privacy: Protecting Private Life from Media Invasions Under the ECHR*, 109 IUS GENTIUM 127, 142 (2024).
[117] *Private Life Definition*, *supra* note 115.
[118] *Id.*
[119] *Id.*

the work of the judicial system very difficult in guaranteeing and respecting this right and identifying violations presumed in this respect."[120]

The aspects of one's life that one expects to be private, as opposed to public, and has a *right* to keep private, must include, at a minimum, that person's own thoughts, views, beliefs, and ideas.[121] That is, "respect for autonomy is a principle in which there is an acknowledgement that individuals have the 'right to hold views, make choices, and to take actions based on personal values and beliefs'."[122] "In addition to being a moral right of autonomous individuals—broadly construed as individuals who are capable of making their own decisions—the ability of autonomous individuals to hold views, make decisions, and act on their personal values and beliefs is a constitutionally-protected right."[123]

This sphere of one's private life, "the ability of autonomous individuals to hold views, make decisions, and act on their personal values and beliefs,"[124] is, of course, primarily protected by the First Amendment's free speech and free exercise clauses,[125] but under article 1, section 23, it either is, or should be, protected under the right of privacy as well. As noted by Professor William M. Brooks, "the foundation of our status as free and rational beings rests on an ability to reach conclusions about what is good and then act on these beliefs."[126] Naturally, then, an express constitutional right that protects against "governmental intrusion into the person's private life" clearly should protect against government efforts to invade a person's most private autonomous zone—the inside of their mind, where they hold their most private beliefs, and where they make their own personal decisions.[127] This is the very intrusion aimed at by propaganda in

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[120] *Id.*

[121] *See* Thomas D. Harter, *Is There a Moral Obligation for Health Care Organizations to Develop Robust Advance Care Planning Programs?*, 10 ST. LOUIS U. J. HEALTH L. & POL'Y 45, 58–59 (2016) (discussing how, through the autonomy principle, "individuals have the right to hold views, make choices, and to take actions based on personal values and beliefs," and this right is constitutionally protected (internal quotation marks omitted)).

[122] *Id.* at 58.

[123] *Id.* at 58–59 (footnote omitted) (quoting TOM. L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMED. ETHICS 103, 58 (5th ed. 2001)).

[124] *Id.* at 58.

[125] U.S. CONST. amend. I; William M. Brooks, *Democracy on the Edge: Use the First Amendment to Stop False Speech by Government Officials*, 53 U. MEM. L. REV. 255, 285 (2022) ("The autonomy theory of the First Amendment rests on a belief that '[i]ndividuals, within the limits of their intellectual and emotional development, their physical environment, and the restraints which may be imposed on them by other persons, are capable of free choice and are responsible for the behavior which they choose. The philosophy of free speech presumes the existence of the freedom to accept or reject the alternatives which are offered." (quoting Frederick Schauer, *Free Speech and the Assumption of Rationality*, 36 VAND. L. REV. 199, 204 (1983)); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–35 (1977) (Supreme Court has asserted that "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."); William M. Brooks, *Democracy on the Edge: Use the First Amendment to Stop False Speech by Government Officials*, 53 U. MEM. L. REV. 255, 285 (2022) ("Justice Robert Jackson elaborated on the meaning of the concept of autonomy when he said '[t]he very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind . . . In this field, every person must be his own watchman for truth because the forefathers did not trust any government to separate the true from the false for us'" (quoting Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring))).

[126] Brooks, *supra* note 125.

[127] FLA. CONST. art. I, § 23; Harter, *supra* note 121.

general, and government propaganda in particular. And where propaganda seeks to deceive or mislead—that is, where the propaganda's message is intentionally false or misleading—it amounts to nothing more than a self-serving lie disseminated to a mass captive audience.

A. Lies intrude into the private life and individual autonomy of the one lied to

Every lie consists of "a statement by one who does not believe it but intends to make someone else believe it."[128] Thus, it "has three parts: (1) a message (2) communicated to another by a speaker who does not believe the message to be true but (3) intends to cause listeners to believe it to be true." In telling a lie, the speaker deprives the listener of their ability to self-govern in their own decision-making process.[129] This makes lying very effective—thus, in contexts where lying is permitted or goes unpunished, this confers a benefit and advantage on those willing to use dishonesty to further their own agenda.[130] "This follows from the notion that a lie distorts the reasoning process of the victim, interfering with her rational deliberation; the lie robs one of her ability to make rational choices concerning her beliefs and course of conduct—it is an assault on her integrity as an individual."[131] As noted by Professor Gregory Klass, "[w]e are social creatures who cannot help but rely on information we receive from others to navigate the world around us."[132] Thus, "[d]eception thus strikes at the heart of the faculty of reason, and so it is especially difficult to guard against."[133]

Just how difficult it is to guard against deception has only recently come to light with social science research by Kim B. Serota, Timothy R. Levine, and Franklin J. Boster, and others.[134] In fact, the findings in Levine's book *Duped* make clear it may well be impossible, as an individual, to effectively guard against being deceived.[135] In the book, Levine examined four decades of deception detection research, including

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[128] WES HENRICKSEN, IN FRAUD WE TRUST: HOW LEADERS IN POLITICS, BUSINESS, AND MEDIA PROFIT FROM LIES-AND HOW TO STOP THEM 21 (2024); *see also* Arnold Isenberg, *Deontology and the Ethics of Lying*, 24 PHIL. AND PHENOMENOLOGICAL RSCH 463, 466 (1964); CASS R. SUNSTEIN, LIARS: FALSEHOODS AND FREE SPEECH IN AN AGE OF DECEPTION 22 (2021).

[129] *See, e.g.*, Helen Norton, *The Government's Lies and the Constitution*, 91 IND. L.J. 73, 75 (2015) (noting that some "government lies . . . deprive their targets of the ability meaningfully to exercise voting, reproductive, or other protected rights").

[130] *See* Gregory Klass, *The Law of Deception: A Research Agenda*, 89 U. COLO. L. REV. 707, 714–15 (2018).

[131] Bryan H. Druzin & Jessica Li, *The Criminalization of Lying: Under What Circumstances, If Any, Should Lies Be Made Criminal?*, 101 J. CRIM. L. & CRIMINOLOGY 529, 535 (2011); *see also* Alan Strudler, *Incommensurable Goods, Rightful Lies, and the Wrongness of Fraud*, 146 U. PA. L. REV. 1529, 1546 (1998) (noting that "a lie interferes with its victim's rational deliberation [and] . . . robs a person of her prospects for making certain rational choices about what to do or what to believe").

[132] Klass, *supra* note 130 at 715.

[133] *Id.*

[134] *See generally* TIMOTHY LEVINE, DUPED: TRUTH-DEFAULT THEORY AND THE SOCIAL SCIENCE OF LYING AND DECEPTION (Univ. of Ala. Press 2020); Kim B. Serota and Timothy R. Levine, *A Few Prolific Liars: Variation in the Prevalence of Lying*, 34 J. OF LANG. AND SOC. PSYCH. 138, 138–57 (2014); Kim B. Serota, Timothy R. Levine, & Franklin J. Boster, *The Prevalence of Lying in America: Three Studies of Self-Reported Lies*, 36 HUM. COMMC'N RSCH. 2, 2–25 (2010).

[135] *See generally* LEVINE, *supra* note 134.

hundreds of individual studies, to look at how well individuals detect lies.[136] In the aggregate, across these hundreds of studies, test subjects were able to detect lies about 54 percent of the time.[137] This number held steady regardless of whether the lie was read, seen, or heard.[138] It was also constant across cultures, languages, and geographic regions.[139] According to these studies, then, people's lie detection ability—regardless of age, education, or IQ—is only slightly higher than random chance.[140] This means flipping a coin to determine if someone is lying is nearly as effective a method of deception detection as human perception, skill, and intuition.[141] Because we are so powerless against lies, at least when it comes to our own natural abilities, people deceived by those manipulating them for their own self-serving purposes are victimized in ways we have historically not fully appreciated. After all, we create our picture of the world, and of ourselves, almost entirely by way of information we read, see, and hear, which we believe to be true, but which we cannot with certainty determine accuracy or truthfulness.[142]

This is our only manner of perceiving the world and ourselves; "[o]ur minds continually consume, produce, and attempt to integrate ideas about ourselves and the world that purport to be true."[143] But of course, much of what we "learn" from things we read, see, and hear—from the news, from social media, and from family, friends, and colleagues—is untrue. "Learning" false information makes one less informed than they were before "learning" it.[144] But because people possess no natural ability to detect falsehoods—written, verbal, or otherwise—they have no consistently reliable way of knowing whether what they read, see, or hear is real or fake, whether the person communicating the message is telling the truth or lying, or whether the communicator is even a person at all.[145] Discovering objective truth is something the scientific method is well-equipped to accomplish,[146] but that we are not.[147] We do not form our own beliefs on objectively verifiable facts, but on "a variety of subjective,

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[136] *Id.* at 10.
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Levin, supra note 134*.
[141] *Id.*; *see also* HENRICKSEN, *supra* note 128, at 27.
[142] LEVINE, *supra* note 134, at 3–15.
[143] SAM HARRIS, THE MORAL LANDSCAPE, 14 (Free Press, 2010).
[144] *See* LEVINE, *supra* note 134, at ix–xii, 3–14 (2020) (noting, inter alia, "We all are perceptually blind to deception. We are hardwired to be duped.").
[145] *See id.* at 3–14, 17–26.
[146] *See* Steven R. Salbu, *Off-Label Use, Prescription, and Marketing of FDA-Approved Drugs: An Assessment Legis. and Regul. Pol'y*, 51 FLA. L. REV. 181, 197 (1999) (referring to the scientific method as one "in which '[t]he objective data determine what is to be accepted as scientific truth'") (quoting Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 73 (1994)).
[147] *See* Michael Curtis, *Introduction to* WALTER LIPPMANN, PUBLIC OPINION xvi (Transaction 1991) (1922) (noting, "[t]he real external environment is too big, too complex and too fleeting for direct acquaintance by citizens" and "[t]he key problem . . . [is] people take as facts not what is, but what they perceive to be facts"). WALTER LIPPMANN, PUBLIC OPINION 3–5 (1922) (telling about an isolated island where, at the start of the first World War, English, French, and Germans lived together in harmony until six weeks into the war, when they learned they had, for six weeks, been mortal enemies, and noting that "whatever we believe to be a true picture, we treat as if it were the environment itself.").

personal, emotional, and psychological" factors.[148] And someone who tells a lie exploits this fundamental aspect of human nature.

Against this backdrop, it is clear that those who communicate a lie undermine the autonomy of the individuals lied to.[149] That is, "lies that are told for the purpose of influencing behavior . . . involve a denial of autonomy in the sense that they interfere with a person's control over her own reasoning process."[150] It does this in a very simple way. Communicating an intentionally false message with the aim of convincing the listener it is true "hinders autonomy by giving listeners false belief as to the world around them and the actual choices available to them."[151] This, according to Professor Courtney Cox, makes lying "a direct violation of autonomy."[152] This is not a new idea. Immanuel Kant explained in 1785 that "lies are morally wrong when speakers undermine listener autonomy by seeking to use their listeners as a means to the speakers' own ends, rather than treating listeners as ends in themselves."[153]

According to Kant, then, because lies are calculated to deceive the listener, they are immoral.[154] That is, they are immoral because their purpose is to deceive, to manipulate.[155] A lie, then, is a manner of using the listener for the speaker's own self-serving purposes. "One can never assent to lying: either one does not know of the lie (e.g., a false promise to repay) and so cannot assent, or else does know, and so assents to what the liar seeks . . ."[156] Autonomous individuals are free to believe or disbelieve what they choose, and in this context, such free and autonomous individuals will sometimes make bad choices.[157] "But a choice based on misinformation is not fully autonomous, especially if the misinformation was provided by someone attempting to influence the recipient's behavior."[158] This is the nonautonomous choice bad faith propaganda forces onto individuals. It introduces false or misleading claims into the minds of listeners, obscuring the truth and manipulating people into making choices and engaging in behaviors that (1) are based on false beliefs purposefully imposed on them, and (2) to the benefit of those who disseminated the propaganda.

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[148] MICHAEL SHERMER, THE BELIEVING BRAIN: HOW WE CONSTRUCT BELIEFS AND REINFORCE THEM AS TRUTHS 6 (2011). *See also* Timothy R. Levine, *Truth-Default Theory (TDT): A Theory of Human Deception and Deception Detection*, 33 J. LANG. SOC. PSYCH. 378, 378–92 (2014) (introducing Truth-Default Theory, which holds people default to truth when receiving new information, and do so for evolutionary adaptive purposes.)

[149] Ellen P. Goodman, *Visual Gut Punch: Persuasion, Emotion, and the Const. Meaning of Graphic Disclosure*, 99 CORNELL L. REV. 513, 526 (2014).

[150] David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 354 (1991).

[151] GOODMAN, *supra* note 149, at 526.

[152] Courtney M. Cox, *Legitimizing Lies*, 90 GEO. WASH. L. REV. 297, 354 (2022).

[153] Helen Norton, *Powerful Speakers and Their Listeners*, 90 U. COLO. L. REV. 441, 443 (2019) (citing IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 63–65 (James W. Ellington trans., 3d ed. 1993) (1785)).

[154] IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 63–65 (James W. Ellington trans., 3d ed. 1993) (1785)).

[155] *Id.*

[156] COX, *supra* note 152, at 354.

[157] KLASS, *supra* note 130, at 715.

[158] *Id.*

B. Bad faith propaganda spreads self-serving falsehoods intended to deceive the public

The purpose of propaganda is to surreptitiously manipulate the desires, beliefs, emotions, and behaviors of large groups of people.[159] It is essentially a tool used for control and influence over public opinion, choice, and action.[160] Its key features "are thus a speaker's *hidden* efforts to shape listeners' decision-making that *target* and *exploit* those listeners' vulnerabilities in ways that the targets are not consciously aware of, and in ways that those targets could not easily become aware of if they were to try."[161] This has been well-understood since the early twentieth century.[162] "By the 1920s, [there was a] realization that propaganda…shaped public desires and predilections."[163] In 1928, Edward Bernays observed that "[t]he conscious and intelligent manipulation of the organized habits and opinions of the masses is an important element in democratic society."[164] Bernays continued: "Those who manipulate this unseen mechanism of society constitute an invisible government which is the true ruling power of our country. We are governed, our minds are molded, our tastes formed, our ideas suggested, largely by men we have never heard of."[165]

Propaganda has been not only well understood, but also well studied, since the first half of the twentieth century.[166] To summarize, because people lack firsthand knowledge about most matters, they form their beliefs based on what they read, see, and hear about what others are saying about things going on in the world.[167] The technique of persuading the public through mass-diffused messages is called propaganda – a process that can be used for good or for evil.[168] It could, on one hand, be used to spread messages that are truthful, helpful to society, or at least

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[159] Daniel Susser, Beate Roessler & Helen Nissenbaum, *Online Manipulation: Hidden Influences in a Digital World*, 4 GEO. L. TECH. REV. 1, 26 (2019).

[160] *See, e.g.*, EDWARD S. HERMAN & NOAM CHOMSKY, MANUFACTORING CONSENT (Pantheon Books, 1988) (arguing that the mass media operates on a "propaganda model" by misleading the public and defending powerful interests).

[161] Helen Norton, *Manipulation and the First Amendment*, 30 WM. & MARY BILL RTS. J. 221, 224–25 (2021).

[162] *See* WALTER LIPPMANN, THE PHANTOM PUBLIC 112–14 (1927) (describing how propaganda is used by government and private interests to manipulate the public); FREDERICK E. LUMLEY, THE PROPAGANDA MENACE 45 (1933) (noting that propaganda is a major force affecting public opinion.)

[163] Sarah Barringer Gordon, *The Creation of a Usable Judicial Past: Max Lerner, Class Conflict, and the Propagation of Judicial Titans*, 70 N.Y.U. L. REV. 622, 635 (1995).

[164] EDWARD BERNAYS, PROPAGANDA 9 (1928); *see also* WALTER LIPPMANN, PUBLIC OPINION 248 (1922): "That the manufacture of consent is capable of great refinements no one, I think, denies. The process by which public opinions arise is certainly no less intricate than it has appeared in these pages, and the opportunities for manipulation open to anyone who understands the process are plain enough . . . [a]s a result of psychological research, coupled with the modern means of communication . . . ."

[165] EDWARD BERNAYS, PROPAGANDA 9 (1928).

[166] *See, e.g.*, Herman C. Beyle, *Determining the Effect of Propaganda Campaigns*, 179 ANNALS AM. ACAD. POL. SOC. SCI. 106, 106–13 (1935); Melvin R. Marks & Wilson L. Taylor, *A Methodological Study of the Effects of Propaganda*, 65 J. SOC. PSYCH. 269, 269–77 (1965); United States v. Haldeman, 559 F.2d 31, 154–55 (D.C. Cir. 1976) (discussing how "[d]uring World War II, a team of psychologists studied the propaganda effect of orientation films," and were surprised to learn how deeply the intended message penetrated test subjects' minds, even long after the propaganda) (discussing RUDOLF FLESCH, THE ART OF CLEAR THINKING 165–66 (Collier-MacMillan 1969))).

[167] *See* Curtis, *supra* note 147; *see also* LIPPMANN, *supra* note 147.

[168] *See* G. Alex Sinha, *Lies, Gaslighting and Propaganda*, 68 BUFF. L. REV. 1037, 1045–46 (2020) (articulating some positive examples and some negative examples of uses of propaganda).

communicated in good faith.[169] On the other hand, it could also be, and often has been, used to spread messages that are knowingly false and communicated in bad faith.[170] Most messages spread to the public, like messages in general, likely fall somewhere along the spectrum between true and false. Those that fall far over at the false end of the spectrum, which involve the dissemination of knowingly or recklessly false messages,[171] constitute a class of propaganda I will refer to as "bad faith propaganda," which deserves closer scrutiny. As is the case with intentional falsehoods communicated one-on-one, intentional falsehoods communicated to the masses—bad faith propaganda—always poses a threat to individual autonomy and often poses threats to society and individual well-being.[172]

As noted by Professor Helen Norton, whenever an individual is purposefully deceived by another, that deceit is an exploitation of the vulnerabilities of the one deceived.[173] In this way, one who spreads bad faith propaganda robs those who are duped of the dignity of independent thought.[174] The intentional falsehoods embedded in bad faith propaganda are, thus, an assault on the autonomy of the one lied to.[175] This is necessarily true for any lie, even one told to a single person, but this principle is amplified where a lie is aimed at manipulating large numbers of people, as is the case with bad faith propaganda.

Bad faith propaganda has deleterious effects beyond those suffered the by the individual or individuals duped. It harms society in numerous ways. The massive amount of falsehoods disseminated by those who hold the public megaphone—by politicians, industry leaders, media figures, etc.—"destroy[s] public confidence in all kinds of sources of information, from the news media to public officials, and these falsehoods give the impression that 'everyone is lying' or 'all of it is lies'."[176] Ironically, "the cynicism caused by those spreading self-serving falsehoods actually makes it even easier [to manipulate the public] because when objective sources of information seem untrustworthy, people gravitate instead toward partisan sources whose messages they are predisposed to agree with."[177] This, in turn, makes it even easier for those who hold the public megaphone to profit off spreading bad faith propaganda.

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[169] *Id.*
[170] *See* Sara Dillon, *The Propaganda Conundrum*: *How to Control This Scourge on Democracy*, 23 OR. REV. INT'L L. 123, 124 (2022) (presenting a broad definition of propaganda).
[171] New York Times Co. v. Sullivan, 376 U.S. 254, 279–80, 287–88 (1964) (the "knowingly or recklessly false" standard).
[172] *See* Dillon, *supra* note 170, at 123–24 (noting threats posed by political and corporate propaganda).
[173] NORTON, *supra* note 161, at 225.
[174] HENRICKSEN, *supra* note 128, at 108.
[175] *See, e.g.*, Christine M. Korsgaard, *What's Wrong with Lying? in* PHIL. INQUIRY: CLASSIC AND CONTEMP. READINGS, 577–85 (Adler & Elgin eds., Hackett Publ'g Co. 2007); *See also* SUNSTEIN, *supra* note 128; Paul Faulkner, *What's Wrong with Lying?*, 75 PHIL. & PHENOMENOLOGICAL RESEARCH. 535, 536–38, 555 (2007); SEANA V. SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, & THE LAW 121, 144–45, 152 (Princeton Univ. Press, 2014); Christine M. Korsgaard, *The Right to Lie: Kant on Dealing with Evil*, *in* CREATING THE KINGDOM OF ENDS, 133–58 (Cambridge Univ. Press 1986).
[176] HENRICKSEN, *supra* note 128, at 108.
[177] *Id.*

One underappreciated dimension to the issue of bad faith propaganda is the asymmetrical power dynamic between speaker and listener. Propaganda, by its nature, is a method of communicating with the public at large, and is therefore available only to those who speak to large segments of the public.[178] Accordingly, those who disseminate propaganda constitute an elite and powerful minority in society. It is only those who can push a message out to millions that have propaganda at their disposal. This includes, for instance, political leaders and their surrogates, high-level government officers, wealthy corporations, and members of the media whose messages reach a broad audience.[179] Thus, any speaker who spreads propaganda is in a powerful position. They, thus, necessarily hold immense advantage, in terms of both information and power, over their listeners. And in that context, where the speaker holds so great an advantage over the listener, "their speech can more readily harm their listeners through deception or coercion."[180] Those who spread propaganda "can mislead or muscle their listeners in ways that strike us as unfair and sometimes dangerous."[181]

Indeed, the power to persuade the public to vote for a candidate, to buy a product, to want certain things or to dress a particular way, or to support a war or government policy, is an awesome power. As Bernays pointed out, the ones who hold the public megaphone, and therefore "manipulate this unseen mechanism of society constitute . . . the true ruling power of our country."[182] They shape our beliefs, desires, tastes, choices, and behavior.[183]

All of this pertains to propaganda in general. But there are certain constitutional doctrines implicated when the one disseminating propaganda is the government, as opposed to a private speaker such as a corporation, a public relations firm, a social media influencer, or a pundit on a major news network. When the government engages in the spreading of bad faith propaganda, it implicates at least two important areas of constitutional freedoms. The first one consists of the liberties contained in the First Amendment, including free speech, free exercise, and establishment.[184] When the government imposes its own message on the people, it may interfere with the people's rights with regard to speech and thought, as well as worship and belief.[185] These aspects of bad faith propaganda have been explored to some extent by other scholars.[186] The other constitutional

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[178] Dillion, *supra* note 170.
[179] HENRICKSEN, *supra* note 128, at 37.
[180] Norton, *supra* note 153, at 442–43.
[181] *Id.*
[182] BERNAYS, *supra* note 164, at 9.
[183] *Id.*
[184] U.S. CONST. amend. I.
[185] *Id.*
[186] *See generally*, *e.g.*, Caroline Mala Corbin, *The Unconstitutionality of Government Propaganda*, 81 OHIO ST. L.J. 815, 818 (2020); Alex Sinha, *Lies, Gaslighting and Propaganda*, 68 BUFF. L. REV. 1037 (2020); Russell L. Weaver, *Should Congress (Or, for That Matter, A New Federal Authority) Regulate Social Media?*, 58 GA. L. REV. 1057, 1060 (2024); Emily E. Burton, *American Star Chamber: Online Misinformation, Government Intervention, & the Intellectual Matrix of the First Amendment*, 32 CATH.

freedom implicated by bad faith government propaganda is the right of privacy. Could intentional falsehoods disseminated by the government, which are intended to mislead the public for the government's own self-serving purposes, be a violation of privacy rights? Does Florida's more robust privacy protections provide protections against bad faith government propaganda that might not be covered by the federal privacy right? If this right is implicated, what legal standard should be applied to determine the constitutionality of a law or government action? Part V will explore these questions.

IV. BAD FAITH GOVERNMENT PROPAGANDA ARGUABLY VIOLATES FLORIDA'S RIGHT TO PRIVACY

The means to disseminate messages to large segments of the public, something necessary to engage in the practice of propaganda, is available almost exclusively to an elite minority.[187] Indeed, until recently, the access was absolutely exclusive; before the rise of social media in the early 2000s,[188] those outside the elite minority had virtually no access to the means of spreading messages to the masses. Now, however, there is at least a possibility, albeit small, that non-elites might disseminate a message that ends up viewed by, and may potentially influence, large numbers of people.[189] Even today, however, the elite minority still remains in almost exclusive control of the ability to push messages out to the general public, and this minority includes, for instance, wealthy corporations, industry trade groups, politicians with a national platform, media platforms with millions of users, and media figures with large audiences.[190] This does not mean these elites are in any way less moral or honest than non-elites; rather, while people on the whole are willing in varying degrees to deceive others for self-serving purposes, only this elite subset has access to the means to do so effectively on a scale out of reach to most.[191]

Because the individuals and entities that make up this elite group are able to speak to the public at large, they possess what is often referred to as the proverbial public megaphone, meaning their voices reach large

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U.J.L. & TECH. 79, 102–105 (2024); Philip A. Hamburger, *Courting Censorship*, 4 J. FREE SPEECH L. 195, 197–98 (2024); Richard A. Clarke, *Hostile State Disinformation in the Internet Age*, 5 J. FREE SPEECH L. 187, 194–95 (2024); SUNSTEIN, *supra* note 128 ; RICHARD L. HASEN, CHEAP SPEECH: HOW DISINFORMATION POISONS OUR POLITICS—AND HOW TO CURE IT 106 (Yale Univ. Press, 2022).

[187] HENRICKSEN, *supra* note 128, at 37.

[188] *See* Alexandra Paslawsky, *The Growth of Social Media Norms and Governments' Attempts at Regulation*, 35 FORDHAM INT'L L.J. 1485, 1490 (2012) (discussing "[t]he rise of social media," which occurred in the early 2000s).

[189] *See, e.g.*, Soroush Vosoughi, Deb Roy & Sinan Aral, *The Spread of True and False News Online*, 359 SCIENCE 1146, 1148–50 (2018) (concluding that, on Twitter, falsehoods "spread farther, faster, deeper, and more broadly than the truth in all categories of information" despite the fact that the spreaders of falsehoods tended to be accounts of users who "had significantly fewer followers," "followed significantly fewer people," "were significantly less active on Twitter," "were verified significantly less often," "and had been on Twitter for significantly less time").

[190] HENRICKSEN, *supra* note 128, at 37. (This should not be misconstrued as a criticism of *all* elites. Any group of people will contain a diverse range of individuals within it who possess varying degrees of willingness and motive to deceive others for self-profit. But only elites have the means to carry this out reliably on a large scale.).

[191] *Id.*

audiences and can influence people's behavior.[192] But one of the loudest megaphones, if not *the* loudest megaphone, is held, not by any of these other elites, but by the government.[193] Federal and state governments possess enormous power to spread messages—both by way of words and by way of action or inaction—that are heard and heeded by large segments of the public.[194] In a democratic republic like ours, this means that not only does our government reflect, at least to a degree, the views and preferences of the people,[195] but the government also tailors and manipulates the people's views and preferences for its own ends.[196] Indeed, the fact "American presidents and top government officials can craft news content and influence public opinion"[197] has been long understood.[198]

To give a now-historical example, one author noted that "the Bush Administration was particularly adept at choking the executive branch's information chain by preventing unfavorable information from entering discourse and manipulating press coverage with favorable information."[199] The lies of the Bush Administration, in fact, were catalogued and counted. The Center for Public Integrity (CPI), a nonprofit journalism organization, "assembled a database of 935 'patently false statements' and hundreds of additional misleading statements made by President Bush, Secretary of State Powell, Secretary of Defense Rumsfeld, Vice President Cheney, National Security Advisor Rice, Undersecretary of Defense Wolfowitz, and Press Secretaries Fleischer and McClellan about alleged Iraqi weapons of mass destruction (WMDs) and ties to al-Qaeda."[200]

Such historical examples of possible bad faith government propaganda hold at least two advantages over contemporary examples. First, truth or falsity of any assertion or idea, whether expressed by the

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[192] *See, e.g.*, Sallie T. Sanford, *Nobody Knew How Complicated: Constraining the President's Power to (Re)shape Health Reform*, 45 AM. J. L. & MED. 99, 120 (2019) ("The presidential megaphone has long been used, by Republicans and Democrats alike, to advocate with the public and with Congress for legislative solutions to expand access to high quality health care."); Saura Masconale & Simone M. Sepe, *Citizen Corp.: Corporate Activism and Democracy*, 100 WASH. U. L. REV. 1, 54–55 (2022) ("[C]itizens realize that a small group of investors has the corporate megaphone at their *exclusive* disposal to influence the public discourse around divisive societal ends.").

[193] *See* Sallie T. Sanford, *Nobody Knew How Complicated: Constraining the President's Power to (Re)shape Health Reform*, 45 AM. J. L. & MED. 99, 99–101 (2019).

[194] *Id.* at 111; *see also* Nikolas Guggenberger, *Moderating Monopolies*, 38 BERKELEY TECH. L.J. 119, 142 (2023) (noting "there are good arguments to deny any head of state or government a private digital megaphone through which they can amplify misinformation or stoke public rage and political violence" because of the enormous power governments have when given access to such a megaphone).

[195] *See, e.g.*, Bruce E. H. Johnson & Sarah K. Duran, *A View from the First Amendment Trenches: Washington State's New Protections for Public Discourse and Democracy*, 87 WASH. L. REV. 495, 495 (2012) (quoting ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 19 (2012), "'[D]emocracy requires that government action be tethered to public opinion' because 'public opinion can direct government action in an endless variety of directions.'"); Jeffrey Jacobsen, *Georgia v. Public.Resource.org–A Missed Opportunity for Democracy*, 36 BERKELEY TECH. L. J. 1437, 1439 (2021) ("Democratic governments must be responsive to the public opinion for consent to be valid.").

[196] *Id.* at 1439 ("Certain government works carry great weight when informing the public opinion because they are official statements from the government itself on how it is governing.").

[197] Robert Bejesky, *Press Clause Aspirations and the Iraq War*, 48 WILLAMETTE L. REV. 343, 348 (2012).

[198] *See supra* notes 162, 163 & 164.

[199] Bejesky, *supra* note 197.

[200] *Id.* at 34849.

government or anyone else, is much less easily determined in the short-term than it is in the long-term, with the benefit of hindsight.[201] That is, it is far more difficult to know with certainty which of today's ideas are true or false than it is to know with certainty which ideas of long ago were true or false.[202] Second, contemporary examples of possible bad faith government propaganda are often highly politically-charged. Pointing out apparent falsehoods spread by any current government leader or party is likely to upset those ideologically aligned with the political leader or party accused of spreading the falsehood. Notwithstanding these downsides of providing examples of contemporary possible bad faith government propaganda, giving no such examples presents its own disadvantages. Without contemporary examples, the discussion is relegated to theory, untethered to the realities of current life and society.

Accordingly, I will present a handful of examples of potential bad faith propaganda—i.e., containing arguably false or misleading assertions—disseminated by government leaders on both sides of the political aisle over the past few years. To be sure, neither the Left nor the Right holds a monopoly on falsehoods, though partisans on both sides of the aisle tend to believe the other side is far more dishonest.[203] Accordingly, contemporary readers who identify strongly with the Left or the Right will likely bristle at examples of possible falsehoods on their own side of the political aisle. But this should not make us shy away from the issue; if we are to have a legal standard for falsity, we must be able to apply that standard with just as much force to those with whom we agree as we do to those with whom we disagree. If we cannot do that, the standard itself would be meaningless.[204]

A. Falsehoods are asserted by speakers on both sides of the political aisle

Let us look at a handful of examples of messages likely to have been spread in a manner that was knowingly or recklessly false[205]—and possibly fraudulent, as has been argued elsewhere[206]—by those in government, or aspiring to be in government, starting with messages disseminated by the

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[201] *See* JOHN STUART MILL, *ON LIBERTY*, 36 (1859) (noting that "every age ha[s] held many opinions which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions, now general, will be rejected by future ages, as it is that many, once general, are rejected by the present").
[202] *See Id.*
[203] *See* Kevin Vallier, *Political Trust*, 47 BYU L. REV. 1275, 1276 (2022) ("Each side sees the other as behaving badly, creating suspicion on both sides of the political aisle."). In fairness, however, at least one study concluded the Right lies more than the Left. *See* Anna Lamb, *Rising 'epidemic of political lying',* HARVARD GAZETTE (Dec. 4, 2024), https://news.harvard.edu/gazette/story/2024/12/rising-epidemic-of-political-lying/ (discussing a study that found "55 percent of the statements made by Republicans and investigated by PolitiFact were false, while 31 percent of those made by Democrats were.").
[204] *See, e.g.*, MANUFACTURING CONSENT: NOAM CHOMSKY AND THE MEDIA at 02:10 (1992) ("If you believe in freedom of speech, you believe in freedom of speech for views you don't like. Goebbels was in favor of freedom of speech for views he liked. So was Stalin. If you're in favor of freedom of speech, that means you're in favor of freedom of speech precisely for views you despise"); Nadine Strossen, *Children's Rights v. Adult Free Speech: Can They Be Reconciled?*, 29 CONN. L. REV. 873, 882 (1997) (quoting Voltaire) ("I may not agree with you, but I will defend to the death your right to say it'").
[205] *See supra* notes 113 & 171.
[206] *See* HENRICKSEN, *supra* note 128, at 64–88; Wes Henricksen, *On the Legality of Defrauding the Public*, 107 MARQ. L. REV. 1043, 1071–85 (2024).

Right. One more caveat is in order, however. This is a very short list of political lies. The list, of course, could go on ad nauseam. After all, as noted by economist Thomas Sowell, "In politics, the goal is not truth but votes. If most voters believe what is said, that rhetoric is a success, as far as politicians are concerned."[207] Accordingly, "[i]f you took all the deception and fraud out of politics, there might not be a lot left."[208] Thus, any such list of political lies is, by necessity, woefully incomplete and selective. I'll touch on three examples from both sides of the political aisle.

The first example from the Right is the stolen election lie arising out of the 2020 U.S. presidential election. Before, during, and after the election, Trump claimed that the only way his opponent might win the election was through cheating or massive fraud.[209] In his book *Cheap Speech*, Professor Richard Hasen detailed a number of Trump's false claims and bad faith efforts to overturn the 2020 election:

> By the Saturday after Election Day, it was apparent that Joe Biden had sufficient leads in enough states to win the presidency by an Electoral Margin of 306 to 232. Rather than concede the race once the outcome became clear and news networks had called it for Biden, Trump repeatedly and falsely claimed victory—even a "landslide"—arguing that the reported results were marred by fraud, pointing in part to his ephemeral Election Night leads, based on only partial vote counts in key states.
>
> He and his allies brought dozens of suspect lawsuits across the United States calling the election results into question, but once in court, his lawyers did not present any real evidence of significant voter fraud anywhere in the United States. When his lawsuits began to fail, he called on Republican state legislatures to thwart the will of the people by selecting phony slates of Trump electors for the Electoral College. He tried to pressure the Georgia secretary of state to "find" 11,780 votes—one more than Biden's margin of victory—to flip the results to Trump. He leaned on Republican governors and the U.S. Department of Justice to help in his efforts to declare the results fraudulent. About three weeks after the election Trump, without conceding, allowed the transition process to begin while still falsely claiming voter fraud.[210]

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[207] THOMAS SOWELL, SOCIAL JUSTICE FALLACIES 51 (2023).
[208] THOMAS SOWELL, DISMANTLING AMERICA 71 (2010).
[209] *See, e.g.*, Marshall Cohen & Daniel Dale, *Fact check: 12 Election Lies Trump Is Using to Set the Stage to Dispute a Potential 2024 Defeat*, *CNN* (Sept. 30, 2024, 12:00 AM), https://www.cnn.com/2024/09/30/politics/fact-check-trump-election-lies-2024/index.html; *see generally* Wes Henricksen & Broderick Betz, *The Stolen Election Lie and the Freedom of Speech*, 127 PENN ST. L. REV. PENN STATIM 111 (2023).
[210] HASEN, CHEAP SPEECH at 4.

For weeks, Trump continued spreading false and misleading—and totally baseless—claims that the election had been stolen by his opponent.[211] "By mid-December 2020, President Trump had spent months insisting to his base that the only way he could lose the election was a dangerous, wide-ranging conspiracy against them that threatened America itself."[212] For instance, on December 19, Trump tweeted: "Statistically impossible to have lost the 2020 Election. Big protest in D.C. on January 6th. Be there, will be wild!"[213] On December 26, he tweeted: "If a Democrat Presidential Candidate had an Election Rigged & Stolen, with proof of such acts at a level never seen before, the Democrat Senators would consider it an act of war, and fight to the death. Mitch & the Republicans do NOTHING, just want to let it pass. NO FIGHT!"[214] A mere fourteen minutes later, he tweeted: "The 'Justice' Department and the FBI have done nothing about the 2020 Presidential Election Voter Fraud, the biggest SCAM in our nation's history, despite overwhelming evidence. They should be ashamed. History will remember. Never give up. See everyone in D.C. on January 6th."[215] Then, on January 1, Trump tweeted: "The BIG Protest Rally in Washington, D.C., will take place at 11.00 AM on January 6th . . . StopTheSteal!"[216] What occurred next is detailed in the "Trial Memorandum of the U.S. House of Representatives in the Impeachment Trial of President Donald J. Trump":

> As January 6 approached, and President Trump's other attempts to overturn the election failed (including his schemes at DOJ), he further escalated his call to arms. On January 4, he gave an angry speech in Dalton, Georgia, warning that "Democrats are trying to steal the White House . . . [y]ou can't let it happen. You can't let it happen," and "they're not taking this White House. We're going to fight like hell, I'll tell you right now." The next day, on January 5, he tweeted: "Washington is being inundated with people who don't want to see an election victory stolen by emboldened Radical Left Democrats. Our Country has had enough, they won't take it anymore! We hear you (and love you) from the Oval Office. MAKE AMERICA GREAT AGAIN!" Trump made it clear that his goal was to prevent the election results from being certified: "I hope the Democrats, and even more importantly, the weak and ineffective RINO section of the Republican Party, are looking at the thousands of people pouring into

[211] *See supra* note 209; *see supra* note 210.
[212] Jamie Raskin, Diana DeGette, David Cicilline, Joaquin Castro, Eric Swalwell, Ted Lieu, Stacey Plaskett, Madeleine Dean, Joe Neguse, *Trial Memorandum of the U.S. House of Representatives in the Impeachment Trial of President Donald J. Trump*, IN RE IMPEACHMENT OF DONALD J. TRUMP, February 2, 2021, at 12–14 (bold font and footnotes omitted), https://int.nyt.com/data/documenttools/impeach-ment-manager-brief/77a0a0d89423b554/full.pdf.
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.*

> D.C. They won't stand for a landslide election victory to be stolen. @senatemajldr @JohnCornyn @SenJohnThune"[217]

To date, Trump—recently elected to his second term in office[218]—and other Republicans have continued to repeat and perpetuate the stolen election lie.[219]

The second example from the political Right comprises a handful of lies in Trump's announcement that he would run for the 2024 presidential nomination. Trump claimed he had "built the greatest economy in the history of the world," that America surrendered $85 billion worth of military equipment to the Taliban in the Afghanistan withdrawal, and that his administration had "filled up" the Strategic Petroleum Reserve but that under Biden it has been "virtually drained."[220] All statements were false. In fact, Trump's economy was not the strongest in the history of the world by any reasonable measure; the value of the military equipment was only $7.1 billion, much of it inoperable before withdrawal; and in fact, the Strategic Petroleum Reserve not only was not "drained"—virtually or otherwise—under Biden, but in fact contained less when Trump left office than when he took office.[221]

The third example from the Right is an oft-repeated falsehood that Trump stated during a press conference in which he told 163 lies in 64 minutes.[222] It is the accusation that those on the Left—in this case, presidential candidate Kamala Harris and her running mate Tim Walz—are for "open borders."[223] In reference to Walz, Trump said: "He doesn't want to have borders."[224] This accusation has no evidence to support it; it is a gross misrepresentation the Democratic platform position on immigration.[225]

Turning to falsehoods disseminated by the Left, the first was an assertion by Biden and other Democrats during the 2024 presidential campaign that Trump is a fascist, and would become a dictator immediately if once again elected to the office.[226] This became a

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[217] Raskin, *Trial Memorandum*, at 12–14.
[218] Franco Ordoñez, *How Trump Won a Second Term as President in 2024*, NPR (Nov. 6, 2024, 9:53 AM), https://www.npr.org/2024/11/06/g-s1-33007/how-trump-won-policies.
[219] *See, e.g.*, Molly Bohannon, *Vance Avoids Saying Trump Lost 2020 Race—Again—In Latest Interview*, FORBES (Oct. 13, 2024, 2:31 PM), https://www.forbes.com/sites/mollybohannon/2024/10/13/vance-again-avoids-saying-trump-lost-2020-race-in-latest-interview/.
[220] Linda Qiu, *In Announcing 2024 Bid for Presidency, Trump Echoes Old Falsehoods*, N.Y. TIMES (Nov. 16, 2022), https://www.nytimes.com/2022/11/16/us/politics/trump-fact-check.html; Daniel Dale & Paul LeBlanc, *Fact Check: 20 False and Misleading Claims Trump Made in His Announcement Speech*, CNN (Nov. 16, 2022, 10:21 AM), https://www.cnn.com/2022/11/15/politics/fact-check-trump-announcement-speech-2024/index.html.
[221] *Id.*
[222] Domenico Montanaro, *162 Lies and Distortions in a News Conference. NPR Fact-checks Former President Trump*, NPR (Aug. 11, 2024, 07:00 AM), https://www.npr.org/2024/08/11/nx-s1-5070566/trump-news-conference.
[223] *Id.*
[224] *Id.*
[225] *Id.*
[226] Samantha Waldenberg & Michael Williams, *Biden Believes Trump is a Fascist, White House Says*, CNN (Oct. 23, 2024, 4:16 PM), https://www.cnn.com/2024/10/23/politics/biden-trump-fascism/index.html.

Democratic talking point during the campaign.[227] Although certainly the terms "fascist" and "dictator" may have someone flexible definitions, any fair objective interpretation would apply these terms to autocrats such as Vladimir Putin, Bashar al-Assad, or Kim Jong-Un. The term fascist was coined with the rise of Mussolini in Italy, Hitler in Germany, and Franco in Spain.[228] Although "fascist" has clear historical roots, its definition might arguably be broader than its original use and meaning, but nevertheless it must reasonably encompass what it has always been understood to mean, which is totalitarian government.[229] Accordingly, the assertion that Trump is akin to prior autocratic leaders who led under the banner of fascism, or that his presidency would bear any actual likeness to them, is not only a stretch, but much closer to a falsehood than to any truthful or accurate statement. It lacks credible evidence, particularly given the fact Trump served as president for four years previously and although there are certainly well-founded policy and ideological critiques against his presidency, his term in office was not a fascist dictatorship in the manner of Mussolini, Hitler, or Franco. Moreover, even if the accusation was arguably an opinion or belief, or mere hyperbole, it was asserted in a manner as to serve as a grave warning, if not an assertion of plain fact.[230] Yet, the behavior of Biden and other Democrats in the immediate aftermath of the 2024 election demonstrated they clearly, in truth, did not expect Trump to be a fascist dictator; rather, Biden conducted the ceremonial meetings and transfer of power duties of office in the same manner as would be the case for any other regular, non-fascist political opponent.[231]

The second leftwing falsehood was Biden's assertion that Trump was the only president in history to not attend his successors inauguration.[232] Shortly after the 2024 election, Biden was interviewed, and he said, "The only president to ever avoid an inauguration was the guy that's about to be inaugurated."[233] This falsehood, like the one above that painted Trump as a fascist dictator, are part of a wider leftwing narrative aimed at convincing

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[227] *See, e.g.*, Eric Bradner et al., *Takeaways from Kamala Harris' CNN town hall*, CNN (Oct. 23, 2024, 10:57 PM), https://www.cnn.com/2024/10/23/politics/takeaways-kamala-harris-town-hall/index.html; Michael S. Schmidt, *As Election Nears, Kelly Warns Trump Would Rule Like a Dictator*, N.Y. TIMES (Nov. 6, 2024), https://www.nytimes.com/2024/10/22/us/politics/john-kelly-trump-fitness-character.html.

[228] *See* Barbara Pozzo, *Masculinity Italian Style*, 13 NEV. L.J. 585, 597 (2013); Olivia B. Waxman, *What to Know About the Origins of Fascism's Brutal Ideology*, TIME (March 22, 2019, 2:46 PM), https://time.com/5556242/what-is-fascism/.

[229] *See* Daniel Gordon, *Life's Complexities: Rethinking Barnette, the Flag, Totalitarianism, and the First Amendment*, 17 U. MASS. L. REV. 142, 162–63 (2022) (discussing how the fascist movement was understood to mean totalitarian government, "which concerns itself not only with political organization and political tendency, but with the whole will and thought and feeling of the nation") (quoting Giovanni Gentile, *The Philosophic Basis of Fascism*, 6 FOREIGN AFFS. 290, 299 (1928)).

[230] *See supra* note 226; *see supra* note 227.

[231] *See* Michael D. Shear, *Trump and Biden Make Nice at the White House, at Least for 29 Seconds*, N.Y. TIMES (Nov. 13, 2024), https://www.nytimes.com/2024/11/13/us/politics/trump-biden-white-house.html.

[232] Taija PerryCook, *Biden Called Trump the Only President to Avoid Successor's Inauguration. Here's Why He Was Wrong*, FACT CHECK (Jan. 2, 2025), https://www.snopes.com/fact-check/presidents-didnt-attend-inauguration/.

[233] *Id.*

the public that Trump is a wildly unqualified and dangerous choice for president, although he served previously as president and, in the 2024 election, a majority of Americans voted for him.[234] Indeed, Trump won the popular vote by more than two million votes.[235]

The third leftwing falsehood is the assertion that biological sex categories of men and women, and the differences caused by these sex categories, are unsupported by science, if not entirely nonexistent.[236] During the 2024 election, for example, a Democratic state representative from New Hampshire argued against a state law providing that schools should provide separate locker rooms for boys and girls, and stated, "The term 'biological male' has no commonly accepted definition."[237] Moreover, leftwing congressional witnesses have also denied that biological males have physical and physiological advantages over biological females when debating the issue of transgender participation in athletics,[238] notwithstanding the fact males' athletic advantages are scientifically uncontroversial and well-known by athletes themselves.[239] In fairness, many asserting falsehoods at odds with biology on this issue likely do so to further well-meaning aims, such as protecting the rights of

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[234] *US Presidential Election Results 2024*, BBC, https://www.bbc.com/news/election/2024/us/results.
[235] *Id.*
[236] *See, e.g.*, Evan Lips, *NH Dem Says There's No 'Accepted Definition' of 'Biological Male'*, NH JOURNAL (Oct. 10, 2024), https://nhjournal.com/nh-dem-says-theres-no-accepted-definition-of-biological-male/.
[237] *Id.*
[238] *See* Elad Vaida, *NCAA President says it's 'Debatable' That Male Athletes Have an Advantage Over Female Opponents, gets Grilled by Sen. Kennedy*, CAMPUS REFORM (Dec. 18, 2024, at 4:32 PM); PBS NewsHour, *Senate Judiciary Committee hearing on LGBTQ+ rights as Pride Month continues*, at 1:43–1:50 (YouTube, June 21, 2023), https://www.youtube.com/watch?v=95yMXFv2geA; Elizabeth Troutman, *Riley Gaines Grand Slams Queer Activist's Senate Testimony That Men Can't Beat Serena Williams*, FOX NEWS (June 21, 2023, at 2:51 PM), https://www.foxnews.com/politics/riley-gaines-grand-slams-queer-activists-senate-testimony-men-cant-beat-serena-williams; Shayna Medley & Galen Sherwin, *Banning Trans Girls From School Sports Is Neither Feminist Nor Legal*, ACLU (March 12, 2019), https://www.aclu.org/news/lgbtq-rights/banning-trans-girls-school-sports-neither-feminist-nor-legal (arguing there is "ample evidence that girls can compete and win against boys").
[239] *See, e.g.*, Doriane Lambelet Coleman & Wickliffe Shreve, *Comparing Athletic Performances: The Best Elite Women to Boys and Men*, Duke Law School, CTR. FOR SPORTS L. & POL'Y, https://law.duke.edu/sites/default/files/centers/sportslaw/comparingathleticperformances.pdf (observing that world track and field records held by women were, in one year, beaten by dozens to hundreds of boys under eighteen, and by thousands of adult male athletes, and arguing that the difference in performance "isn't the result of boys and men having a male identity, more resources, better training, or superior discipline," but rather the boys' and men's "androgenized body"); Regarding the assertion that the Williams sisters can beat male tennis players, see, e.g., *Serena Williams on David Letterman 22 August 2013*, at 5:25-6:00 (YouTube, July 13, 2017), https://www.youtube.com/watch—?v=6ALxFXyRno8 (interview in which Serena Williams explains that men's and women's tennis are "completely different sports," that the men are faster, and serve and hit the ball harder, and that if she, a top-ranked women's tennis player, were to play Andy Murray, one of the top men's players, she would lose 6-0 and 6-0 "in about five to six minutes, maybe ten minutes"); Chris Oddo, *The Man Who Beat Venus and Serena Back-to-Back*, TENNIS NOW (Nov. 7, 2017), https://tennisnow.com/the-man-who-beat-venus-and-serena-back-to-back/ (recounting how at the 1998 Australian Open, Serena and Venus Williams both claimed they could beat any male tennis player outside the top 200, and the 203rd ranked player, Karsten Braasch, accepted the challenge and beat the sisters 6-1 and 6-2, respectively, in back-to-back matches); *WTA year-end rankings for 1998,* TENNIS ABSTRACT, http://tennisabstract.com/reports/wtaRankings1998.html (showing both Williams sisters ranked in the top 20 in the women's tennis rankings in 1998).

transgender individuals—a critical and complex contemporary issue[240]—but well-meaning aims do not change a factual falsehood into truth. The question posed in this article is whether any such falsehood expressed by the government, on this issue or on any other, might violate the right to privacy.

B. Why some intentional government falsehoods might violate the right to privacy

Florida's constitution guarantees that "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life."[241] The scope of a person's "private life" is certainly open to interpretation, but has already been held to include at least some personal choices,[242] and might reasonably be interpreted to cover at least some autonomous thoughts, ideas, and beliefs.[243] That is, much of our own independent thoughts, ideas, and beliefs are part of our own private life we expect not to be interfered with by the government.[244] This is particularly true when it comes to thoughts, ideas, and beliefs (as well as decisions) at the core of the democratic process, such as the choice of which policies are best for ourselves and society.[245] Although the government likely cannot avoid *all* intrusions into our private mental life in these areas, intentional falsehoods calculated to mislead and deceive might well cross the line into protected territory.[246] Such a government invasion of these most personal

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[240] *See generally,* Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894 (2019); Lewis A. Grossman, *Criminalizing Transgender Care*, 110 IOWA L. REV. 281 (2024); Ashley Attia, *Explicit Equality: The Need for Statutory Protection Against Anti-Transgender Employment Discrimination*, 25 S. CAL. INTERDISC. L. J. 151 (2016); Diana Elkind, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895 (2007); Erin E. Clawson, *I Now Pronoun-Ce You: A Proposal for Pronoun Protections for Transgender People*, 124 PENN STATE L. REV. 247 (2019); Sophia Ureta-Fulan, *Litigating the Future of Youth's Access to Gender-Affirming Care*, 51 UC L. CONST. Q. 283 (2024); Casey Smith, *An Overview of Transgender Laws, Legislation, and Litigation in Kansas*, 93 KAN. B.J. 35 (2024); Amanda K. Baumle, Steven Boutcher, M.V. Lee Badgett, & Donald Tomaskovic-Devey, *Enforcement Agencies and an Emerging Category of Law: Examining EEOC Processing of Sexual Orientation and Gender Identity Charges*, 58 L. & SOC'Y REV. 607 (2024).

[241] FLA. CONST. art. I, § 23.

[242] *See* Nancy C. Marcus, *Reclaiming Personal Privacy Rights Through the Freedom of Intimate Association*, 54 SETON HALL L. REV. 1047, 1068–69 (2024) (discussing the Supreme Court's interpretation of the federal right of privacy to protect several "intimate life choices," including whether to engage in certain sexual conduct, whether to purchase or use contraceptives, and, until *Dobbs*, whether to choose to have an abortion, at least up to a certain point in the pregnancy).

[243] *See* Norton, *supra* note 129, at 75; Klass *supra* note 130, at 714–15, and; Druzin, *supra* note 131, at 535.

[244] Indeed, one of the reasons the freedom of speech is deemed fundamental in American jurisprudence is that speech is the verbalization of thought, and thus regulating speech is one manner of regulating thought. *See* Lucas Swaine, *Does Hate Speech Violate Freedom of Thought?*, 29 VA. J. SOC. POL'Y & L. 1, 11–16 (2022) (discussing the interplay between the "freedom of thought" and the "freedom of speech"); Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 186 (1997) (noting that "the Court has drawn a line between acceptable government regulation of lies and unacceptable attempts to regulate thoughts").

[245] *See e.g.,* Norton, *supra* note 129 (noting that some "government lies . . . deprive their targets of the ability meaningfully to exercise voting, reproductive, or other protected rights"); STRUDLER, *supra* note 132 (noting that "a lie interferes with its victim's rational deliberation [and] . . . robs a person of her prospects for making certain rational choices about what to do or what to believe").

[246] *Id.*

and private areas of one's life, accordingly, arguably fit within the scope of Florida's—and perhaps other states'—privacy rights, particularly as they cover a broader scope of decisional privacy than that protected by the federal Constitution.[247]

However, whether bad faith government propaganda amounts to an actual "intrusion" into this area of individuals' private life—in the constitutional sense—is another question, as is whether such an intrusion into the right of privacy should nevertheless be tolerated.[248] Consider the stolen election lie. This was a falsehood disseminated, based on the evidence, in a manner that was either knowingly false or with reckless disregard as to its falsity.[249] Moreover, it must have been asserted, by those who first manufactured and spread it, as with most communications, with the intent of making those who heard it believe it to be true.[250] This, in other words, was a purposeful manipulation of millions of people on a matter of enormous importance: the integrity and outcome of a presidential election. Moreover, given the asymmetrical dynamic between speaker and listener when it comes to government propaganda, the manipulation of public opinion via the powerful government megaphone smacks as even more wrongful than would be the case of a private individual lying to another private individual.[251] Arguably, then, the stolen election lie is a significant intrusion into the individual decision-making processes of millions of people, something that might run afoul of the right to privacy.[252]

This argument is not without valid critiques. One counterargument might be that the whole idea of considering government lies to potentially violate a constitutional right to privacy would lead to a slippery slope of holding that *all* government lies must be such violations. A second critique might be that even if government lies could violate the right to privacy, in theory, enforcing this right would necessitate empowering the government to become an arbiter of truth akin to Orwell's Ministry of Truth in the novel *1984*.[253] And if that were the case—so this critique might continue—that would lead to two outcomes, both absurd. The first is that if the government falsehood at issue was communicated by the current government or ruling party, then that would mean the government possesses the power to assert that the message is true, regardless of its actual truthfulness or falsity. And second, if the alleged lie was communicated by a prior government, or under a different political party, then the government possesses the power to assert the message is false,

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[247] City of N. Miami v. Kurtz, 653 So. 2d 1025, 1027 (Fla. 1995).
[248] *See Id.* (noting that Florida's right to privacy "was not intended to be a guarantee against all intrusion into the life of an individual"); Machovec v. Palm Beach Cnty., 310 So. 3d 941, 948 (Fla. Dist. Ct. App. 2021) (noting that Florida's right to privacy "is not absolute").
[249] *See supra* note 210, at 110.
[250] The bad faith intention of the speaker is key to the analysis. *See, e.g.*, Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 170 (1997) ("The State can and should regulate speech that, by attempting to override the thought processes of other individuals, disrespects their rational capacities.").
[251] *See* Norton, *supra* note 129.
[252] *See* Wells, *supra* note 250.
[253] GEORGE ORWELL, 1984 (1949).

regardless of its actual truthfulness or falsity. In other words, both counterarguments assert that the whole idea of empowering the state to punish bad faith government propaganda leads—so the arguments go—inevitably to undesirable, if not downright tyrannical, results.[254]

In response, however, it is worth noting that although the concerns expressed in both counterarguments are valid, such critiques must grapple with the very real danger now posed by bad faith government propaganda.[255] That is, though proposed solutions pose their own problems and risks, so too does the status quo. The free-flowing falsehoods disseminated by the state are a problem in need of addressing, one way or another.[256] A democratic process where candidates can simply manufacture and disseminate largescale intentional falsehoods intended to mislead voters might have always posed dangers, but in today's digital world the dangers have multiplied.[257] Moreover, there are a number of reasons why the Ministry of Truth argument against punishing largescale falsehoods misses the mark.[258] But those issues are being addressed elsewhere.[259]

More to the point, however, there is an important distinction to be made between falsehoods that are clearly false statements of fact, such as the stolen election lie, and other statements that present a more problematic issue, such as statements that might arguably be an opinion, viewpoint, or interpretation. Almost all of the other government falsehoods listed above—apart from the stolen election lie—are of this far more problematic kind of lie; that is, they are not, strictly-speaking, provably false statements of fact. Trump's lies about having "built the greatest economy in the history of the world," about the value of the surrendered military equipment tied to the withdrawal from Afghanistan, and about how his administration had "filled up" the Strategic Petroleum Reserve but that Biden had "virtually drained" it are all matters well within the scope of interpretation of events, rather than strict facts that might be provable in court as either true or false.[260] The same can be said about Trump's accusation that his opponents wanted "open borders."[261] By contrast, when

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[254] Regarding both counterarguments, *see, e.g.*, Eugene Volokh, *When Are Lies Constitutionally Protected?*, 4 J. FREE SPEECH L. 685, 690 (2023) (noting there are some areas of speech where "it is perilous to permit the state to be the arbiter of truth") (quoting United States v. Alvarez, 567 U.S. 709, 751–52 (2012) (Alito, J., dissenting)).

[255] *See, e.g.*, United States v. Miller, 605 F. Supp. 3d 63, 66-67 (D.D.C. 2022) (noting that the stolen election lie culminated in the January 6, 2020 attack on the U.S. Capitol); Edward D. Cavanagh, *Countering the Big Lie: The Role of the Courts in the Post-Truth World*, 107 CORNELL L. REV. ONLINE 64, 80 (2022) (same).

[256] Russell L. Weaver, *Remedies for "Disinformation"*, 55 U. PAC. L. REV 185, 190 (2024) (discussing ways that society might be able "to try to tackle the problem of disinformation"); Russell L. Weaver, *Fake News and the Covid-19 Pandemic*, 9 J. INT'L MEDIA & ENT. L. 273, 281 (2021) ("Disinformation regarding the pandemic has created various societal problems.").

[257] Richard K. Sherwin, *Anti-Speech Acts and the First Amendment*, 16 HARV. L. & POL'Y REV. 353, 355–56 (2022).

[258] HENRICKSEN, *supra* note 128, at 177–78.

[259] *See generally* Mark Tushnet, *Epistemic Disagreement, Institutional Analysis, and the First Amendment Status of Lies*, 4 J. FREE SPEECH L. 651 (2023); *cf.* Catherine J. Ross, *Ministry of Truth: Why Law Can't Stop Prevarications, Bullshit, and Straight-Out Lies in Political Campaigns*, 16 FIRST AMEND. L. REV. 367 (2017).

[260] Qiu, *supra* note 220; *see also* Dale & LeBlanc, *supra* note 220.

[261] Montanaro, *supra* note 222.

it comes to the integrity of an election, an assertion that it was "stolen" through "massive fraud" is quite plainly a statement of fact that is either true or false. That is not to say there is *no* wiggle room for hyperbole or insults on such matters. But the stolen election lie went much further than saying, for instance, that "my opponent is a crook" or "a cheat" or something vague like that. It specifically asserted the election was literally "stolen" through "fraud." That is something that either occurred or it didn't. (We know, of course, that it did not happen.[262]) Trump's other lies discussed in this paragraph were likewise false,[263] but proving so in a court of law—or rather, permitting a claim of falsity to move forward in a court on law on these topics—would be far more problematic.

The same can be said for all but one of the lies from the Left. This includes that assertion that Biden and others believe Trump is a fascist and would rule the United States as a dictator[264] and the assertion that science does not support the existence of, or differences between, the sexes of male and female.[265] In both cases, although the assertions are arguably factually false, they could just as easily be framed as statements of opinion or viewpoint, rather than statements of provable and falsifiable fact. And the third falsehood from the Left discussed, that Trump was the only president in history to not attend his successors inauguration,[266] although it is provably false, and thus a pure statement of falsifiable fact, is nevertheless of such little consequence, not only politically but societally, that such a falsehood should not subject the speaker to any serious legal repercussions notwithstanding its provable falsity. This highlights the balancing that must occur if courts were to wade into the waters of finding falsehoods to potentially violate the right of privacy. As is the case in the First Amendment context, numerous factors should be taken into account when regulating such falsehoods. Professor Cass Sunstein's four-pronged approach is a helpful starting point. He suggests looking at state of mind of the speaker, magnitude of harm the falsehood causes, the likelihood of harm, and the timing of harm.[267] These factors, at a minimum, should be taken into account and given due weight when drawing the constitutional line on intrusions into these areas of private life. Any such intrusions, of course, infringe a fundamental right and therefore must pass strict scrutiny.[268]

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[262] *See supra* note 210 at 4; *supra* note 212 at 12–14; *supra* note 255.
[263] *See supra* notes 220 & 222.
[264] Samantha Waldenberg & Michael Williams*, Biden believes Trump is a fascist, White House says*, CNN (last visited Oct. 23, 2024), https://www.cnn.com/2024/10/23/politics/biden-trump-fascism/index.html.
[265] *See, e.g.*, Evan Lips, *NH Dem Says There's No 'Accepted Definition' of 'Biological Male'*, NH JOURNAL (last visited Oct. 10, 2024), https://nhjournal.com/nh-dem-says-theres-no-accepted-definition-of-biological-male/.
[266] Taija PerryCook, *Biden Called Trump the Only President to Avoid Successor's Inauguration. Here's Why He Was Wrong*, SNOPES: FACT CHECK (Jan. 2, 2025), https://www.snopes.com/fact-check/presidents-didnt-attend-inauguration/.
[267] *See* SUNSTEIN, *supra* note 128 at 14–17.

[268] *See, e.g.*, Green v. Alachua Cnty., 323 So. 3d 246, 250 (Fla. Dist. Ct. App. 2021); 7020 Ent., LLC v. Miami-Dade Cnty., 519 F. Supp. 3d 1094, 1104 (S.D. Fla. 2021); Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1253 (Fla. 2017); State v. J.P., 907 So. 2d 1101, 1109 (Fla. 2004).

It is the coercive and deceitful nature of propaganda,[269] particularly when it is provably false, that supports the idea of regulating it, not only under the First Amendment but as potentially a violation of the right of privacy. "[P]ropaganda, unlike persuasion, seeks only the satisfaction of the propagandist."[270] Moreover, "[o]ne of propaganda's key characteristics is that the speaker mobilizes it for their own benefit, rather than for the audience's, so that its goal is inherently negative."[271] For that reason, others have already argued that "government propaganda undermines core goals of the Free Speech Clause, most notably the promotion of democratic self-governance ," and should therefore be regulable.[272] This is particularly true given that propaganda, by its nature, "serve[s] a nefarious and antidemocratic purpose that is itself at least partly concealed in the expression of the propaganda."[273] Because it "is designed to change group behavior in a manner advantageous to the propagandist," propaganda should, some argue, not enjoy full First Amendment protections, but rather be treated as akin to other deceitful, self-serving speech that harms others.[274]

Moreover, the Supreme Court has made clear that each state has the "power," if not the obligation, "to shelter its people from … fraud."[275] Thus, efforts to defraud people, even if targeted at the public at large, are something within the states' purview to protect against. Courts have already decided this, at least in certain limited kinds of cases, such as those involving tobacco and asbestos injuries. For instance, federal district court in New York held that "[m]isrepresentations made to the public at large may give rise to a claim of fraud so long as the plaintiff was part of the class of persons intended to receive the misrepresentations."[276] Similarly, one court in Georgia held:

> Even where the representations are made to the public at large, or to a particular class of persons, as long as they are given with the intention of influencing any member of the public or of the class to whom they may be communicated, any one injured through the proper reliance thereon may secure redress.[277]

Arguably, efforts to defraud the public at large are at least as serious as efforts to defraud individual victims. Some bad faith government

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[269] BETH S. BENNETT & SEAN PATRICK O'ROURKE, *A Prolegomenon to the Future Study of Rhetoric and Propaganda: Critical Foundations,* in READINGS IN PROPAGANDA AND PERSUASION: NEW AND CLASSIC ESSAYS 51, 63 (Garth S. Jowett & Victoria O'Donnell eds., 2006).
[270] *Id.*
[271] Caroline Mala Corbin, *The Unconstitutionality of Government Propaganda*, 81 OHIO ST. L.J. 815, 826 (2020).
[272] *Id.* at 829.
[273] Sara Dillon, *The Propaganda Conundrum: How to Control This Scourge on Democracy*, 23 OR. REV. INTL. L. 123, 124 (2022).
[274] *Id.*; *see also* Corbin, *supra* note 271, at 829.
[275] H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533 (1949).
[276] In re Simon II Litig., 211 F.R.D. 86, 140 (E.D.N.Y. 2002).
[277] Starling v. Seaboard Coast Line R.R. Co., 533 F. Supp. 183, 193 (S.D. Ga. 1982).

propaganda fits squarely into this category of intentional falsehoods. Certainly, the stolen election lie was disseminated to the public at large to influence people's opinions and political decisions. Certainly, the stolen election lie caused cognizable harm. It also caused, and continues to cause, an enormous amount of less quantifiable or measurable injury, particularly with regard to our democratic institutions and the functioning of our electoral democracy.

Accordingly, at least some of the government's purposeful manipulation of people's beliefs and decisions, and ultimately their lives, when based on intentional falsehoods and when done in bad faith, arguably intrudes into the private lives of those duped by the propaganda. Whether such intrusion justifies regulation and what that regulation might look like are questions for another day. My aim here is merely to highlight the fact that bad faith government propaganda raises not only freedom of speech and fraud concerns,[278] but right of privacy concerns as well.

V. CONCLUSION

Some privacy protections against intrusions into a person's "private life" are already recognized in law: family relations, reproduction, health, and personal information.[279] But other dimensions of "private life" are mostly, if not entirely, ignored, such as "the mental and physical inviolability of the natural person."[280] The purposeful manipulation of individuals, when done one on one, is largely covered by various fraud laws,[281] and therefore calls for no right of privacy analysis. But bad faith government propaganda largely avoids regulation under the fraud laws. Therefore, if there is a solution to be found for how to either punish wrongdoers who purposefully disseminate bad faith propaganda, or to compensate victims harmed by it, courts and legislatures may need to look outside the traditional fraud context. One option for regulation might be the right of privacy under state constitutions.

Of course, it is an open question whether courts or legislatures should do anything at all to combat bad faith government propaganda, or any propaganda for that matter. The Supreme Court has a long history of skepticism with regard to regulatory fixes to combat harmful false speech.[282] Indeed, beginning almost 75 years ago the Supreme Court answered the questions I raise here by making clear the answer lies not in more regulations but in more speech. In *Dennis v. United States*,[283] for example, the Court held that "speech can rebut speech, propaganda will

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[278] Henricksen, *On the Legality of Defrauding the Public*, *supra* note 206 at 1093.
[279] *See supra* Section III.B.
[280] *Private Life Definition*, *supra* note 115.
[281] Henricksen, *On the Legality of Defrauding the Public*, *supra* note 206 at 1062–63.
[282] *See, e.g.*, Dennis v. United States, 341 U.S. 494, 503 (1951) (noting that "speech can rebut speech, propaganda will answer propaganda"); Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence."); Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974) ("However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.").
[283] Dennis v. United States, 341 U.S. 494, 503 (1951).

answer propaganda."[284] Of course, while the idea that "the solution to false speech is more speech" has a long history, so too do counterarguments against the idea.[285] Too often, more speech does not lead to truth, nor does it provide relief to victims harmed by the falsehood.[286]

Nevertheless, there are good reasons for advancing cautiously while seeking solutions to the problem of bad faith government propaganda. At the end of the day, it is an issue centered on speech. Propaganda, though it may be false, thought it may be disseminated in bad faith and for self-serving purposes, is nevertheless speech. The First Amendment stands as a crucial protection against government overreach when it comes to regulating speech. That foundational protection has no exception for any category of speech called "propaganda." Nor does it have an exception for false speech.[287] I and others have argued elsewhere that at least some intentional falsehoods disseminated to the public in bad faith, which cause substantial harm, should not enjoy full First Amendment protections.[288] But this is a call for delicate and precise action to regulate only a narrow subset of propaganda that would satisfy all elements of "fraud on the public."[289] That is, the falsehoods at issue in my call for regulation are limited to those that would satisfy all the elements of fraud, which narrows the scope of application to great degree with juxtaposed with the overall universe of falsehoods disseminated to the public. The free speech and fraud aspects of this issue are, of course, important. But state constitutions have provided another avenue to potentially allow regulation of some of the most harmful bad faith government propaganda. This makes it at least worth considering whether such purposeful and bad faith efforts to manipulate the behavior and decisions of people might justifiably be deemed an intrusion into their "private life."

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[284] *Id.*
[285] *See, e.g.*, David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991) (criticizing the arguments underpinning the consequentialist justification of the "more speech" principle).
[286] *See generally* Edward Glaeser & Cass R. Sunstein, *Does More Speech Correct Falsehoods?*, 43 J. LEGAL STUD. 65 (2014) (analyzing whether the "more speech" principle is accurate or useful); Richard K. Sherwin, *Anti-Speech Acts and the First Amendment*, 16 HARV. L. & POL'Y REV. 353, 362 (2022) (calling the "more speech" principle "ineffectual").
[287] United States v. Alvarez, 567 U.S. 709, 718 (2012) (plurality opinion).
[288] *See, e.g.*, HENRICKSEN, *supra* note 128, at 270.
[289] *Id.* at 188.

Student Protests and the Return of Blacklisting

CHARLES F. WALKER*

INTRODUCTION

Soon after the end of World War Two, the Cold War began, and fear of Communist infiltration in government and the entertainment industry became a focus for politicians and the media. The federal government's loyalty program, which included the establishment of a quasi-official government blacklist,[1] was quickly followed by blacklisting by private employers, including the Hollywood studios in particular. After the 1947 Congressional hearings involving the "Hollywood 10," the net cast by government inquiries and the concomitant blacklisting by private industry and the government widened greatly. In the late 1940s and into the 1950s, if you were a Communist Party member, or if you refused to answer questions from a congressional committee on your affiliations, you became unemployable in government or in the movie industry. Former Communist Party members, "fellow travelers"[2] and even unaffiliated political liberals and progressives were soon targeted beyond Hollywood and Washington, D.C. Academics, union members, and others were swept up, many losing their jobs after being blacklisted as a result of association with Communist Party members or a refusal to answer questions by government investigators. Free expression was stultified in what became one of the most repressive periods in American history. As Professor Geoffrey Stone describes: "From 1946 to 1954, there was a steady erosion in the support of civil liberties among those individuals and institutions we rely upon most to preserve and protect the freedom of expression – the press, intellectuals, liberal politicians, lawyers, courts, and educators" and "[b]y the mid-1950s, a decade of political repression had created a pervasive sense of apprehension among Americans that they could suffer serious consequences if they openly expressed their opinions."[3]

What started as a specific and targeted undertaking – identifying Communist Party members in the U.S. government – had metastasized into a broad hunt for political dissidents and their associates. By the mid-1950s,

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[1] *See* Part II. A. below.

[2] The term "fellow traveler" became ubiquitous in this time period and later historical accounts. One former Communist Party member, testifying before Congress, stated that the term "fellow traveler" was generally understood to mean someone who, although not a Communist Party member, was "not unsympathetic to your being a Communist." ROBERT VAUGHN, ONLY VICTIMS: A STUDY OF SHOW BUSINESS BLACKLISTING 194 (Limelight ed. 1996).

[3] GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME, FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 419 (2004). *See* Part II below.

state and local governments had joined the pursuit, and innumerable employers and institutions were inquiring into individuals' memberships and affiliations. Naming names and identifying those affiliated with or members of suspect groups became commonplace. Indeed, the stigma attached to being identified as a member of a questionable group had become such an effective weapon that the practice later spread in Southern states opposed to integration, as they sought to identify and target individual members of civil rights groups.[4]

The Supreme Court, after Chief Justice Warren's appointment and the replacement of other Justices in the mid-1950s, responded (haltingly at first) and, in a series of decisions through the 1960s and later, placed limits on many of the government's repressive efforts.[5]

Blacklisting of political dissenters now appears to be making a comeback. Student protesters are the new target. Responding to pro-Palestinian protests at Columbia University in the Spring of 2024, a group of 13 federal judges (the "Judges") announced in a letter dated May 6, 2024 (the "Judges' Letter"), that they will not hire as law clerks "anyone who joins the Columbia University community – whether as undergraduates or law students – beginning with the entering class of 2024," regardless of any individual student's participation (or lack of participation) in any protest.[6] The Judges' Letter further indicates that the Judges intend not to hire any disruptive protesters (regardless of affiliation).[7]

In parallel with the Judges' action, the U.S. House of Representatives Committee on Education and the Workforce (the "House Education Committee"), held a series of hearings and issued reports in 2023 and 2024 condemning student protests. A number of members of the House Education Committee were critical of those protests, and in its reports the committee referred to protesters as "woke mobs" and called for the executive branch "to enforce the laws and ensure colleges and universities restore

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[4] *See* Part III below.

[5] *See id.*

[6] Letter from Judge James C. Ho, et al., to Minouche Shafik, President, Columbia Univ. (May 6, 2024), https://www.cnn.com/.element/interactive/2024/05/letter-to-Shafik-from-Judges.pdf (Minouche Shafik was the President of Columbia University at the time the letter was sent. The letter included a cc to Gillian Lester, the Dean of Columbia Law School, and was signed by Judge Ho of the United States Court of Appeals for the Fifth Circuit; Judge Elizabeth L. Branch of the United States Court of Appeals for the Eleventh Circuit; Judge Matthew H. Solomson of the United States Court of Federal Claims; Judges Alan Albright and David Counts, both of the United States District Court for the Western District of Texas; Judges James W. Hendrix, Matthew Kacsmaryk and Brantley Starr, all of the United States District Court for the Northern District of Texas; Judge Jeremy Kernodle of the United States District Court for the Eastern District of Texas; Judge Tilman E. Self, III, of the United States District Court for the Middle District of Georgia; Judge Drew B. Tipton of the United States District Court for the Southern District of Texas; Judge Daniel M. Traynor of the United States District Court for the District of North Dakota; and Judge Stephen Alexander Vaden of the United States Court of International Trade).

[7] *See infra* Part I (the judges' actions as announced in the Judges' Letter are referenced below as the "Judges' Blacklist" or the "Judges' hiring ban." The Judges' Letter follows earlier announcements by one of its lead signatories, Judge James Ho, that as a result of disruptive protests at Yale Law School and Stanford Law School he would not hire any law students who had attended those schools. Judge Elizabeth Branch joined Judge Ho in blacklisting law students from Yale and Stanford); *see also* Andrew Goudsward, *Conservative Judges Extend Clerk Boycott to Stanford After Disrupted Speech*, REUTERS (Apr. 3, 2023, 3:20 PM), https://www.reuters.com/legal/government/conservative-judges-extend-clerk-boycott-stanford-after-disrupted-speech-2023-04-03/.

order."[8] The executive branch, with the inauguration of a new administration in January 2025, subsequently also expressed its antipathy to student protesters, targeting universities for their handling of pro-Palestinian campus protests while detaining and seeking to deport non-citizen protesters.[9]

Separately, a law firm – Sullivan & Cromwell – adopted a policy under which a law student's "participation in a protest – on campus or off – could be a disqualifying factor" precluding employment at the firm (the "Law Firm Blacklist").[10] The report of the Law Firm Blacklist followed upon the Judges' Blacklist and the House Education Committee hearings.[11] Under the law firm policy, a job candidate's presence at a protest or involvement in a pro-Palestinian student group will be scrutinized, and participation in a

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[8] *See Transcript: What Harvard, MIT and Penn presidents said at antisemitism hearing*, ROLL CALL (Dec. 13, 2023, 1:39 PM), https://rollcall.com/2023/12/13/transcript-what-harvard-mit-and-penn-presidents-said-at-antisemitism-hearing/ (reporting various committee members' criticism of the universities' responses to student protests); Press Release, H.R. Comm. on Education and the Workforce, (reporting various committee members' criticism of the universities' responses to student protests); Press Release, H.R. Comm. on Education and the Workforce, @EdWorkforce Unveils Alarming Report on Free Speech in Secondary Education (Sept. 21, 2023), https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=409591; H.R. COMM. ON EDUCATION AND THE WORKFORCE, 118TH CONG., REP. ON FREEDOM OF SPEECH AND ITS PROTECTION ON COLLEGE CAMPUSES 13, Sept. 21, 2023, https://edworkforce.house.gov/uploadedfiles/free_speech_committee_report_final.pdf The Republican staff of the House Committee issued a subsequent report in October 2024. *See* Comm. on Educ. and the Work Force, U.S. House of Representatives, Antisemitism on College Campuses Exposed, at 121 (2024) (Sept. 21, 2023), https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=409591; H.R. COMM. ON EDUCATION AND THE WORKFORCE, 118TH CONG., REP. ON FREEDOM OF SPEECH AND ITS PROTECTION ON COLLEGE CAMPUSES 13, Sept. 21, 2023, https://edworkforce.house.gov/uploadedfiles/free_speech_committee_report_final.pdf ; *See* also Comm. on Educ. and the Work Force, U.S. House of Representatives, Antisemitism on College Campuses Exposed, at 121 (2024) (the Republican staff of the House Committee issued a subsequent report in October 2024).

[9] *See, e.g.*, Katherine Rosman, *Legal Experts Question Trump's Authority to Cancel Columbia's Funding*, N.Y. TIMES (Mar. 17, 2025), https://www.nytimes.com/2025/03/17/nyregion/columbia-trum-p-administration-funding-fight.html?smid=nytcore-ios-share&referrringSource=articleShare; Kate Selig, *The Trump Administration Revoked 800 Student Visas. Here Is What To Know*, N.Y. TIMES (Mar. 27, 2025, updated Apr. 11, 2025), https://www.nytimes.com/2025/03/27/us/students-trump-ice-detention.html?smid=nytcore-ios-share&referringSource=articleShare.

[10] *See* Emily Flitter, *A Wall Street Law Firm Wants to Define Consequences of Israel Protests*, N.Y. TIMES (July 8, 2024, updated July 11, 2024), https://www.nytimes.com/2024/07/08/business-/sullivan-cromwell-israel-protests.html?smid=nytcore-ios-share&referringSource=articleshare (reporting on Sullivan & Cromwell's policy on student protesters and noting that a number of other prominent New York law firms have "privately said they are adopting similar" policies regarding the hiring of student protesters).

[11] The Law Firm Blacklist was preceded by an earlier communication by a group of New York law firms (including Sullivan & Cromwell) with law school deans condemning law student participation in pro-Palestinian protests and urging the deans to address the situation at their law schools. *See, e.g.*, Dan Roe, *Big Law Firms Call on Top Law Schools to Condemn Anti-Israel Protests, Harassment*, LAW.COM (Nov. 2, 2023, 8:00 AM), https://www.law.com/americanlawyer/2023/11/02/big-law-firms-call-on-top-law-schools-to-condemn-anti-israel-protests-harassment-405-131250/. Prominent alumni at a number of universities also joined in the attacks on pro-Palestinian protesters, in some cases urging that private employers blacklist undergraduates who participated in protests. *See, e.g.*, Pamela Paul, *And Now, a Real-World Lesson for Student Activists*, N.Y. TIMES (May 30, 2024), https://www.nytimes.com/2024/05/30/opinion/college-activism-israel-gaza.html?smid=nytcore-ios-share&referringSource=articleShare (describing employer reactions to pro-Palestinian protests and noting that one prominent employer requested "that Harvard release the names of students [who were members of student organizations involved in one protest event] 'so as to insure that none of us inadvertently hire any of their members.'").

protest or involvement in a group reportedly may be sufficient to preclude employment.[12]

These actions by the Judges and the law firm are fairly denominated as blacklisting. These employers are not merely exercising their discretion in screening applicants as part of the hiring process. Rather, these measures are intended to deter the hiring of students associated with pro-Palestinian protests regardless of an individual candidate's merit. In the case of the law firm, pro-Palestinian protesters and members of pro-Palestinian groups are targeted, and in the case of the Judges, all students who have attended a certain school (in addition to protesters) are barred. These actions, based on political association, are akin to the executive branch's action in the 1940s in establishing the Attorney General's List of Subversive Organizations ("AGLOSO"), the quasi-official government blacklist of the McCarthy era used to identify organizations (such as the Communist Party) as subversive and disloyal.[13] Under AGLOSO, a listed group was unilaterally deemed by the Attorney General to be "guilty" (i.e., Communist or otherwise subversive), and that determination was used as evidence against government employees in loyalty hearings.[14] AGLOSO not only led to private-industry blacklisting and loss of employment for individuals affiliated with organizations on that list, it broadly chilled associational and speech rights throughout that era.[15] Like AGLOSO and similar organizational blacklists, the demarcations by the Judges and the law firm taint all affiliated with the identified groups.

The Judges' Blacklist and the Law Firm Blacklist, in tandem with the House Education Committee hearings, also appear to have had a speech-chilling effect similar to that of AGLOSO. Although the impact of a blacklist is not subject to objective quantifiable measurement, it is notable that the number of pro-Palestinian campus protests, which proliferated across the country in the Spring of 2024, reportedly declined 64 percent in the Fall of 2024, from 3,220 to 1,151.[16] New restrictive protest policies enacted by universities undoubtedly were a significant factor (perhaps the most significant factor) in that drop, as were the arrests and suspensions of

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[12] *See* Flitter, *supra* note 10. Although the law firm hiring ban reportedly leaves open the prospect of hiring pro-Palestinian protesters and group members, it clearly taints all associated with those protests and groups, presenting them with the prospect of lost opportunity, and is undoubtedly intended to chill speech and protest activity.

[13] *See* discussion *infra* notes 63-77 and accompanying text.

[14] *See, e.g.,* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 143 (1951) (Black, J., concurring) ("Without notice or hearing and under color of the President's Executive Order 9835, the Attorney General found petitioners guilty of harboring treasonable opinions and designs, officially branded them as Communists, and promulgated his findings and conclusions for particular use as evidence against government employees suspected of disloyalty.").

[15] *See* Part II below.

[16] Johanna Alonso, *Massive Decline in Protests From Spring to Fall 2024*, INSIDE HIGHER ED (Dec. 19, 2024), https://www.insidehighered.com/news/students/free-speech/2024/12/19/2000-fewer-pro-palestinian-protests-fall-spring-2024 (reporting data from the Crowd Counting Consortium, a project run by Harvard University's John F. Kennedy School of Government and the University of Connecticut that collects data on protests). (reporting data from the Crowd Counting Consortium, a project run by Harvard University's John F. Kennedy School of Government and the University of Connecticut that collects data on protests).

many protesters as a result of the Spring 2024 protests.[17] In addition to those factors, however, the widespread publicity accompanying the blacklists and government hearings likely brought them to the attention of students and had an impact. This chilling effect highlights why the blacklists raise a more serious First Amendment concern beyond a refusal to hire an individual protester. Unlike an individual hiring decision, the announcement of a blacklist ban chills potential speech and expressive conduct, such as the political protest activity targeted here, before it happens.[18]

Peaceful political protest and freedom of association are ideas at the core of the First Amendment,[19] and blacklisting efforts targeting student protesters raise significant issues under that amendment. The Judges' Letter explicitly states that the hiring ban is based on Columbia University's "viewpoints" and the students' protest activity, and requires that those viewpoints change and that protest activity cease in order for the university to avoid the Judges' ire.[20] This threat of coercion of the university runs squarely into the Supreme Court's admonition in NRA v. Vullo,[21] that "[g]overnment officials cannot attempt to coerce private parties in order to punish or suppress views the government disfavors."[22] Of course, the Judges, like the rest of us, can voice their views freely and criticize particular beliefs and viewpoints. "What [they] cannot do, however, is use the power of the State to punish or suppress disfavored expression."[23] Yet that is

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[17] *Id.* Columbia University and other colleges and universities adopted new, more restrictive protest policies in the wake of the Judges' announcement and the House Education Committee hearings. Those more restrictive policies were prompted at least in part by those government actions. *See, e.g.*, *AAUP Condemns Wave of Administrative Policies Intended to Crack Down on Peaceful Campus Protest*, AM. ASS'N OF UNIV. PROFESSORS (Aug. 14, 2024), https://www.aaup.org/news/aaup-condemns-wave-administrative-policies-intended-crack-down-peaceful-campus-protest ("The recent proliferation of these new restrictive policies seems to be an attempt to appease politicians who are calling for university administrators to use a heavy hand against faculty and student protesters."). ("The recent proliferation of these new restrictive policies seems to be an attempt to appease politicians who are calling for university administrators to use a heavy hand against faculty and student protesters.").

[18] *See infra* Part V. B.

[19] *See, e.g.*, Counterman v. Colorado, 600 U.S. 66, 81 (2023) ("dissenting political speech [is] at the First Amendment's core"); Ams. for Prosperity Found. v. Banta, 594 U.S. 595 (2021) ("Protected association . . . 'is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority'") (quoting Roberts v. United States Jaycees, 468 U.S. 609, 622 [1984]); Charles F. Walker, *Free Speech and Disruptive Campus Protests*, 88 ALB. L. REV. (forthcoming) (discussing the role of protest and dissent in First Amendment jurisprudence); Dawn C. Nunziato, *First Amendment Protections for "Good Trouble,"* 72 EMORY L. J. 1187, 1191–1214 (2023) (discussing how the "Civil Rights Era [protest] cases forged fundamental First Amendment doctrines")(the pro-Palestinian campus protests have been largely peaceful and fit squarely within the tradition of non-violent civil rights protests in the United States); *See* Erica Chenoweth, Soha Hamman, Jeremy Pressman, & Jay Ulfelder, *Protests in the United States on Palestine and Israel, 2023-2024*, SOC. MOVEMENT STUD. (2024) (collecting, reviewing, and analyzing data, and concluding that "this pro-Palestinian movement has not been violent. That is true of both the national protest wave in general and of the student encampments in spring 2024 in particular").

[20] Judges' Letter, *supra* note 6, at 1–2.

[21] NRA v. Vullo, 602 U.S. 176 (2024).

[22] *Id.* at 180.

[23] *Id.* at 188 (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 830 (1995)). *See* Genevieve Lakier, *Enforcing the First Amendment in an Era of Jawboning*, 93 U. Chi. L. Rev. (forthcoming 2026) (manuscript at 24–25)) [hereinafter Lakier, *Enforcing the First Amendment*] (stating that the *Vullo* decision reaffirms "that the First Amendment rule against schemes of informal censorship is a prophylactic, or what we might also describe as a categorical, rule that prohibits all efforts by government actors to coerce the private suppression of speech or to force private parties to disassociate from disfavored speakers.").

exactly what the Judges are doing here. As the Chief Judge of the United States Court of Appeals for the Eighth Circuit stated in reviewing a complaint against one of the Judges for participation in the hiring ban, the "judges seek through the allocation of publicly-funded employment opportunities (or other allocation of public funds) to influence the behavior of private institutions on matters of public concern."[24] This type of coercive pressure by government officials targeting speech based on viewpoint is wholly antithetical to the First Amendment.[25]

In addition to the improper coercion of the university, the Judges' blacklisting of students based on their protest activity, their affiliation with protesters, and even their affiliation with an institution where disruptive protests have occurred, directly implicates those students' freedom of speech and association.[26] The Supreme Court has explicitly held that the First Amendment prevents the government from "conditioning hiring decisions on political belief and association . . . unless the government has a vital interest in doing so."[27] Similarly, the Court has held that government employment generally may not be denied based on an applicant's constitutionally protected speech.[28] Of course, the Court has also recognized that certain government positions are sensitive, with a heightened need for trust and confidence, which may outweigh these other interests.[29] The job of a judicial law clerk is arguably such a position, as clerks often work in close confidence with the judge, providing counsel and advice on difficult issues, all of which is appropriate for consideration in an individual hiring decision. However, as discussed below, the announcement of an across-the-board ban on public employment as a law clerk while condemning a large cohort of potential applicants for their political speech and activity, as well as their associations with others, including their attendance at a particular institution of higher education, clearly runs contrary to the First Amendment and is fairly subject to condemnation.[30]

Blacklisting of student protesters by a private law firm is also subject to criticism in this regard. Although law firms are not state actors and therefore not subject to First Amendment constraints, there are numerous state laws that bear on free speech, and employee speech and political

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[24] In re Complaint of John Doe, No. 08-24-90036, 2025 at 4 (Jud. Council 8th Cir., 2025) (Colloton, C.J.) (dismissing ethics complaint while noting that there is "a substantial question whether judges cross an important line when they go beyond expressing their personal views in an effort to persuade and begin using their power as government officials to pressure private institutions to conform to the judges' preferences.").

[25] *See* Part IV below.

[26] *See* Part V below.

[27] Rutan v. Republican Party of Ill., 497 U.S. 62, 78 (1990) (citing Torcaso v. Watkins, 367 U.S. 488, 496 (1961)).

[28] *See, e.g.*, Perry v. Sindermann, 408 U.S. 593, 597 (1972) (government may not deny public employment "to a person on a basis that infringes his constitutionally-protected interests – especially, his interest in freedom of speech."); *see also* U.S. v. Nat'l Treasury Emps. Union, 513 U.S. 454, 465 (1995) (government employees "have not relinquished 'the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest.'") (quoting Pickering v. Bd. of Ed., 391 U.S. 563, 568 (1968)).

[29] *See, e.g.*, Rankin v. McPherson, 483 U.S. 378, 388 (1987) ("in assessing the government's interest, a relevant consideration is whether the speech "has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary") (citing *Pickering*, 391 U.S. at 570-73).

[30] *See* Part V below.

activity in particular.[31] New York's Labor Law, for example – relevant here in light of Sullivan & Cromwell's New York City headquarters – prohibits a private employer's refusal to hire an applicant based on the applicant's "political activities outside of working hours" or the applicant's "recreational activities."[32] The protections afforded by that statute are intended to protect New York employees' freedoms of speech and association, and arguably apply to a refusal to hire an applicant based on political protest activity.[33] Even if the New York Labor Law does not govern here, the law firm's policy is subject to condemnation insofar as it follows upon and furthers government efforts to condemn protester speech and expressive conduct.[34] Acting in concert with government officials as they condemn speech and expressive conduct has no place within the legal profession, especially in light of the profession's role in preserving the processes and protecting the values, including free speech values, that underlie our constitutional democracy.

Blacklisting in the McCarthy era was condemned for good reason: it not only chilled First Amendment activity such as speech and political association, but it had a corrosive effect on democracy, undermining core constitutional values. Lawyers – the "foot soldiers of our Constitution"[35] – should not be abetting this activity. As one commentator has stated: "In constitutional democracies that define democratic values (e.g., representative government) and assign at least partial responsibility for protecting those values to the courts, the rule of law becomes increasingly significant for the democracy. As the experts in legal process, lawyers arguably have a special role to play in preserving that process."[36] Piggybacking on government condemnation of protesters, and blacklisting applicants on the basis of their political activity, expression, and associations, is a position ill-fitted to those who hold a central place as defenders of constitutional rights.

Part I of this Article provides a description of both the Judges' Blacklist and the Law Firm Blacklist and the reactions to those blacklists. Part II then provides some context for the practice of blacklisting with a brief overview of how blacklists and loyalty programs operated in the McCarthy era, and the Supreme Court's complicity in the abuses of that era. Part III addresses

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[31] *See, e.g.,* Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2331-2342 (2021) [hereinafter Lakier, *Non-First Amendment Law of Freedom of Speech*] (discussing worker speech protection laws); Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295 (2012) [hereinafter Volokh, *Private Employees' Speech*] (cataloguing state laws protecting employee speech and political activity).

[32] N.Y. LAB. LAW § 201-d(2)(a), (c) (McKinney 2023). *See Sullivan & Cromwell – About Us – Overview*, https://www.sullcrom.com/About/about-us (noting law firm is headquartered in New York City) (noting law firm is headquartered in New York City).

[33] *See* Part VI below.

[34] *See id.*

[35] RENNARD STRICKLAND & FRANK T. READ, THE LAWYER MYTH: A DEFENSE OF THE AMERICAN LEGAL PROFESSION 13 (2008).

[36] Fred C. Zacharias, *True Confessions About the Role of Lawyers in a Democracy*, 77 FORDHAM L. REV. 1591, 1608-09 (2009); *see also* MODEL RULES OF PRO. CONDUCT, PMBL. (AM. BAR ASS'N 1983) ("A lawyer, as a member of the legal profession, is . . . a public citizen having a special responsibility for the quality of justice.").

how the Supreme Court subsequently (albeit slowly and with some hesitation) led the country out of the McCarthy era with decisions overturning that era's precedent in some cases and, even when not explicitly overruling past cases, breaking new ground (or returning to pre-McCarthy-era ground) in opinions protecting the freedom of speech and association. Part IV sets out the argument that the Judges' ban on hiring from Columbia University is a form of informal government censorship that violates the First Amendment. Part V discusses the concerns raised by the Judges' Blacklist under the Court's post-McCarthy era cases addressing First Amendment protections for government employees, with a focus on the hiring context. Part VI addresses the free speech issues, including state law prohibitions, implicated by the Law Firm Blacklist. The Article concludes that the Judges' hiring ban is at variance with First Amendment precedent, and that the law firm's policy is similarly deficient insofar as it violates New York state law and broader free speech standards.

I. THE BLACKLISTS

In May 2024 the Judges announced their ban on hiring as law clerks anyone who has attended Columbia University.[37] The Judges stated that the action was prompted by their view that "Columbia University has become ground zero for the explosion of student disruptions, anti-semitism, and hatred for diverse viewpoints on campuses across the Nation."[38] The Judges' Letter continues:

> Disruptors have threatened violence, committed assaults, and destroyed property. As judges who hire law clerks every year to serve in the federal judiciary, we have lost confidence in Columbia as an institution of higher education. Columbia has instead become an incubator of bigotry. As a result, Columbia has disqualified itself from educating the future leaders of our country.
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> By favoring certain viewpoints over others based on their popularity and acceptance in certain circles, Columbia has failed as a legitimate, never mind elite, institution of higher education.

[37] Judges' Letter, *supra* note 6. Judge Ho subsequently reaffirmed the ban. *See* James Taranto, Opinion, *The Weekend Interview with James C. Ho: The Case of District Judges vs. Trump*, WALL ST. J., May 10–11, 2025, at A11 (discussing the Judges' Letter and Judge Ho's statement that, if Congress and the executive branch "want to get involved in this, absolutely [they should]. I would cheer that on.").
[38] Judges' Letter, *supra* note 6.

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> Recent events demonstrate that ideological homogeneity throughout the entire institution of Columbia has destroyed its ability to train future leaders of a pluralistic and intellectually diverse country.[39]

The letter states that "[s]ignificant and dramatic change in the composition of its faculty and administration is required to restore confidence in Columbia" and concludes that "absent extraordinary change, we will not hire anyone who joins the Columbia University community – whether as undergraduates or law students – beginning with the entering class of 2024."[40] The letter also states that Columbia should identify students who participate in disruptive protests so that employers are not "forced to assume the risk that anyone they hire from Columbia may be one of these disruptive and hateful students."[41]

This effort followed on the earlier announcement by Judge James Ho (who, as noted above, is a lead signatory to the Judges' Letter) that he would not hire students who had attended either Yale Law School or Stanford Law School as a result of disruptive student protests at those schools. Judge Ho announced in September 2022 that he "will no longer hire law clerks from Yale Law School" because of the disruptive student protest of an outside speaker at the school and the school administration's response.[42] In April 2023, Judge Ho stated that he "will not hire any student who chooses to attend Stanford Law School in the future" as a result of a disruptive student protest of a federal judge during a speaking event, and the school administration's response.[43] In his announcement of the Stanford Law School blacklist, Judge Ho stated that "at a minimum, law schools should identify disruptive students, so that future employers will know who they're hiring."[44]

The Judges' Blacklist has elicited a number of reactions.[45] The New York City Bar Association issued a "Statement of Concern Regarding

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[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] James C. Ho, *Agreeing to Disagree: Restoring America by Resisting Cancel Culture*, 27 TEX. REV. L. & POL. 1, 5-6, 17 (2022).
[43] James C. Ho, *Judge James Ho's Remarks Announcing a Hiring Boycott from Stanford Law School*, FED. SOC'Y: FREEDOM OF THOUGHT PROJECT (Apr. 27, 2023), https://www.freedomofthought.fedsoc.org/judge-james-hos-remarks-announcing-a-hiring-boycott-from-stanford-law-school/.
[44] *Id.* As noted above, Judge Branch joined Judge Ho in these announcements.
[45] In addressing the reactions to raucous student protests at law schools over the past few years, Professor Thomas Healy referenced Judge Ho's initial blacklist of Yale Law students, stating: "I will have little to say about the conservative backlash (to student protests) in this essay. When conservatives such as Judge Ho respond to 'cancel culture' by engaging in the very same behavior they condemn – in effect indiscriminately 'canceling' an entire student body – it is hard to take them seriously." Thomas Healy, *The Kids Are Alright*, 51 HOFSTRA L. REV. 439, 441 (2023) (noting that the judge by his com-

Improper Use of Judicial Offices in Relation to Law Clerk Hiring and Refusal to Hire" (the "NYC Bar Statement"), in which it stated that "the [Judges'] Letter improperly penalizes Columbia University's students and intervenes in a highly politicized public controversy brandishing the institutional heft of federal judicial offices."[46] The NYC Bar Statement expresses concern that the Judges' Letter was issued "in an effort to pressure Columbia to more harshly punish student protesters and police the ideological composition of its faculty – goals that implicate the free speech rights of members of the Columbia community and of the university itself," and states that "the [Judges'] Letter's blunderbuss warning to entering undergraduates and law students, none of whom was, to our knowledge, accused of illegal conduct at Columbia or anywhere else, seems intended to deter *all* students from attending that university under pain of forfeiting opportunities for future clerkships with a significant number of federal judges."[47]

A number of academics have also responded to the Judges' Blacklist. Professor Vikram Amar of the University of California at Davis School of Law said that the policy described in the Judges' Letter "imposes guilt by association" and that "at a minimum, it's not well thought through on the part of the judges."[48] Dean Erwin Chemerinsky of the University of California at Berkeley School of Law stated: "I find it outrageous the judges would punish students for the choices of their university presidents or administrators. Students should be considered on their merits, not what administrators or faculty or peers have done."[49] Professor Eugene Volokh of the Hoover Institution and UCLA School of Law echoed Professor Chemerinsky's comments, stating that Columbia students "shouldn't be held responsible for what Columbia does, and they shouldn't be retaliated against

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ments has made it clear that he seeks "passivity and acquiescence" from student protesters and not debate). The additional blacklist undertaken by the Judges, together with the Law Firm Blacklist and related congressional and executive branch actions, however, would indicate that these efforts are not waning and do warrant attention.

[46] Press Release New York City Bar Association, Statement of Concern Regarding Improper Use of Judicial Offices in Relation to Law Clerk Hiring and Refusal to Hire (June 17, 2024), https://www.nycbar.org/press-releases/statement-of-concern-regarding-improper-use-of-judicial-offices-in-relation-to-law-clerk-hiring-and-refusal-to-hire/.

[47] *Id.* (emphasis in original). (Separately, the non-profit organization Citizens for Responsibility & Ethics in Washington ("CREW") filed a complaint with the Judicial Conference of the United States regarding the Judges' Letter, as well as Judge Ho's earlier blacklisting of students from Yale Law School and Stanford Law School, stating that the blacklists violate the Code of Conduct for United States Judges.) *See* Letter from Noah Bookbinder, Citizens For Resp. & Ethics in Washington, to The Hon. Robert J. Conrad, Jr., Dir., Admin. Off. of the U.S. Courts and Sec'y, Judi. Conf. of the U.S. (June 5, 2024), https://www.citizensforethics.org/wp-content/uploads/2024/06/Judicial-Hiring-Boycott-Letter.pdf. The Judges' Blacklist has also resulted in recusal motions and complaints addressed to the individual judges who signed the letter. *See, e.g.*, Nate Raymond, *U.S. Judge Boycotting Columbia Law Clerks Won't Recuse From Protest Case*, REUTERS (Sept. 13, 2024, at 3:24 PM), https://www.reuters.com/legal/government/us-judge-boycotting-columbia-law-clerks-asked-recuse-protest-case-2024-09-13/ (reporting on recusal motion against Judge Traynor in the District of North Dakota and a complaint against eight judges presented to the Fifth Circuit)

[48] Jack Needham, *Judges' boycott of Columbia students is 'guilt by association,'* DAILY J. (May 9, 2024), https://www.dailyjournal.com/articles/378704-judges-boycott-of-columbia-students-is-guilt-by-association. Professor Amar added: "For them to say that they're not going to consider anyone from this school is basically to punish hundreds, if not thousands, of students for the actions of administrators." *Id*.

[49] *Id.*

as a means of trying to pressure Columbia to change."[50] Professor Volokh added that his concern was related to the "familiar principle" of "rejecting guilt by association. We may refuse to hire people [who] do various bad things, but we shouldn't refuse to hire people who are friends with those people, or who belong to the same groups as those people."[51] Stanford Professor Orin Kerr's comments regarding Judge Ho's earlier boycott of Yale Law School students in response to their disruptive protests are also applicable here:

> [Judge Ho] is trying to use his position as a government official, and the accompanying power to direct taxpayer dollars to employ staff, in a way that maximizes his personal agenda outside of his government work . . . . I think this 'boycott' crosses an important line. It's the line between judges expressing their personal views in an effort to persuade (which is fine), and judges harnessing their power as government officials to create pressure on private institutions to further their personal agendas (which is not fine, in my view).[52]

In contrast to the Judges' Blacklist, the Law Firm Blacklist does not involve a blanket ban on students from particular schools. Rather, it targets student involvement in protests and their association with pro-Palestinian organizations: "The firm is scrutinizing students' behavior with the help of a background check company, looking at their involvement with pro-Palestinian groups, scouring social media and reviewing news reports and footage from protests."[53] The firm is reportedly focused on antisemitic language, and under its policy "[c]andidates could face scrutiny even if they weren't using problematic language but were involved with a protest where others did."[54] The firm's position is reportedly that "protesters should be responsible for the behavior of those around them . . . or else they [are] embracing a 'mob mentality.'"[55] Accordingly, "applicants will have to "list student groups they have joined" and "[p]articipation at a protest or involvement in a group that Sullivan & Cromwell finds objectionable will prompt questioning. Applicants will have to explain their role, including

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[50] Eugene Volokh, *Columbia, the Boycotting Judges, Neutrals, and Secondary Boycotts*, REASON (May 7, 2024, 8:01 AM), https://reason.com/volokh/2024/05/07/columbia-the-boycotting-judges-neutrals-and-secondary-boycotts/.
[51] *Id.*
[52] Orin Kerr, *Boycotting Law Schools in Clerk Hiring As a Way to Influence Law School Culture*, REASON (Sept. 29, 2022, 10:53 PM), https://reason.com/volokh/2022/09/29/boycotting-law-schools-in-clerk-hiring-as-a-way-to-influence-law-school-culture/.
[53] Flitter, *supra* note 10. The firm is reportedly "looking for explicit instances of antisemitism as well as statements and slogans it has deemed to be 'triggering' to Jews." *Id.*
[54] *Id.*
[55] *Id.*

what they did to stop other protesters from making offensive or harassing statements."[56]

The law firm's policy has received support.[57] It has also been criticized. Professor Roderick Ferguson stated that "[d]isqualifying people based on what someone else nearby may have been doing seems to characterize all protesters as having a single mind-set" and that condemning an individual for membership in or participation in a group "can mimic racist thinking, sexist thinking, homophobic thinking, that one instance becomes a character of all."[58] One legal commentator has noted that aspects of the policy are reminiscent "of Sen. Joseph McCarthy during the Red Scare."[59] Other commentators have asked what "due process safeguards" will attach to the law firm's review of applicants, stating that "[s]ilencing, chilling, or deterring speech that offends no civil or criminal prohibition subtracts from our democratic dispensation and the health of civil society."[60]

Context for understanding these blacklisting efforts and their effects can be found in similar efforts by the government and private actors in the post-World War II hunt for Communist Party members and other "subversives" in the United States during the Cold War, discussed below.

II. THE MCCARTHY ERA

A. The Loyalty Program and McCarthy-Era Blacklisting

The protection of free speech and association arguably reached its 20th century nadir with the McCarthy era.[61] That period is perhaps best described as a time when – from a First Amendment point of view – government overreached, creating a profoundly oppressive social and political environment. Fear of Communism, which rose quickly after the Second World War and the demise of relations with the Soviet Union, became a central focus of numerous politicians and organizations soon after the end of the war.[62] Responding to political pressures, President Truman issued Executive Order 9835 (the "Executive Order") in March 1947 establishing a loyalty program for all current and prospective federal executive branch

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[56] *Id.*

[57] The chairman of another large New York City law firm stated, "What's happening here is really just the implementation of basic work force decency standards." *Id.*

[58] Emily Flitter, *A Wall Street Law Firm Wants to Define Consequences of Israel Protests*, N.Y. TIMES (July 11, 2024), https://www.nytimes.com/2024/07/08/business/sullivan-cromwell-israel-protests.html?smid=nytcore-ios-share&referringSource=articleshare

[59] Vivia Chen, *Sullivan & Cromwell's New Hiring Policy Is Polarizing and Worrisome*, SUBSTACK: VIVIA CHEN (May 23, 2024), https://viviachen.substack.com/p/sullivan-and-cromwells-new-hiring.

[60] Letter from Bruce Fein, Ralph Nader, & Lou Fisher to Joseph C. Shenker, Sullivan & Cromwell LLP, N.Y. TIMES (July 30, 2024), https://www.nytimes.com/interactive/2024/07/30/business/sullivan-letter.html?smid=nytcore-ios-share&referringSource=articleShare.

[61] The political environment and the Supreme Court's decisions in First Amendment cases during and following World War I closely rival the McCarthy era in this regard. *See* ROBERT JUSTIN GOLDSTEIN, POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO 1976 382– 83 (2001) [Hereinafter GOLDSTEIN, POLITICAL REPRESSION] (noting the similarity of factors that "dampened dissent" in the 1917-1920 period and the McCarthy era, including the risk of being tried for sedition or "simply being accused of being a 'subversive.'").

[62] STONE, *supra* note 3, at 323-25. In addition to the federal government, organizations at the forefront of anti-Communist efforts included the U.S. Chamber of Commerce and the Catholic Church. *Id*. at 325.

employees (the "Loyalty Program").[63] Under the Executive Order, an individual was deemed ineligible for federal employment if there were "reasonable grounds" for belief that he or she is "disloyal to the U.S. Government."[64] Every present and prospective executive branch employee was subject to an extensive loyalty investigation under the order.[65] Professor Stone states that "[i]t was [the Loyalty Program], more than any other single action, that laid the foundation for the anti-Communist hysteria that gripped the nation over the next decade."[66]

The term "disloyal" was not defined in the Executive Order; rather, that order listed types of activities by employees or applicants to be considered in assessing loyalty, including, among other things, espionage; treason; sedition; advocacy of illegal overthrow of the government; or, most significantly, "[m]embership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist or subversive . . . ."[67] This last criteria, which called for consideration of an employee or applicant's membership in an organization or group "designated by the Attorney General" led to the creation and establishment by the Department of Justice of what became known as the "Attorney General's List," – a list of "subversive organizations" which became a quasi-official blacklist.[68] Dozens of organizations were initially listed, with over 250 listed within a few years thereafter.[69] Although there was no public disclosure of the criteria for listing, for a number of years organizations that found themselves on the Attorney General's List had no right to a hearing or judicial review, and thus no right to contest being labeled "subversive."[70]

The consequences of being included on the Attorney General's List were profound:

> The effect of being listed was clearly to seriously hinder or destroy the organizations involved. Membership and contributions usually dried up, the Treasury Department revoked the tax exempt status of at least sixteen organizations that were listed, meeting places suddenly became

[63] Exec. Order No. 9835, 12 C.F.R. 59 (Mar. 25, 1947).
[64] *Id.* at 1938; *see* GOLDSTEIN, POLITICAL REPRESSION, *supra* note 61, at 299-300.
[65] STONE, *supra* note 3, at 326.
[66] STONE, *supra* note 3, at 327; *see also* GOLDSTEIN, POLITICAL REPRESSION, *supra* note 61, at 300.
[67] Exec. Order No. 9835, *supra* note 63.
[68] ROBERT JUSTIN GOLDSTEIN, AMERICAN BLACKLIST: THE ATT'Y GEN.'S LIST OF SUBVERSIVE ORG. 63 (2008) [hereinafter GOLDSTEIN, AMERICAN BLACKLIST] ("AGLOSO [the Attorney General's List of Subversive Organizations] . . . quickly became a massively publicized, quasi-official blacklist.").
[69] DAVID CAUTE, THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER 169 n. 18 (1978).
[70] STONE, *supra* note 3, at 344. Although the Supreme Court subsequently held, in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951), that the Attorney General's procedures were arbitrary and unlawful, the DOJ did not issue regulations allowing a challenge of designation until 1953, and did not grant a hearing until 1955. *See* CAUTE, *supra* note 69, at 170; GOLDSTEIN, AMERICAN BLACKLIST, supra note 68, at 181, 216-23.

> difficult to find, and the list was soon incorporated into state and local loyalty programs and became the basis for private blacklisting.[71]

Although the Attorney General's List was promulgated for the purpose of providing administrative guidance for the Loyalty Program, it was soon reportedly used by the administration for political ends.[72] Thus, when the Connecticut State Youth Conference demonstrated against the United States intervention in Greece in 1947, it was placed on the Attorney General's List.[73] Other non-profit organizations that opposed administration policy were similarly listed.[74] Being identified as a current or former member of a group on the Attorney General's list also had significant consequences for individuals, including loss of employment.[75] As a result, "because the criteria for listing were vague and undisclosed, and because new groups were constantly being added to the list, citizens had to be wary about joining *any* organization. The only 'safe' course was not to join anything."[76] As Professor Robert Goldstein stated, "the greatest effect of the Attorney General's list was not on the organizations listed . . . but on the general climate of political dissent. The loyalty program directly affected only federal employees, but the Attorney General's list affected all Americans who belonged to or contemplated belonging to or in any way associating with organizations."[77]

The Loyalty Program was itself a perversion of due process. The hearings before agency loyalty review boards have been said to be akin to a "medieval inquisition," with questions about "sympathetic association" with members of subversive organizations; actions and associations of family members; and possession or knowledge of books, films and musical records.[78] That process was described by Judge Henry White Edgerton of the United States Court of Appeals for the District of Columbia Circuit in the case of Dorothy Bailey.[79] Bailey had been denied reinstatement to her position as a training officer based on allegations that she was or had been a member of the Communist Party and other organizations on the Attorney General's list. Bailey's challenge to that determination was rebuffed by the D.C. Circuit and ultimately by the Supreme Court, which split 4-4, leaving

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[71] GOLDSTEIN, POLITICAL REPRESSION, *supra* note 61, at 310.
[72] *See* GOLDSTEIN, AMERICAN BLACKLIST, *supra* note 68, at 63 ("AGLOSO . . . was utilized in an almost unlimited variety of punitive fashions by governments and private groups across the nation."); CAUTE, *supra* note 57, at 169 ("From the outset, the list was used to intimidate and morally outlaw the Left, to pillory and ostracize critics of the Truman administration, and to deter potential critics.").
[73] CAUTE, *supra* note 69, at 169-70.
[74] *Id.*
[75] *See, e.g*., GOLDSTEIN, AMERICAN BLACKLIST, *supra* note 68, at 85 (" . . . allegations of AGLOSO ties were published in private publications that became the informal 'bibles' of the notorious 'blacklist' of the broadcast and movie industries . . . [and as a result] artists, writers, announcers, and directors . . . were effectively 'being deprived of their opportunity to make a living' because once 'listed' they became 'controversial . . .'").
[76] STONE, *supra* note 3, at 344 (emphasis in original).
[77] GOLDSTEIN, POLITICAL REPRESSION, *supra* note 61, at 310.
[78] *Id.* at 300, 302– 05; *see also* CAUTE, *supra* note 69, at 279-86.
[79] Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd without op*., 341 U.S. 918 (1951).

the Court of Appeals decision in place.[80] Judge Edgerton's dissenting opinion in the D.C. Circuit lays out the facts of the case:

> The Federal Bureau of Investigation had reported that informants believed to be reliable had made general statements purporting to connect [Bailey] with the Communist Party. These reports were not disclosed to [Bailey] and have not been disclosed to the court. The informants were not identified to [Bailey] or even to the [Loyalty Review] Board. Their statements were admittedly not made under oath. [Bailey] denied under oath any membership in and any relationship or sympathy with the Communist Party, any activities connected with it or with communism, and any affiliation with any organization that advocated overthrow of the government of the United States. She asserted her loyalty to the government of the United States. She admitted attending one Communist meeting in 1932 in connection with a seminar study of the platforms of the various parties while she was a student at Bryn Mawr.[81]

Despite these facts, the court rejected Bailey's statutory and constitutional challenges, holding that she had no right to a hearing or further process, and that the decision as to loyalty is one left solely to the executive branch: "[T]he President, absent congressional restriction, may remove from government service any person of whose loyalty he is not completely convinced."[82] As to her First Amendment challenge to the denial of reinstatement based on her alleged political beliefs, the Court stated, "[S]o far as the Constitution is concerned there is no prohibition against the dismissal of government employees because of their political beliefs, activities or affiliations . . . [T]he First Amendment guarantees free speech and assembly, but it does not guarantee Government employ."[83]

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[80] *Id.* Justice Clark, who served as Attorney General when the Loyalty Program was implemented, recused himself from the decision, resulting in the 4-4 vote affirming the decision below.
[81] *Id.* at 66. Bailey also admitted she had been a member of the American League for Peace and Democracy, an organization on the Attorney General's list. *Id*. at 50.
[82] *Id.* at 65.
[83] *Id.* at 59. Although there was precedent at that time for the view that public employees had no right to object to unconstitutional conditions of employment, *see infra* note 132, Judge Edgerton noted in his dissent that the Court's decision contravened principles espoused in prior Supreme Court precedent, stating: "Appellant's dismissal attributes guilt by association, and thereby denies both freedom of assembly guaranteed by the First Amendment and the due process of law guaranteed by the Fifth." *Id*. at

The executive branch's establishment and implementation of the Loyalty Program ran in parallel with Congressional investigations. Congressional investigations, however, unlike the administration's Loyalty Program, were not limited to federal employees, and the U.S. House of Representatives Un-American Activities Committee ("HUAC") began its now-familiar investigation of Communists in the motion picture industry in 1947.[84] HUAC soon alleged that "scores of screen writers who are Communists" had infiltrated the Hollywood studios and injected Communist propaganda into the movies.[85] HUAC famously subpoenaed eleven writers, actors, and directors who were "suspected of poisoning America's film industry," posing the same question to each: "Are you now or have you ever been a member of the Communist Party?"[86] Ten of the eleven witnesses – soon known as the "Hollywood 10" – refused to answer, and were cited by the Committee for contempt of Congress.[87] Promptly after the 1947 HUAC hearings, and prior to litigation of the contempt citations, the Hollywood studios blacklisted the Hollywood 10, refusing to employ any of them "until such time as he is acquitted or has purged himself of contempt and declares under oath that he is not a Communist."[88] Those ten witnesses had each invoked the First Amendment in refusing to answer the Committee's questions.[89]

The courts rejected that defense to the HUAC contempt citation, and the Supreme Court denied certiorari.[90] Each of the Hollywood 10 were

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74 (citing Schneiderman v. United States, 320 U.S. 118, 136 (1943) ("under our traditions beliefs are personal and not a matter of mere association, and . . . men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles.")).

[84] STONE, *supra* note 3, at 359-60. In its initial incarnation in 1938 as a Special Committee, HUAC had investigated "Communist collaboration," prompting the passage of the Alien Registration Act of 1940 (better known as the "Smith Act," after the name of its sponsor, Rep. Howard W. Smith of Virginia). LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE 299 (2016). The Smith Act, a broadly-worded anti-sedition act that proscribes, among other things, knowingly or willfully teaching or advocating (or distributing any written material that teaches or advises) the overthrow of any government in the United States by force or violence, was the basis for the prosecution in Dennis v. United States, 341 U.S. 494, 496 (1951), discussed below. *See infra* notes 136-141 and accompanying text.

[85] STONE, *supra* note 3, at 360.

[86] *Id.* at 363.

[87] GOLDSTEIN, POLITICAL REPRESSION, *supra* note 61, at 307. The German playwright Bertolt Brecht was the sole witness who answered, denying that he was or had ever been a member of the Communist Party. STONE, *supra* note 3, at 363. The other 10 witnesses, Hollywood writers and directors, refused to answer the committee's questions about membership in the Communist Party on First Amendment grounds. *Id*.

[88] LARRY CEPLAIR & STEVEN ENGLUND, THE INQUISITION IN HOLLYWOOD: POLITICS IN THE FILM COMMUNITY 1930-60 328-31, 455 (2003) (quoting the Association of Motion Picture Producers' Waldorf Statement (Dec. 3, 1947)).

[89] STONE, *supra* note 3, at 363-64.

[90] Lawson v. United States, 176 F.2d 49, 52-53 (D.C. Cir. 1949) (affirming convictions for refusal to answer HUAC's questions on Communist Party membership and rejecting First Amendment defense), *cert. denied*, 338 U.S. 934 (1950). At the time of the congressional hearings in 1947, the witnesses' legal strategy was focused on litigating the First Amendment issue to the Supreme Court, where it was anticipated there would be five votes for the First Amendment defense. *See* CEPLAIR AND ENGLUND, *supra* note 88, at 264. The composition of the Court changed before *Lawson* reached the high court, however (*see* discussion *infra* notes 122-124 and accompanying text), and the challenge to HUAC ended in the D.C. Circuit with the Supreme Court's denial of certiorari.

sentenced to prison[91] and, upon their release in 1951, all but one remained blacklisted and unemployable.[92]

Once the Hollywood studios, and the producers that controlled them, decided to blacklist the Hollywood 10, opposition to HUAC in the film industry collapsed.[93] "An anti-blacklist organization proved impossible to form in an industry town where the bosses were doing the blacklisting and the unions and guilds were ducking for political and economic cover."[94] HUAC soon gained steam, bolstered by developments both domestic (including the trial of Eugene Dennis and other Communist Party members in 1949 and the conviction of former State Department official and alleged Communist Party member Alger Hiss for perjury in 1950) and foreign (including the fall of the Chinese Nationalist Government in 1949 and the start of the Korean War in 1950).[95] The anti-communist fervor in Congress was also advanced by the rise to prominence of Senator Joseph McCarthy in 1950.[96] McCarthy had been elected to the Senate from Wisconsin in 1946 and thereafter established his name by falsely asserting that he had the names of "card-carrying Communists" in the State Department.[97] Although many Senators saw he was a fraud, McCarthy drew support from the majority of his Republican colleagues and by 1953 had become the chair of the Senate Permanent Subcommittee on Investigations.[98] From there, McCarthy ran hearings similar to HUAC's, attacking government agencies for allegedly harboring Communist infiltrators.[99] His charges were largely baseless; McCarthy "slandered witnesses and ridiculed, debased, and humiliated dozens of innocent individuals, many of whom had to litigate for years to regain their positions. Some never recovered their reputations."[100]

These congressional investigations and hearings did not lead to legislation or criminal referrals (other than for contempt in the case of those who refused to answer questions); their goal was "exposure and ruination of individuals."[101] HUAC held "more than 100 days of public hearings at which more than three hundred witnesses would testify" in 1951 and 1952.[102] Hollywood remained the target, although by this time the witnesses were

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[91] CEPLAIR & ENGLUND, *supra* note 88, at 355-56.
[92] *Id.* at 359. One member of the Hollywood 10, Edward Dmytryk, escaped blacklisting by "recant[ing] his political past" and reappearing before HUAC to answer questions and name "former comrades." *Id*. at 357-59.
[93] *Id.* at 289-92.
[94] *Id.* at 289.
[95] *See, e.g.*, GOLDSTEIN, POLITICAL REPRESSION, *supra* note 61, at 316, 320, 368. Dennis's subsequent conviction was upheld by the Supreme Court in U.S. v. Dennis, 341 U.S. 494 (1951), discussed below. *See infra* notes 135-140 and accompanying text.
[96] GOLDSTEIN, POLITICAL REPRESSION, *supra* note 61, at 320– 21.
[97] ROBERT M. LICHTMAN, THE SUPREME COURT AND MCCARTHY-ERA REPRESSION, 18 (2015).
[98] STONE, *supra* note 3, at 375-76, 382.
[99] *Id.* at 382-90.
[100] *Id.* at 384.
[101] GOLDSTEIN, POLITICAL REPRESSION, *supra* note 61, at 345. *See* Barenblatt v. United States, 360 U.S. 109, 153 (1959) (Black, J., dissenting) ("[T]he chief aim, purpose and practice of the House Un-American Activities Committee, as disclosed by its many reports, is to try witnesses and punish them because they are or have been communists or because they refuse to admit or deny communist affiliations. The punishment imposed is generally punishment by humiliation and public shame.").
[102] WALTER GOODMAN, THE COMMITTEE: THE EXTRAORDINARY CAREER OF THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES, at 298 (1968).

primarily former Communist Party members or so-called "fellow travelers."[103] The Committee's focus was on "naming names;" many ex-Communists complied and identified former colleagues in order to save their careers.[104] Others remained defiant, and refused to testify on the grounds of the Fifth Amendment, resulting invariably in blacklisting and the attendant consequences.[105] Although HUAC's hearings failed to show Communist dominion of the film industry, over the following years "some 250 writers, directors, and actors were blacklisted in Hollywood," in many cases ruining lives and careers.[106] The Hollywood blacklisting was facilitated by private groups such as the American Legion and a firm operating under the name "American Business Consultants", which compiled lists of people who, although not Communists, had "dallied with liberal politics or causes."[107] Professor Ellen Schrecker succinctly captures the essence of this aspect of McCarthyism:

> [I]t helps to view McCarthyism as a process rather than a movement. It took place in two stages. First the objectionable groups and individuals were identified – during a committee hearing, for example, or an FBI investigation; then, they were punished, usually by being fired. The bifurcated nature of this process diffused responsibility and made it easier for each participant to dissociate his or her action from the larger whole. Rarely did any single institution handle both stages of McCarthyism. In most cases it was a government agency which identified the culprits and a private employer which fired them . . . By the time the investigative furor that characterized the first stage of McCarthyism abated in the late fifties, thousands of people had lost their jobs. And thousands more, whether realistically

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[103] *Id.* at 298-301.
[104] CAUTE, *supra* note 69, at 501.
[105] Although witnesses frequently invoked both the First and Fifth Amendments in declining to answer questions about Communist Party membership, the Supreme Court continued to rebuff the First Amendment defense, while upholding reliance on the Fifth Amendment. *See* Emspak v. United States, 349 U.S. 190, 195 (1955) (affirming use of the Fifth Amendment privilege against self-incrimination where witness stated he was invoking "primarily the First Amendment, supplemented by the Fifth;" the Court stated that "[i]f it is true that in these times a stigma may somehow result from a witness' reliance on the Self-Incrimination Clause, a committee should be all the more ready to recognize a veiled claim of the privilege. Otherwise, the great right which the Clause was intended to secure might be effectively frustrated by private pressures."); Quinn v. United States, 349 U.S. 155, 163 (1955) (Reliance on the First Amendment "does not preclude . . . reliance on the Fifth Amendment as well.").
[106] STONE, *supra* note 3, at 365; *see also* GOLDSTEIN, POLITICAL REPRESSION, *supra* note 61, at 345.
[107] CEPLAIR & ENGLUND, *supra* note 88, at 387-88.

> or not, feared similar reprisals and curtailed their political activities.[108]

Blacklisting became pervasive, not just in Hollywood, but in academia, among unions, and throughout the country.[109] For example, HUAC had come to focus on colleges and universities in its search for Communists during the 1953-54 congressional term.[110] Most institutions of higher education cooperated in those investigations, and the Association of American Universities (the "AAU") went so far as to say that Communist Party membership "extinguishes the right to a university position" and that exercising the constitutional right of invoking the Fifth Amendment "places upon a professor a heavy burden of proof of his fitness to hold a teaching position and lays upon his university an obligation to re-examine his qualification for membership in its society."[111] As a result, hundreds of faculty members were dismissed or forced to resign based on their affiliations or because they invoked the Fifth Amendment when questioned.[112] Once a faculty member lost his or her position as a result of the inquiries, blacklisting kept them out of the profession. As Professor Schrecker describes:

> Almost every academic who lost a job as a result of a congressional investigation had trouble finding a new one. A blacklist was in place, a blacklist at least as comprehensive and far less well known than the one in the entertainment industry. It operated to deny academic employment to almost every teacher who refused to cooperate with an anti-Communist investigation and to an unknown number of other controversial individuals as well . . . . [D]uring the height of McCarthyism, in the middle and late fifties, no academic who

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[108] ELLEN W. SCHRECKER, NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES, at 9 (Oxford University Press, 1986). Professor Genevieve Lakier has made the same point in discussing how efforts at repression of pro-Palestinian protests on campus are reminiscent of the McCarthy era. Knight First Amendment Institute, *'War & Speech' Episode 1 Transcript: How Repressive Is This Moment, Really?* April 3, 2024), https://knightcolumbia.org/documents/79mb6nc1za_ (citing the "harnessing of both public and private power and their complex intermingling" in both eras, and noting that "it was . . . the government providing the instigation and then the private institutions providing the firepower that I think made the McCarthy era [very] powerful.")

[109] GOLDSTEIN, POLITICAL REPRESSION, *supra* note 61, at 360– 69. Unions were specifically targeted in the Taft-Hartley Act, which in effect precluded Communist Party members from serving as union officers. *See* Am. Commc'ns Ass'n v. Douds, 339 U.S. 382 (1950), discussed *infra* at notes 124-29 and accompanying text.

[110] GOODMAN, *supra* note 102, at 325-32.

[111] GOLDSTEIN, POLITICAL REPRESSION, *supra* note 61, at 362– 63. The AAU "represented the heads of thirty-seven of the most prestigious American colleges." *Id*. at 363. The American Association of University Professors (the "AAUP") opposed the AAU position. *See* GOODMAN, *supra* note 102, at 327-28.

[112] CAUTE, *supra* note 69, at 406, 416.

> was dismissed as the result of a public refusal to cooperate with an investigating committee was able to find a regular teaching position at an academically respectable American college or university.[113]

The effect was intimidation and fear. As Robert M. Hutchins, the President of the University of Chicago, stated at the time, "[t]he question is not how many teachers have been fired, but how many think they might be, and for what reasons . . . . The entire teaching profession of the U.S. is now intimidated."[114] College students were also impacted: "Deans at several institutions reported that students had become frightened to voice liberal views, or to become identified with peace or free speech, because such views had 'become associated with Communism.' Any criticism of the nation was likely to be decried as unpatriotic."[115]

Thus, the academic blacklists had the same effect as the Hollywood blacklists: they silenced dissent and suppressed political criticism. The blacklists were, in essence, "an institutionalized, politicized mechanism for imposing censorship and weakening dissent in Cold War America."[116] And the blacklists were effective. Professor Goldstein notes that by the mid-1950s "most voices of dissent had long been shackled . . . . opposition to American cold war foreign policies was practically unheard of, and suggestions of radical alternatives to the existing political and economic structure in America were almost equally rare."[117]

As Professor Stone has pointed out, although there were legitimate concerns about espionage and unlawful foreign influence in this time period, "a democracy is about means as well as ends," and the witch hunts engaged in by McCarthy and others "violated the fundamental norms and the essential values of the American constitutional system."[118] The proper way to address the dangers of espionage and sabotage, he adds, is to "focus precisely on the criminal conduct and to use appropriate *law enforcement* tools to identify, punish and deter dangerous lawbreakers," and not to "stifle open debate or to foster a climate of fear and timidity."[119] Congress's pursuit of guilt by association, and the resulting blacklisting, however, did exactly that, smothering debate and creating an environment of anxiety and concern.

B. The Courts' Complicity in McCarthyism

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[113] SCHRECKER, *supra* note 108, at 265-66.
[114] CAUTE, *supra* note 69, at 429 (quoting President Hutchins).
[115] STONE, *supra* note 3, at 422.
[116] CEPLAIR & ENGLUND, *supra* note 88, at xi.
[117] GOLDSTEIN, POLITICAL REPRESSION, *supra* note 61, at 406.
[118] STONE, *supra* note 3, at 393.
[119] *Id.* at 374 (emphasis in original).

Although the Supreme Court had issued a number of decisions in the 1930s and 1940s that were protective of First Amendment rights,[120] that soon changed with the onset of the Cold War. One driver of the change was the appointment of new justices to the Court. Fred Vinson replaced Harlan Fiske Stone as Chief Justice in 1946. Three years later, two of the Court's "most zealous defenders of civil liberties," Justices Frank Murphy and Wiley Rutledge, both passed away, replaced by conservative stalwarts Tom C. Clark and Sherman Minton.[121] The appointments of Justices Clark and Minton had a profound effect on the Court, creating a "new five-justice conservative majority. . . in 'Communist' cases – one that would prevail for the remainder of the Vinson court's tenure."[122] That five-member voting bloc of the Court – Chief Justice Vinson, together with Justices Clark, Minton, Harold Burton and Stanley Reed – "largely acquiesced in government action" in those cases, and "did not resist the era's repressive practices."[123]

In American Communications Ass'n v. Douds,[124] the reconstituted Court faced an early test in the war on Communism. In a plurality opinion authored by Chief Justice Vinson, the Court upheld a provision of the Taft-Hartley Act that required each union officer to sign an affidavit stating in part that "he is not a member of the Communist party or affiliated with such party" and "does not believe in . . . the overthrow of the United States Government by force or by any illegal or unconstitutional methods."[125] The statute was aimed at preventing political strikes by unions, that is, strikes led by Communists or others aiming to disrupt the economy.[126] The law was challenged on the ground that it infringed the First Amendment rights of union officers "to hold what political views they choose and to associate with what political groups they will . . ."[127] Chief Justice Vinson's opinion rejected that challenge, stating that the statute's "manifest purpose was to

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[120] *See, e.g.*, Stromberg v. California, 283 U.S. 359, 369-70 (1931) (reversing conviction for display of red flag as a symbol of "opposition to organized government."); Near v. Minnesota, 283 U.S. 697, 722-23 (1931) (reversing prior restraint on antisemitic newspaper report accusing public officials of corruption); De Jonge v. Oregon, 299 U.S. 353, 362, 365 (1937) (reversing state court syndicalism conviction for assisting in the conduct of a public meeting "under the auspices of the Communist Party."); W. Va. State Board of Education v. Barnette, 319 U.S. 624, 633 (1943) (affirming injunction against enforcement of a state regulation requiring students to salute and pledge allegiance to the flag).

[121] LICHTMAN, *supra* note 97, at 24-25.

[122] *Id.* at 25. As to the other Justices, Lichtman states that Justices Hugo Black and William Douglas "would continue to cast liberal votes, but now they were often isolated. The votes of the remaining Justices, Felix Frankfurter and Robert H. Jackson, were difficult to predict." *Id. See also* MARJORIE HEINS, PRIESTS OF OUR DEMOCRACY: THE SUPREME COURT, ACADEMIC FREEDOM, AND THE ANTI-COMMUNIST PURGE 103 (2013) (noting that the "lamentable performance" of the Vinson Court after the addition of Justices Minton and Clark "made a wreck of the First Amendment jurisprudence that the Court had built under its previous chiefs, Evan Hughes and Harlan Fiske Stone.").

[123] LICHTMAN, *supra* note 97, at 29-30.

[124] *Douds*, 339 U.S. at 415, 445. Chief Justice Vinson's opinion was joined by Justices Reed and Burton. Justices Frankfurter and Jackson dissented in part and concurred in part, and Justice Black dissented. Justices Douglas, Minton and Clark did not participate.

[125] *Id.* at 385-86. Absent the oath, unions could not avail themselves of federal labor-law remedies. *Id*. Thus, the statute effectively precluded Communist Party members from holding union office.

[126] *Id.* at 388-89; *see* Heins, *supra* note 122, at 107 ("Congress thought communists would organize strikes not just to achieve better pay and working conditions but to disrupt the economy sufficiently to prepare for revolution.").

[127] *Douds*, 339 U.S. at 389.

bring within the terms of the statute only those persons whose beliefs strongly indicate a will to engage in political strikes and other forms of direct action when, as officers, they direct union activity" and he therefore construed the applicable clause to apply only to "persons and organizations who believe in violent overthrow of the Government as it presently exists under the Constitution as an objective, not merely a prophecy."[128] The *Douds* opinion thus provided a legal and conceptual foundation for the dubious principle of guilt by association and the resulting blacklisting in the following years.[129]

Subsequently, in Adler v. Board of Education,[130] public school teachers brought a declaratory judgment action pursuant to the First and Fourteenth Amendments seeking to enjoin a New York state statute – the Feinberg Law – that, among other things, prohibited state employment of anyone who advocates, advises or teaches the overthrow of the government by unlawful means, or becomes a member of a group that advocates, advises or teaches such overthrow.[131] In an opinion authored by Justice Minton, the Court held that the statute did not violate the First Amendment, stating that the teachers "may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and association and go elsewhere."[132] The statute also allowed the State Board of Regents to list those organizations in which membership would constitute prima facie evidence of disqualification from employment. The Court held that such a list was not a due process violation, as "[d]isqualification follows . . . as a reasonable presumption."[133] In his dissent, Justice Douglas summarized the failings of this scheme:

> The present law proceeds on a principle repugnant to our society – guilt by association. A teacher is disqualified because of her membership in an organization found to be 'subversive.' The

[128] *Id.* at 407. Justice Black, dissenting, made short shrift of that rationale, citing the Court's earlier First Amendment precedent and stating that "penalties should be imposed only for a person's own conduct, not for his beliefs or the conduct of others with whom he may associate. Guilt should not be imputed solely from association or affiliation with political parties or any other organization, however much we abhor the ideas they advocate." *Id*. at 452 (citing Schneiderman v. United States, 320 U.S. 118, 136-39 (1943) and De Jonge v. Oregon, 299 U.S. 353, 365 (1937)).

[129] *See* HEINS, *supra* note 122, at 107 ("This first major Supreme Court encounter [in *Douds*] with the test oaths, blacklisting, and guilt by association that came to define the Red hunt of the 1950s was . . . cited ceaselessly in the years to come as signaling the Court's approval of nearly any anti-subversive measure.").

[130] 342 U.S. 485 (1952).

[131] *Id.* at 487-89.

[132] *Id.* at 492. The decision in *Adler* reflected the courts' long-held view – later rejected by the Warren Court – that a public employee had no right to object to conditions placed upon the terms of employment – including those which restricted the exercise of constitutional rights. Connick v. Myers, 461 U.S. 138, 143 (1983) (discussing the demise of this view and citing the "classic formulation of this position" as espoused by Justice Holmes in McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220 (1892) (Holmes, J.) ("A policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."). *See* Part V. A. below.

[133] *Adler*, 342 U.S. at 495.

> finding as to the 'subversive' character of the organization is made in a proceeding as to which the teacher is not a party and in which it is not clear that she may even be heard. To be sure, she may have a hearing when charges of disloyalty are leveled against her. But in that hearing the finding as to the 'subversive' character of the organization apparently may not be reopened in order to allow her to show the truth of the matter. The irrebuttable charge that the organization is 'subversive' therefore hangs as an ominous cloud over her own hearing. The mere fact of membership in the organization raises a prima facie case of her own guilt. She may, it is said, show her own innocence. But innocence in this case turns on knowledge, and when the witch hunt is on, one who must lean on ignorance leans on a feeble reed.[134]

In the most significant decision of the era, *Dennis v. United States*,[135] the Court (in another plurality decision authored by Chief Justice Vinson) upheld the conviction of Eugene Dennis and 11 other members of the national board of the Communist Party for conspiring to teach and advocate the overthrow of the U.S. government by force and violence.[136] Chief Justice Vinson abandoned Justice Holmes's clear and present danger test[137] (which required imminent danger to allow government restriction of speech) and adopted Judge Learned Hand's modification of Holmes's test (proposed in Judge Hand's opinion for the Second Circuit in the decision below), under

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[134] *Id.* at 508-09. Justice Black joined in Justice Douglas's dissent. Justice Frankfurter dissented separately on standing and ripeness grounds; In its subsequent decision in Wieman v. Updegraff, 344 U.S. 183, 190-91 (1952), the Court struck down Oklahoma's state loyalty oath where membership in a designated organization created a "conclusive" presumption of disloyalty, stating: "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process." In striking down the oath on due process grounds, the Court did not reach the First Amendment issue and in doing so did little more than reassert the "feeble reed" of a defense of ignorance referenced in Justice Douglas's dissent in Adler.

[135] Dennis v. United States, 341 U.S. 494 (1951).

[136] *Id.* at 516-17. Chief Justice Vinson's plurality opinion was joined by Justices Minton, Burton and Reed. Justices Frankfurter and Jackson concurred, and Justices Black and Douglas dissented. The prosecution was brought under the Smith Act, which among other things made it unlawful for any person to "knowingly or willfully advocate, abet, advise or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence." *Id*. at 496.

[137] Schenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J.) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."); *see also* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., joined by Holmes, J., concurring) (No danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.).

which the notion of a "present" or imminent danger was replaced by a balancing test. That balancing test required the Court to "ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[138] By allowing Dennis's conviction for conspiring to teach and advocate political ideas, and abandoning the concepts of clear and present danger or imminent threat, Chief Justice Vinson's opinion, together with the earlier opinions in *Douds* and *Bailey*, markedly diminished First Amendment protections for speech and association and "deeply compromised free speech" at the height of the McCarthy era.[139] Moreover, "[t]he biggest impact was not on the already floundering [Communist Party]; it was on the many thousands of individuals who were subject to loyalty programs, to blacklisting, and to legislative inquisitions."[140]

III. THE SUPREME COURT AND THE END OF THE MCCARTHY ERA: RENEWED PROTECTION FOR THE FREEDOMS OF ASSOCIATION AND SPEECH

After the Supreme Court's decision in *Dennis*, between the years 1953 and 1957, the composition of the Court changed yet again and, led by a new Chief Justice, the Warren Court opened a new era in civil rights jurisprudence.[141] Of particular note, the Court issued a series of significant

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[138] *Dennis*, 341 U.S. at 510. In their dissents, Justices Black and Douglas took exception to the other Justices' abandonment of Holmes's clear and present danger test. Justice Douglas (who, unlike the other justices, had reviewed the trial record) concluded that the prosecution was based on the defendants' teaching Marxist-Leninist doctrine from books that "lawfully remain on library shelves," and that there was "no evidence whatsoever that the acts charged viz., the teaching of the Soviet theory of revolution with the hopes that it will be realized, have created any clear and present danger to the nation." *Id*. at 583, 587. *See* LICHTMAN, *supra* note 84, at 45. Professor Harry Kalven, Jr., points out that among other failings, the Court's decision in *Dennis*, although involving a prosecution for defendants' speech, nowhere discusses "specific messages" conveyed. HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 194 (Jamie Kalven ed., 1988). In addition, although involving a "conspiracy to advocate," the Court did not address "the constitutional limits of conspiracy doctrine applied to speech." *Id*. at 193. Professor Kalven states that "the combined effect of the majority's uncritical acceptance of the conspiracy framework and its reformulation of the clear and present danger test is to enlarge the censor's domain so that it once again includes general advocacy of violent overthrow." *Id*. at 210. Although never explicitly overruled, this criticism was addressed, and resolved, in the Court's decision in Brandenburg v. Ohio, 395 U.S. 444 (1969). *See* Part III below.

[139] Heins, *supra* note 122, at 116.

[140] *Id.* The Court issued another decision that same year, Feiner v. New York, 340 U.S. 315 (1951), in which it upheld the conviction of a speaker for disorderly conduct where violence and fights erupted as a result of his speech. The Court, per Chief Justice Vinson, held that the conviction presented no constitutional violation because the police acted to preserve order and protect the general welfare. *Id.* at 319. In his dissent, Justice Douglas noted that Feiner's speech did not involve incitement or the use of fighting words, but only "an unsympathetic audience and the threat of one man [in the audience] to haul the speaker from the stage." *Id*. at 331. In Justice Douglas's view, Feiner's speech was protected and his arrest and conviction violated the First Amendment. *Id*. Like the Court's decision in Dennis, the Feiner decision was widely criticized and, although not explicitly overruled, has fallen into disfavor and has been repeatedly distinguished in analogous cases. *See, e.g.*, Frederick Schauer, *Costs and Challenges of the Hostile Audience*, 94 NOTRE DAME L. REV. 1671, 1680 (2019) ("the Supreme Court appears to have eviscerated *Feiner* of whatever authority it may once have had.") (citing cases).

[141] Chief Justice Warren replaced Chief Justice Vinson in March 1954. Thereafter, Justice Harlan replaced Justice Jackson in March 1955; Justice Brennan replaced Justice Reed with a recess appointment in October 1956 and confirmation to the bench in March 1957; and Justice Whittaker replaced Justice Minton also in March 1957. *See* Supreme Court Historical Society, *Justices and the Court*, https://supremecourthistory.org.

decisions on Monday, June 17, 1957, a date subsequently demarcated as "Red Monday" by FBI Director J. Edgar Hoover.[142] In one of those decisions, Watkins v. United States,[143] the Court reviewed the conviction of John Watkins, who had been called before HUAC where he refused to answer questions about individuals whom he believed were no longer members of the Communist Party. (Watkins had provided other information to the committee, including the identity of current Communist Party members.) His refusal rested on the grounds that the questions were not relevant to the work of the committee. In upholding that challenge and ordering the indictment for contempt to be dismissed, the Court spoke expansively on the potential for abuse inherent in public investigations:

> The mere summary of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference. And when those forced revelations concern matters that are unorthodox, unpopular, or even hateful to the general public, the reaction in the life of the witness may be disastrous . . . . Nor does the witness alone suffer the consequences. Those who are identified by witnesses and thereby placed in the same glare of publicity are equally subject to public stigma, scorn and obloquy.[144]

The Court went on to note that government investigations such as HUAC's inevitably create a chilling effect and an environment conducive to private backlash, stating that beyond the immediate impact on witnesses and those they identify "there is the more subtle and immeasurable effect upon those who tend to adhere to the most orthodox and uncontroversial views and associations in order to avoid a similar fate at some future time. That this impact is partly the result of non-governmental activity by private

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[142] Elizabeth J. Elias, *Red Monday and Its Aftermath: The Supreme Court's Flip-Flop Over Communism in the Late 1950s*, 43 HOFSTRA L. REV. 207, 210 (2014). The four decisions issued by the Court on that date were the three decisions discussed immediately below – Watkins, Yates, and Sweezy – and Service v. Dulles, 354 U.S. 363 (1957) (setting aside State Department's discharge of foreign service officer on loyalty grounds where State Department failed to follow its regulations in connection with the discharge). Earlier that month, the Court had issued a decision in Jencks v. United States, 353 U.S. 657 (1957), in which a union leader had been convicted of filing a false Taft-Hartley affidavit. The Court ruled that the lower court had violated Jencks's due process rights by not requiring the government to disclose reports by FBI informants who testified at trial. *Id*. at 667, 672. The decision "had major implications for the use of secret evidence in political cases," and became a point of contention, especially among members of Congress. Heins, *supra* note 122, at 178.

[143] Watkins v. United States, 354 U.S. 178 (1957). Chief Justice Warren delivered the opinion of the Court. Justice Frankfurter concurred and Justice Clark dissented. Justices Burton and Whittaker did not participate.

[144] *Id.* at 197-98.

persons cannot relieve the investigators of their responsibility for initiating the reaction."[145]

Thus, despite the narrow holding of Watkins (reversing a contempt citation on the grounds that the committee had not set forth the relevancy of its questions to the committee's legislative purpose), the Court made clear that it found HUAC's broad and intrusive inquiries, and the resulting reputational harm and blacklisting incurred by many, to be significantly troubling.[146]

In *Dennis* and other decisions of the McCarthy era, the Court had upheld the suppression of dissenting speech that resulted from executive branch overreach and congressional hearings. The Court took an important step to abjure those precedents in *Yates v. United States*,[147] also decided on Red Monday. There, the Court overturned the conviction of Oleta Yates and others for conspiracy to violate the Smith Act on facts essentially indistinguishable from *Dennis*. While not overruling *Dennis*, Justice Harlan's opinion held that advocacy of *action* (rather than advocacy as an "abstract principle") is required for a conspiracy conviction under the Smith Act.[148] The Warren Court subsequently issued a number of decisions specifically addressing speech and associational rights.

A. Renewed Protection for the Freedom of Association

As discussed above, one of HUAC's signature features was its pursuit of guilt by association; the committee was almost singularly focused on exposure of individuals' associations with subversive groups. Senator McCarthy also adopted this tack, as did southern segregationists. Professor Seth Kreimer explains: "The sanctions at the command of Senator McCarthy, his precursors, and his imitators, lay primarily in the ability to obtain and publish information, with the expectation that private parties would respond. So well recognized was this dynamic at the time that massive resistance in the American South consciously adopted similar tactics in the effort to eviscerate civil rights initiatives."[149] The Warren Court addressed this form of abuse, clarifying the First Amendment's protection of the freedom of association, in *NAACP v. Alabama ex rel. Patterson*.[150] In

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[145] *Id.* at 197-198. In Sweezy v. New Hampshire, 354 U.S. 234 (1957), also decided on June 17, 1957, the Court again reversed a contempt citation, this time in connection with a state legislative inquiry. In that case, a college professor was questioned about his class lectures; the Court found the inquiry to be a due process violation. *Id.*

[146] GOLDSTEIN, POLITICAL REPRESSION, *supra* note 61, at 404.

[147] Yates v. United States, 354 U.S. 298 (1957).

[148] *Id.* at 318.

[149] Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 45-46 (2006); *see also* KALVEN, *supra* note 138, at 259 (noting that Southern states sought to compel disclosure of NAACP membership lists in order to "hobble" the civil rights movement).

[150] 357 U.S. 449 (1958). Following the decision in that case, the Court appeared to retreat from its speech-protective position in the Red Monday cases. In Barenblatt v. United States, 360 U.S. 109 (1959) and Uphaus v. Wyman, 360 U.S. 72 (1959), the Court affirmed the convictions of individuals suspected of having connections to the Communist Party for their refusal on First Amendment grounds to answer questions or produce information to government investigators. *Barenblatt*, 360 U.S. at 114-16 (refusal to answer questions); *Uphaus*, 360 U.S. at 74-75 (refusal to produce names). *See* HEINS,

that case, the state of Alabama sought the NAACP's membership list as a condition of doing business in the state. The NAACP argued that its members' First Amendment right of freedom of association permitted it to withhold the membership list. The Supreme Court agreed, recognizing the "vital relationship between the freedom to associate and privacy in one's associations."[151] The Court held that requiring disclosure would be akin to mandating that members wear identifying armbands and would act as a "substantial restraint upon the exercise by [NAACP] members of their right to freedom of association."[152] Disclosure would expose members to "economic reprisal, loss of employment, threat of physical coercion and other manifestations of public hostility."[153] The Court noted that it is no answer that these consequences flow from private reprisal rather than directly from government action: "The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold."[154]

In *Scales v. United States*,[155] and *Noto v. United States*,[156] the Court addressed prosecutions for membership in subversive organizations under the Smith Act.[157] In *Scales*, while affirming the conviction below, the Court held that membership in an organization that engages in illegal conduct is not sufficient for individual liability; rather, the individual must be an "active" member "having also a guilty knowledge and intent."[158] In *Noto*, the Court reversed the conviction below because of a lack of evidence of "illegal Party advocacy," stating that "the mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force or violence, is not the same as preparing a group for violent action and steeling it to such action."[159] Professor David

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supra note 122, at 183 ("the political reaction to the Court's 1957 decisions culminating in "Red Monday" contributed to the Court's retrenchment in Barenblatt and Uphaus."); Elias, *supra* note 142, at 209, 220-26 (discussing possible reasons for the Court's decisions in those cases). The Court subsequently issued a number of decisions reaffirming the right of free speech and association, as discussed below.

[151] *NAACP*, 357 U.S. at 462.

[152] *Id.*

[153] *Id.*

[154] *Id.* at 463. The Court's analysis and decision calls into question the exhortation by the Judges in their letter to Columbia University's President that the school "identify students who engage in [disruptive protest] so that future employers can avoid hiring them." Judges' Letter, *supra* note 6. The Judges' statement echoes the action of the state of Alabama in seeking the names of NAACP members in order to hinder protesters in the exercise of their freedom of association.

[155] 367 U.S. 203 (1961).

[156] 367 U.S. 290 (1961).

[157] Subsequent to *Yates,* which had scuttled the government's ability to prosecute conspiracy under the Smith Act, the government turned to the membership clause of the Act, which made it "a felony if a person 'becomes or is a member' of a 'society, group or assembly of persons who teach advocate or encourage' violent overthrow of the government 'knowing the purposes thereof.'" LICHTMAN, *supra* note 97, at 150.

[158] *Scales*, 367 U.S. at 228. The Court held that the prosecution had met its burden in showing that the defendant, Junius Irving Scales, was an active member of the Communist Party and had engaged in "illegal Party advocacy." *Id.* at 251.

[159] *Noto*, 367 U.S. at 297-99.

Cole has noted that the *Scales* decision "effectively ended prosecutions for Communist Party membership under the Smith Act."[160]

Although the term "association" is not found in the text of the First Amendment, as a result of these early Warren Court decisions, the right of association is now firmly ensconced in Supreme Court jurisprudence. In the seminal case of *NAACP v. Alabama*, discussed above, the Court emphasized that "freedom to engage in association for the advancement of beliefs and ideas" is a protected free speech right.[161] The Roberts Court reaffirmed these principles in its decision in *Americans for Prosperity Foundation v. Bonta*.[162] Justice Roberts there stated that "[p]rotected association furthers 'a wide variety of political, social, economic, religious, and cultural ends' and 'is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.'"[163] Elaborating on the importance of the right of association, the Court has elsewhere stated that an "individual's freedom to speak and to petition the Government for the redress of grievances could not be vigorously protected unless a correlative freedom to engage in group effort for those ends were not also guaranteed."[164] These principles hold regardless of whether the group with which one associates pursues illegal aims; a "law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of 'guilt by association' which has no place here."[165]

B. Renewed Protection for the Freedom of Speech

In addition to its decisions on freedom of association, the Warren Court issued a number of significant free speech decisions.[166] The blacklisting of the McCarthy era had showcased not only the government's formal, regulatory power over speech, but its informal power exercised through congressional investigations and use of the bully pulpit to shame and

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[160] David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 8 (2003).
[161] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958).
[162] 594 U.S. 595 (2021)(holding that a California state requirement that non-profit organizations identify their donors violates the First Amendment right to freedom of association).
[163] *Id.* at 606 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984)).
[164] Roberts, 468 U.S. at 622. In his opinion for the Court in Roberts, Justice Brennan distinguished the "two distinct senses" in which the Court has referenced the "constitutionally protected 'freedom of association.'" *Id*. at 618. In one sense there is the freedom of intimate association, referring to security against intrusion by the state into personal liberties. In the other sense there is the freedom of expressive association – the right to associate for the purpose of engaging in First Amendment protected activities, including speech, assembly and the exercise of religion. *Id*. at 618-19. It is this latter aspect of the freedom of association which is addressed here.
[165] Elfbrandt v. Russell, 384 U.S. 11, 19 (1966); *see also* Keyishian v. Bd. of Regents of the State of New York, 385 U.S. 589, 606 (1967) (striking down New York state's Feinberg Law (barring public employment on the basis of membership in "subversive" organizations) and holding that guilt by association is not an appropriate legal rule, as a legal violation requires "a specific intent to further the unlawful aims of an organization."); Healy v. James, 408 U.S. 169, 186 (1972) (guilt by association "is an impermissible basis upon which to deny First Amendment rights.").
[166] An overview of the Warren Court's First Amendment decisions can be found in Kalven, *supra* note 138; s*ee also* Nunziato, *supra* note 19, at 1191-1211; Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 940-1016 (2008).

criticize. The Warren Court took note, and addressed government overreach in the form of informal, indirect regulation of speech.[167] One such case in which the Court found the improper exercise of the government's informal power was Bantam Books v. Sullivan.[168] There, a state agency, the Rhode Island Commission to Encourage Morality in Youth (the "Commission"), sent notices to a book distributor listing certain books and magazines as "objectionable for sale, distribution or display to youths under 18 years of age;" advising the distributor of "the Commission's duty to recommend to the Attorney General prosecution of purveyors of obscenity;" and stating that the lists of objectionable books were being sent to local police.[169] The notices would solicit or thank the distributor in advance for his cooperation, and a police officer would usually visit the distributor after the notice was sent to see what action had been taken.[170] The distributor accordingly stopped distribution of the listed books.[171] The publishers of the books sued, alleging that the Commission's actions "amount to a scheme of governmental censorship devoid of the constitutionally required safeguards for state regulation of obscenity" in violation of the First and Fourteenth Amendments.[172] The Court agreed, holding that although the Commission had no power to "apply formal legal sanctions," its use of "informal sanctions," including "the threat of invoking legal sanctions, and other means of coercion, persuasion and intimidation . . . amply demonstrates that the Commission deliberately set about to achieve suppression of publications deemed 'objectionable' and succeeded in its aim."[173] The Court added: "It would be naïve to credit the State's assertion that these blacklists are in the nature of mere legal advice, when they plainly serve as instruments of regulation independent of the laws against obscenity."[174]

The primary fault in the system used by the Commission in the *Bantam Books* case was its lack of due process, as it allowed the government to suppress speech without the legal protections found in the criminal sanctions process.[175] In a criminal investigation, "[c]riminal sanctions may be applied only after a determination of obscenity in a criminal trial hedged about with the procedural safeguards of the criminal process. The Commission's

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[167] Many of the Court's decisions during Chief Justice Warren's tenure invoke, in the words of Professors Evelyn Douek and Genevieve Lakier, a "judicial responsibility to encourage, not merely protect, a healthy democratic public sphere." Evelyn Douek & Genevieve Lakier, *Lochner.com?*, 138 HARV. L. REV. 100, 110 (2024). It was this view, that "freedom of speech was a positive and social right, not just a negative and individual one," that led the Court "to show great concern . . . with the threat government actions posed to First Amendment interests, not only when they directly restricted speech but also when they indirectly deterred it." *Id*. at 111.

[168] 372 U.S. 58 (1963).

[169] *Id.* at 58. The Court noted that "the books listed in the notices included several that were not obscene within this Court's definition of the term." *Id.* at 64.

[170] *Id.* at 62-63.

[171] *Id.* at 63.

[172] *Id.* at 64.

[173] Bantam Books v. Sullivan, 372 U.S. 58, 67 (1963).

[174] *Id.* at 68-69 (citing Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (holding that the lack of a hearing in connection with listing in the Attorney General's List of Subversive Organizations (AGLOSO) was unconstitutional; *see* discussion *supra* notes 67-70 and accompanying text)).

[175] *See* Lakier, *Enforcing the First Amendment*, *supra* note 23, at 18 ("The Court recognized . . . that the Commission took advantage of the institutional context in which it operated to create a system of speech regulation that operated largely outside the courts.").

practice is in striking contrast, in that it provides no safeguards whatever against the suppression of nonobscene, and therefore constitutionally protected matter."[176] The Court concluded that the Commission's "conduct as disclosed by this record shows plainly that they went far beyond advising the distributors of their legal rights and liabilities. Their operation was a scheme of state censorship effectuated by extralegal sanctions; they acted as an agency not to advise but to suppress."[177] As discussed below, the Court's decision in *Bantam Books* (together with the more recent decision in NRA v. Vullo[178]) bears directly on the Judges' coercive threats to Columbia University banning anyone who has attended the university from employment with the Judges unless and until the university changes its "viewpoints."[179]

One year after *Bantam Books*, the Court issued its landmark decision in New York Times Co. v. Sullivan.[180] There, the Court reversed a defamation judgment in favor of government officials against the newspaper, holding that the First Amendment requires a finding that the defendant acted with the knowledge of the falsity of the alleged libelous statements or reckless disregard for the truth in the case of statements regarding the official conduct of a public official.[181] The Court in that opinion recognized the importance of allowing criticism of the government, stating that "debate on public issues should be uninhibited, robust and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[182] In another significant decision of the era, the Court put to rest the confusion caused by the reformulated clear and present danger test put forth in Dennis v. United States,[183] holding in Brandenburg v. Ohio that "the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[184] The Court's free speech views expressed in these cases served as the basis for a number of the Court's subsequent First Amendment decisions, discussed below.

IV. THE JUDGES' BLACKLIST AND *VULLO*

The Judges' Letter claims that Columbia University is rife with disruptive protesters, that the school favors certain "viewpoints," and has demonstrated "ideological homogeneity throughout the entire institution."[185] As a result, the Judges assert that they will not hire anyone who has attended

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[176] *Bantam Books*, 372 U.S. at 70.
[177] *Id.* at 72.
[178] 602 U.S. 175 (2024) (*see* discussion *infra* notes 187-205 and accompanying text).
[179] Judges' Letter, *supra* note 6, at 2; *see* Part IV below.
[180] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
[181] *Id.* at 279-80.
[182] *Id.* at 270.
[183] Dennis v. United States 341 U.S. 494 (1951). *See* discussion *supra* notes 136-141 and accompanying text.
[184] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
[185] Judges' Letter, *supra* note 6, at 1-2; *see* Part I above.

the school going forward, absent "extraordinary change" by the university.[186] On its face, the Judges' Letter constitutes a threat of coercion against the school "to achieve the suppression of disfavored speech" in violation of the First Amendment under NRA v. Vullo and Bantam Books, Inc. v. Sullivan.[187]

In *Vullo*, the NRA sued Maria Vullo, the Superintendent of the New York State Department of Financial Services ("DFS"), alleging that she "pressured regulated entities to help her stifle the NRA's pro-gun advocacy by threatening enforcement actions against those entities that refused to disassociate from the NRA and other gun-promotion advocacy groups."[188] The NRA's complaint alleged that in 2017 Vullo had opened an investigation of affinity insurance policies offered by the NRA through state-licensed insurance companies, which are regulated by DFS. After the mass shooting at Marjorie Stoneman Douglas High School in Florida in February 2018, Vullo pressured New York-licensed insurance companies to stop doing business with the NRA.[189] Her efforts included indicating to one insurance company that she would not enforce "technical regulatory infractions" against them if they stopped providing affinity insurance for the NRA, and publicly warning New York state-licensed banks and insurance companies to "review any relationships they have with the NRA," to "continue evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA," and to "take prompt actions to manag[e] these risks."[190] Vullo also issued a joint press release with the governor in which she urged "all insurance companies and banks doing business in New York" to join those "that have already discontinued their arrangements with the NRA."[191] As a result of these and other actions, a number of insurance companies allegedly stopped doing business with the NRA.[192]

The Court held that Vullo's actions, as alleged in the complaint, stated a First Amendment violation based on its claim that she "wield[ed] her power . . . to threaten enforcement actions against DFS-regulated entities in order to punish or suppress the NRA's gun-promotion advocacy."[193] The Court in *Vullo* thereby reaffirmed its earlier holding in *Bantam Books* that informal censorship in the form of coercive threats by government agents intended to suppress speech violate the First Amendment. In both *Vullo* and *Bantam Books*, the government targeted third-parties in order to suppress the speech it found offensive. In *Vullo*, the Superintendent threatened the insurers in order to quash the NRA's speech,[194] and in *Bantam Books*, the Rhode Island Commission targeted book distributors in its effort to suppress the publishers' speech.[195]

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[186] *Id.*
[187] NRA v. Vullo, 602 U.S. 175, 180 (2024) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 67 (1963)).
[188] *Id.* at 180-81.
[189] *Id.* at 183.
[190] *Id.* at 176, 183-84.
[191] *Id.* at 176.
[192] *Id.* at 176.
[193] NRA v. Vullo, 602 U.S. 175, 194 (2024).
[194] *Id.* at 191.
[195] *Bantam Books,* 372 U.S. at 67.

The Judges through their hiring ban have engaged in the very activity condemned by the Court in *Vullo* and *Bantam Books* by threatening Columbia University with the loss of valuable government employment opportunities for its students unless the school changes its viewpoints and ideology and eliminates disruptive pro-Palestinian protester speech on its campus. As the Court in *Vullo* pointed out, this strategy can be particularly nefarious and effective, as "intermediaries will often be less invested in the speaker's message and thus less likely to risk the regulator's ire."[196] As a result, those intermediaries "often just acquiesce to government demands rather than challenge them."[197] Here, the university is presumably less invested than the pro-Palestinian protesters in the protesters' message, and at the same time the school clearly has an interest in avoiding the Judges' wrath, in particular with regard to the anticipated negative effect on enrollment and reputation.

The Judges' lack of any direct regulatory authority over the university has no bearing on the constitutionality of their action. The threat of coercion need not involve regulatory sanctions; the prospect of less direct retaliation is sufficient. As one court has stated, "[a] public official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights regardless of whether the threatened punishment comes in the form of the use (or, misuse) of the defendant's direct regulatory or decision-making authority over the plaintiff, or in some less-direct form."[198] The Judges' coercive threat to stop hiring anyone who has attended the university is clear and impactful even if not an exercise of regulatory authority per se.

One possible response may be that the Judges' Letter explicitly states that their animus is directed at Columbia students who have engaged in "violence or terrorism," i.e., nonexpressive activity and actions unprotected by the First Amendment. Under *Vullo*, however, the question is the intent of the government official.[199] Here, the Judges' coercive threats are expressly intended to cause the university to stop "favoring certain viewpoints" and to alter its practices in order to stifle protester's speech. It is for that reason that the Judges' Blacklist violates the First Amendment.[200]

The Judges may also argue that the blacklist is an expression of personal views and is not intended as an official act, and that "officials who [speak] in their personal capacity and [do] not threaten the exercise of state power simply [cannot] be found to have acted in violation of the First

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[196] *Vullo*, 602 U.S. at 198.
[197] Douek and Lakier, *supra* note 167, at 147.
[198] Okwedy v. Molinari, 333 F.3d 339, 343-44 (2d Cir. 2003) (holding that city borough official's threat to billboard company over which he had no direct regulatory authority could constitute First Amendment violation).
[199] *Vullo,* 602 U.S. at 196-97 (argument that government official targeted "'nonexpressive activity'. . . does not change the allegations that her actions were aimed at punishing or suppressing speech.").
[200] *Id.* at 196. By the same measure, the potential illegality of some protesters' actions does not affect the analysis. As the Court stated in *Vullo*, "the contention that the NRA and the insurers violated New York law does not excuse *Vullo* from allegedly employing coercive threats to stifle gun-promotion advocacy." *Id*. Similarly, "*Bantam Books* held that the commission violated the First Amendment by invoking legal sanctions to suppress disfavored publications, some of which may or may not contain protected speech (*i.e.*, no obscene material)." *Id*.

Amendment, even if they acted with the intent to suppress speech and were successful in that aim."[201] That argument does not appear sufficient here, however, as the Judges "go beyond expressing their personal views in an effort to persuade and . . . us[e] their power as government officials to pressure private institutions to conform to the judges' preferences" and "seek through the allocation of publicly-funded employment opportunities (or other allocation of public funds) to influence the behavior of private institutions on matters of public concern."[202]

Nor do the *Vullo* and *Bantam Books* decisions improperly infringe on government officials' ability to speak out *qua* government officials "condemning views with which they disagree."[203] Rather, those decisions prohibit government officials from making coercive threats "to punish or suppress speech," whether directly or "through private intermediaries."[204] That is,

> [r]ather than prohibiting government criticism or advice to private speech intermediaries per se, [those cases] prohibit[] only criticism or advice that helps create what Justice Brennan described in *Bantam Books* as an 'informal system of regulation, beyond the reach of the laws' . . . In practice, this means that government officials must do or say something to indicate to the target of their campaigning that sanctions, or the withdrawal of benefits that they could otherwise receive, will be predicated on the

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[201] Genevieve Lakier, *Enforcing the First Amendment, supra* note 23, at 24-25 (discussing lower courts' pre-*Vullo* interpretations of *Bantam Books* and citing Hammerhead Enters.,Inc*. v. Brezenoff,* 707 F.2d 33, 39 (2d Cir. 1983) (requiring intimation of "some form of punishment or adverse regulatory action" or "official pronouncements" for First Amendment claim)).

[202] *In re Complaint of John Doe*, JCP No. 08-24-90036, at 4 (Jud. Council 8th Cir. Apr. 8, 2025) (Colloton, C.J.) (dismissing ethics complaint); *see also* Kerr, *supra* note 52 (opining that Judge Ho's earlier boycott of Yale Law School students "crosses an important line . . . between judges expressing their personal views in an effort to persuade (which is fine), and judges harnessing their power as government officials to create pressure on private institutions to further their personal agendas (which is not fine, in my view)").

[203] Nat'l Rifle Ass'n of Am. v. Vullo, 602 U.S. 175, 198 (2024).

[204] *Id. See also Jenner & Block LLP v. U.S. Dep't of Just.*, 2025 WL 1482021, *15 (D.D.C. May 23, 2025) (Bates, J.) (finding that executive order against law firm constituted "coercion against a third party to achieve the suppression of disfavored speech.")(citing *Vullo*, 602 U.S. at 180), *appeal docketed*, No. 25-5265 (D.C. Cir. July 22, 2025); *Perkins Coie LLP v. U.S.* Dep't of Just., 2025 WL 1276857, *3 (D.D.C. May 2, 2025) (Howell, J.) ("the Constitution . . . requires that the government respond to dissenting or unpopular speech or ideas with 'tolerance, not coercion.'") (quoting 303 Creative LLC v. Elenis, 600 U.S. 570, 603 (2023)), *appeal docketed*, No. 25-5241 (D.C. Cir. July 2, 2025); *Wilmer Cutler Pickering Hale & Dorr LLP v. Exec. Off. of the President,* 2025 WL 1502329, *15 (D.D.C. May 27, 2025) (Leon, J.) ("'[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion of perspective of the speaker is the rationale for the restriction'") (quoting *Rosenberger v. Rector and Visitors of Univ. of Va*., 515 U.S. 819, 829 (1995)), *appeal docketed*, No. 25-5277 (July 28, 2025).

> private party's compliance with the [government official's] wishes.[205]

Under this clear standard, the Judges' Blacklist, which vows the loss of clerkship opportunities to anyone who has attended the university absent a change in the university's viewpoints and an end to disruptive protests, is plainly at odds with the First Amendment. As discussed below, that blacklist is also at variance with the Supreme Court's public employment cases, which prohibit discrimination in hiring based on speech or association.

V. THE JUDGES' BLACKLIST AND THE PUBLIC EMPLOYMENT CASES

Beginning in the 1960s, the Warren Court began to grapple with the First Amendment rights of government employees. As Professor Lakier describes, "[o]nly after both the federal and state governments began to aggressively purge Communists and fellow travelers from public employment during the [McCarthy era] did the Court recognize that granting government officials virtually unrestricted power to hire, fire, or discipline whomever it wanted might threaten the democratic and egalitarian values that the First Amendment protects."[206] The Supreme Court addressed these concerns in two lines of cases, one protecting the right to association, and the other addressing freedom of speech. The Judges' Blacklist raises concerns under both. That blacklist impacts associational rights insofar as it targets potential law clerk applicants based on their attendance at a certain university where disruptive protests have occurred (or association with such protests),[207] and it impacts speech rights insofar as it indicates an intent to blacklist students more broadly based on their participation in disruptive protests.[208]

A. The Judges' Blacklist and Freedom of Association

The Judge's Blacklist runs up directly against the cases condemning guilt by association in the public employment context. In Rutan v. Republican Party of Illinois,[209] the Supreme Court brought to bear its precedent governing the freedom of association in a public employment hiring case, stating that "[t]he First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and associate."[210] The Court reiterated the principle that "loss of a job opportunity for failure to compromise one's convictions states a

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[205] Lakier, Enforcing the First Amendment, *supra* note 23, at 52.
[206] Lakier, The Non-Frst Amendment Law of Freedom of Speech, *supra* note 31, at 2332.
[207] *See* Judges' Letter, *supra* note 6 ("blacklisting all Columbia University students").
[208] *See* Judges' Letter, *supra* note 6 ("Universities should also identify students who engage in [disruptive protests] so that future employers can avoid hiring them.").
[209] 497 U.S. 62 (1990).
[210] *Id.* at 76.

constitutional claim"[211] and held that "conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so."[212]

The burden on a government employer to show a vital interest justifying a condition of employment based on political association is a high one.[213] The Warren Court's public employment cases involving teachers who were asked to sign loyalty oaths or to provide information relating to their associations demonstrates this high bar. In Shelton v. Tucker,[214] Arkansas required public school teachers to file annually an affidavit listing every organization to which they belonged in the preceding five years.[215] In assessing this requirement, the Court recognized that "there can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools . . . 'A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the State has a vital concern.'"[216] That "vital concern," however, was not sufficient to sustain Arkansas' broad inquiry in which it asked teachers to disclose all associational ties, many of which had no relevance to the teacher's "occupational competence or fitness."[217] The Court held that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[218] Subsequently, in Keyishian v. Bd. of Regents,[219] the Court addressed the loyalty oath and restrictions on association imposed on public school teachers by New York's Feinberg Law – the same statute the Court had addressed 15 years earlier in *Adler*.[220] The Court held the law constitutionally deficient because it cut into the right of association without requiring any showing that an individual's association posed any threat, stating that "mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion" from public employment.[221]

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[211] *Id.* (citing *Torcaso v. Watkins,* 367 U.S. 488, 496 (1961) (holding that state of Maryland could not refuse license to notary public on the ground that he refused to declare his belief in God, as the oath "unconstitutionally invades the appellant's freedom of belief and religion.")).
[212] *Id.* at 78.
[213] *See* Elrod v. Burns, 427 U.S. 347, 363 (1976) (stating that if a condition of employment is to be based on belief or association, "it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights."); *Branti v. Finkel*, 445 U.S. 507, 515-16 (1980) (government can demonstrate an "overriding interest" of "vital importance" to deny employment on the basis of belief or association).
[214] 364 U.S. 479 (1960).
[215] *Id.* at 480.
[216] *Id.* at 485 (quoting *Adler v. Bd. of Educ.,* 342 U.S. 485, 493 (1952)).
[217] *Id.* at 488.
[218] *Id.*
[219] 385 U.S. 589 (1967).
[220] Keyishian v. Bd. of Regents, 385 U.S. 589, 595 (1967). The Court in *Keyishian* stated that "to the extent that *Adler* sustained the provision of the Feinberg Law constituting membership in an organization advocating forceful overthrow of government a ground for disqualification, pertinent constitutional doctrines have since rejected the premises upon which that conclusion rested. *Adler* is therefore not dispositive of the constitutional issues we must decide in this case."
[221] *Id.* at 606. The Court also found the law unconstitutionally vague. *Id*. at 604.

The Court has affirmed these principles in other contexts relevant here. Thus, in Baird v. State Bar of Arizona,[222] denial of admission to the bar based on a law graduate's beliefs and political associations was struck down.[223] There, the applicant, Sara Baird, had completed all requirements for bar admission, including listing on a questionnaire all organizations with which she had been affiliated since the age of 16.[224] She declined to answer the question whether "she had ever been a member of the Communist Party or any organization 'that advocates overthrow of the United States Government by force or violence.'"[225] The Arizona Supreme Court upheld the state bar committee's denial of Baird's admission to the bar based on that omission. The Supreme Court reversed, with Justice Black stating that Baird had supplied the committee "the information relevant to her fitness to practice law" and that the query on her associations improperly probed into her views and beliefs.[226] Justice Black concluded: "the First Amendment's protection of association prohibits a state from excluding a person from a profession or punishing him solely because he is a member of a particular organization or because he holds certain beliefs."[227] The Court similarly held, in Healy v. James,[228] that association with disruptive protest activity is not a basis to exclude a political group from a college campus. In that case, Central Connecticut State College sought to deny official recognition to the local chapter of the Students for a Democratic Society (the "SDS"). The Court stated that denial would abridge the students' right of association, and that the fact that other SDS chapters "had been associated with disruptive and violent campus activity" was not a sufficient reason for the school to deny official recognition to the local chapter.[229]

These same principles apply in the case of the Judges' Blacklist. A student's association with a school where disruptive protests have occurred, or his or her peaceful participation in such protests, cannot fairly serve as a blanket basis to preclude an applicant consistent with the First Amendment. The Judges' Blacklist casts too wide a net, eliminating any prospect of employment with these judges for any applicant who has attended Columbia University or who has peacefully participated in a protest regardless of other considerations.[230] Although all judges have a not insubstantial interest in hiring clerks who accord with the judge's views, the Judges' Blacklist bars a large swath of students without regard to whether any particular applicant

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[222] 401 U.S. 1, 9 (1971) (Stewart, J., concurring in the judgment) ("[M]ere membership in an organization can never, by itself, be sufficient ground for a State's imposition of civil disabilities or criminal punishment.").
[223] *Id.* at 8.
[224] *Id.* at 4.
[225] *Id.* at 4-5.
[226] *Id.* at 7.
[227] *Baird,* 401 U.S. at 6 (citing *United States v. Robel*, 389 U.S. 258, 259–60, 266 (1967) (striking down federal statute that prohibited members of Communist organizations from working in defense facilities); *Keyishian*, 385 U.S. at 607).
[228] 408 U.S. 169, 172 (1972).
[229] *Id.* at 181, 185.
[230] In this regard, as noted above, the Judges' Blacklist is akin to the McCarthy-era Attorney General's List of Subversive Organizations – AGLOSO – a blacklist that served as a basis to bar anyone associated with the listed organization. *See* discussion *supra* notes 13-18 and accompanying text.

would in any way be incompatible with the position.[231] Moreover, and perhaps most tellingly, since the Judges have stated that their goals are to pressure the university to punish protesters severely and to change the composition of the school's faculty and administration,[232] their blacklist facially lacks any relationship to the merits of applicants, and is plainly nothing more than punishment of innocent individuals as a means to coerce the university. In this respect, the Judges' Blacklist is simply wrongheaded, proceeding "on a principle repugnant to our society – guilt by association."[233]

B. The Judges' Blacklist and Freedom of Speech

Insofar as the Judges' Blacklist targets protesters for their expressive conduct or speech in connection with disruptive protests, it also runs afoul of precedent governing "the interplay between free speech rights and government employment."[234] The seminal case in this area is Pickering v. Board of Education.[235] There, the Court held that the termination of a high school teacher, Marvin L. Pickering, for writing a newspaper editorial critical of the school board's spending violated the teacher's First Amendment rights.[236] The Court reached that result through a two-step analysis, under which an initial assessment must be made as to whether the employee's speech addresses matters of public concern.[237] Once the employee is determined to have been speaking on a matter of public concern, the value of the speech must be balanced against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[238] Where the employee is commenting on matters of public concern, and that speech does not interfere with the operation of the workplace, the government's interest in limiting that speech is no greater than it would be in the case of any member of the general public.[239] The Court thereby held that Pickering's editorial, criticizing school funding decisions, addressed matters of legitimate public concern and that, as the speech did not impede the school's operations, the school's interest did not

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[231] In Branti v. Finkel, 445 U.S. 507, 517 (1980), the Court stated that "if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." The Judges' blanket ban offers no basis to conclude that the "private political beliefs" of any particular blacklisted student "would interfere with the discharge of his public duties."

[232] *See* Judges' Letter, *supra* note 6 (calling for "[s]erious consequences for students and faculty who have participated in campus disruptions" at Columbia University and stating that "significant and dramatic change in the composition of its faculty and administration is required to restore confidence in Columbia.").

[233] Adler v. Bd. of Educ., 342 U.S. 485, 508–09 (1952) (Douglas, J., dissenting).

[234] Kennedy v. Bremerton School District, 597 U.S. 507, 527 (2022) (citing *Pickering v. Bd. of Educ.* 391 U.S. 563 (1968) and Garcetti v. Ceballos, 547 U.S. 410 (2006)).

[235] 391 U.S. at 563.

[236] *Id.* at 565–67

[237] *Id.* at 568.

[238] *Id.* Thus, with regard to speech restrictions, "the government as employer . . . has far broader powers than the government as sovereign." *Waters v. Churchill*, 511 U.S. 661, 671-72 (1994).

[239] *Pickering*, 391 U.S.at 573.

outweigh Pickering's interest in "speak[ing] out freely on such questions without fear of retaliatory dismissal."[240]

The Court subsequently clarified the nature of employee speech that warrants protection in Connick v. Myers,[241] where it held that not all matters related to the operation of a government office are "matters of public concern," and that employee speech relating to "matters only of personal interest" such as an employment grievance are not protected by the First Amendment.[242] In Garcetti v. Ceballos,[243] the Court held that a public employee is speaking as a government employee and not "as a citizen on a matter of public concern" when the employee is "making a statement pursuant to their official duties."[244] Accordingly, "[o]fficial communications" made within the scope of employment do not enjoy First Amendment protection.[245] These three cases, *Pickering*, *Connick* and *Garcetti*, provide the basic framework for speech-based First Amendment public employment cases today.[246]

Under *Pickering* and its progeny, speech involves matters of public concern "when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest, that is, a subject of general interest and of value

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[240] *Id.* at 571.

[241] 461 U.S. 138 (1983). In *Connick*, Sheila Myers, an assistant district attorney ("ADA") for New Orleans, was informed she would be transferred to another section in the office. Unhappy with that decision, Myers disseminated a questionnaire to other ADAs in the office to bolster her case against the transfer. As a result of that action, the District Attorney, Harry Connick, fired Myers for insubordination. *Id.* at 140-42. Although the questionnaire included one question as to whether ADAs "ever feel pressured to work in political campaigns on behalf of office-supported candidates," the Court held that the questionnaire was not protected speech as it was "most accurately characterized as an employee grievance concerning internal office policy." *Id.* at 149, 154.

[242] *Id.* at 147.

[243] 547 U.S. 410 (2006). In that case, Richard Ceballos, a deputy district attorney for the Los Angeles County District Attorney's Office claimed that employment actions taken against him constituted retaliation for a memorandum he had written in the course of his work. Ceballos alleged the memorandum recited "government misconduct" and therefore was a matter of public concern. The Court held that because the memorandum was written pursuant to Ceballos's "official duties," he was not speaking as a citizen for First Amendment purposes, and that therefore "the Constitution does not insulate [his] communication[] from employer discipline." *Id.* at 421.

[244] *Id.* at 422.

[245] *Id.* at 423.

[246] *See, e.g.*, Kennedy v. Bremerton School District, 597 U.S. 507, 509 (2022) (setting out "*Pickering-Garcetti* framework" for resolving public employee speech claims.); Lane v. Franks, 573 U.S. 228, 241-42 (2014) (applying *Connick* in determining if speech involves a matter of public concern). As can be seen from the above discussion, under the Pickering line of cases, a more extensive analysis is required where a public employee asserts a free speech claim, in contrast to a freedom of association claim. In *O'Hare Truck Service, Inc. v. City of Northlake* (1996), the Supreme Court explained its different approaches to speech and association in the public employment context, stating: "Our cases call for a different, though related, inquiry where a government employer takes adverse action on account of an employee or service provider's right of free speech. There, we apply the balancing test from *Pickering* . . . . *Elrod* and *Branti* involved instances where the raw test of political affiliation sufficed to show a constitutional violation, without the necessity of an inquiry more detailed than asking whether the requirement was appropriate for the employment in question. There is an advantage in so confining the inquiry where political affiliation alone is concerned, for one's beliefs and allegiances ought not to be subject to probing or testing by the government." O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712, 719 (1996).

and concern to the public."[247] Public protests plainly fall into the category of speech and expressive conduct addressing matters of social concern. Thus, in Noble v. Cincinnati & Hamilton County Library,[248] Eric Noble, a public library security guard, posted on Facebook regarding the Black Lives Matter ("BLM") protests.[249] His post was soon taken down, but his employer nevertheless deemed it offensive and fired him. Noble's First Amendment retaliation claim was dismissed by the District Court on summary judgment.[250] The Sixth Circuit reversed, holding, among other things, that Noble's speech addressing those protests was "on a matter of public concern," and that the "insensitive manner" of his speech did not affect the analysis of that issue.[251] So too here, campus pro-Palestinian protests, which in broad terms concern issues of U.S. foreign policy and the treatment of civilians in wartime (and which, in the view of some, have at times included insensitive or offensive speech), unquestionably involve protected speech on a subject "of value and concern to the public."[252]

The public employee speech cases have long been applied in the hiring context. As the Court stated in Perry v. Sinderman,[253] a case challenging a university's failure to re-hire a non-tenured employee:

> [E]ven though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are

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[247] *Lane v. Franks*, 573 U.S. at 241 (internal quotations omitted) (quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011)). This principle holds true even where the employee's speech is offensive and controversial. In *Rankin v. McPherson* (1987), for example, the Court held that the workplace remark "if they go for him again, I hope they get him" made by Ardith McPherson, a clerical employee at a sheriff's office in reference to the 1981 assassination attempt on President Reagan, was speech "on a matter of public concern." Rankin v. McPherson, 483 U.S. 378, 380, 386 (1987). The Court noted that the "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Id.* at 387 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)("debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."). McPherson was a clerk who did not interact with the public. In balancing her interest in making her statement against the state's interest in maintaining an effective workplace, the Court noted that there was no evidence in the record of the remark causing disturbance, and that her employer discharged her based solely on the content of her statement and not based on any workplace concern. *Id.* at 384, 390.

[248] 112 F.4th 373 (6th Cir. 2024).

[249] Noble's post contained a meme with a "highly offensive message" critical of the BLM movement. *Id*. at 378-79.

[250] Noble v. Public Library of Cincinnati and Hamilton County, No. 1:20-CV-594, 2023 WL 11897165 (S.D. Ohio, Sept. 26, 2023), *rev'd*, 112 F.4th 373 (6th Cir. 2024). The District Court found that the post "caused documented disharmony with his coworkers and had a detrimental impact on his working relationships, and risked harm to the Library's standing and trust among members of the community." *Id*. at *3.

[251] *Id.* at 381-82 (citing Rankin, 483 U.S. at 387). The court also held that there was no evidence that Noble "took his politics to work or that his views on the BLM protests or any other political matter ever interfered with how he performed his job." *Id*. at 382.

[252] *Lane*, 573 U.S. at 241. The fact that the protests, while peaceful, were in some cases also disruptive does not diminish the applicability of the First Amendment to protected speech and expressive conduct by protest participants. *See, e.g.*, Walker, *supra* note 19, at 14-46 (discussing the centrality of disruptive protest and dissent to the development of First Amendment law); Nunziato, *supra* note 19, at 1191-1214 (discussing Civil Rights Era cases and growth of First Amendment doctrine).

[253] 408 U.S. 593 (1972).

> some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally-protected interests – especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which (it) could not command directly' . . . Such interference with constitutional rights is impermissible.[254]

The Court noted that although it had applied this principle in various contexts, "most often, we have applied this general principle to denials of public employment."[255] Thus, numerous Circuit Courts have applied *Pickering* in the hiring context.[256] As the D.C. Circuit stated in one such case, "[m]erely because an employer is *hiring* rather than *firing* . . . does not justify unconstitutional action."[257]

Significantly, the Judges' Blacklist, unlike the individual employment decisions involved in the cases discussed above, is a broad statement of intent addressed to all applicants, future applicants, and other individuals who may consider application in the future. In this regard, the Judges' Blacklist is not dissimilar from the regulation addressed by the Supreme Court in United States v. National Treasury Employees Union ("NTEU").[258] There, the Court struck down a broad rule that barred federal executive branch employees from accepting payment for a speech or article on any topic.[259] The Court stated that the government's policy prevented employees from speaking as "citizen[s]" on "matters of public concern" because the speeches and articles "were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their government employment."[260] Noting that the ban was "a wholesale deterrent

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[254] *Id.* at 597 (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).
[255] *Id.* (citations omitted).
[256] *See, e.g.*, Heim v. Daniel, 81 F.4th 212, 221 (2d Cir. 2023) (applying "the employer/employee interest-balancing framework first set forth in Pickering" to employee's First Amendment challenge to hiring decision); Anderson v. Valdez, 845 F.3d 580, 599 (5th Cir. 2018) (upholding law clerk applicant's First Amendment claim against state court judge under Pickering); Bonds v. Milwaukee County, 207 F.3d 969, 973 (7th Cir. 2000), *cert. denied*, 531 U.S. 944 (2000) (applying *Pickering* balancing test to decision not to hire prospective employee because of his speech); Worrell v. Henry, 219 F.3d 1197, 1201 (10th Cir. 2000), *cert. denied*, 533 U.S. 916 (2001) (applying *Pickering* to employer's withdrawal of employment offer based on applicant's speech activity); Shahar v. Bowers, 114 F.3d 1097, 1101(11th Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1049 (1998) (employer withdrawal of job offer).
[257] Hubbard v. EPA, 949 F.2d 453, 460 (D.C. Cir. 1992), *aff'd on other grounds en banc*, 982 F.2d 531 (D.C. Cir. 1992) (emphasis in original).
[258] 513 U.S. 454 (1995).
[259] *Id.* at 457.
[260] *Id.* at 466.

to a broad category of expression by a massive number of potential speakers," the Court stated that "[t]he widespread impact of the honoraria ban . . . gives rise to far more serious concerns than could any single supervisory decision."[261] The Court added: "unlike an adverse decision taken in response to actual speech, this ban chills potential speech before it happens."[262] The Court stated:

> For these reasons, the Government's burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action. The Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government.[263]

Accordingly, the Court held that because "the vast majority of the speech at issue in this case does not involve the subject matter of Government employment and takes place outside the workplace, the Government is unable to justify [the ban] on the grounds of immediate workplace disruption asserted in *Pickering* and the cases that followed it."[264]

The *NTEU* case bears directly on the propriety of the Judges' Blacklist. Like the honoraria rule in that case, the Judges' Blacklist is a broad prohibition barring prospective law clerks from speaking at or attending pro-Palestinian protests. Like the publications and speaking events prohibited by the honoraria ban, those protests take place outside the workplace and involve content largely unrelated to the prospective clerks' employment. Most significantly, the Judges' Blacklist chills potential First Amendment activity before it happens. To justify a broad hiring ban based on First Amendment-protected activity, the Judges would have to show that the interests of all of the affected potential future employees in their political expression are outweighed by the impact of the future employees' expression on the "actual operation" of the government.[265] The *NTEU* decision leaves little room for argument that the Judges' hiring ban could surmount that burden.

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[261] *Id.* at 467-68.
[262] *Id.* at 468.
[263] *Id.* (citing *Pickering*, 391 U.S. at 571).
[264] 513 U.S. 454, 470 (1995). The Supreme Court has subsequently noted that the "*Pickering* framework" was designed to address an individual adverse employment decision, while the *NTEU* decision addresses speech-restrictive government action with "widespread impact." Janus v. Am. Fed'n Of State, Cnty., and Mun. Emps.loyee, Council 31, 585 U.S. 878, 907 (2018). In this latter situation, the government carries a heavier burden, "and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights . . . . The end product of those adjustments is a test that more closely resembles exacting scrutiny than the traditional *Pickering* analysis." *Id.*
[265] *Id.* at 468 (citing *Pickering*, 391 U.S. at 571).

The D.C. Circuit's opinion in Guffey v. Mauskopf[266] is also instructive on this score. There, the Administrative Office of the United States Courts (the "AO"), which provides support services to the federal courts, revised its code of conduct to "prohibit partisan political expression."[267] AO employees sued to enjoin the code so as to allow them to engage in partisan political expression outside the office. The D.C. Circuit affirmed the District Court's grant of injunctive relief in relevant part, holding that under *NTEU* the employees' right to speak outweighed the impact on government operations.[268] The Court rejected AO's arguments that the employees' political expression "could undermine the public perception of the Judiciary as an impartial adjudicative body" and that it may impact the trust between judges and the employees.[269] The court stated this latter argument "conflicts with 'the powerful and realistic presumption that the federal workforce consists of dedicated and honorable civil servants.'"[270]

The Supreme Court has stated in its public employee speech cases that in assessing the government's interest, a relevant consideration is whether the speech "has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary."[271] Thus, prospective employees for "sensitive government positions" requiring a "heightened need for trust and confidence" – where the government employer's interest may outweigh the candidate's speech interest – may not enjoy the protections generally afforded by the public employment cases.[272] This precedent addressing sensitive government positions leaves room for an argument that the unique nature of a judicial clerkship, where a lawyer frequently serves as a close confidential advisor to the judge, outweighs an individual applicant's otherwise protected speech interests.[273] That

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[266] Guffey v. Mauskopf, 45 F.4th 442 (D.C. Cir. 2022).
[267] *Id.* at 445.
[268] *Id.* at 446, 452.
[269] *Id.* at 447.
[270] *Id.* at 450 (quoting *NTEU*, 513 U.S. at 476). The court noted that AO employees, unlike law clerks, do not "make recommendations about the outcomes of individual cases." *Id.* at 445. The distinctive nature of the law clerk role is discussed below.
[271] Rankin v. McPherson, 483 U.S. 378, 388 (1987) (citing Pickering v. Bd. of Educ., 391 U.S. 563, 570-73 (1968)); *see also* Damiano v. Grants Pass Sch. Dist. No 7, 140 F.4th 1117, 1139 (9th Cir. 2025) ("[T]he expressive activities of a highly placed supervisory, confidential, policymaking, or advisory employee will be more disruptive to the operation of the workplace than similar activity by a low level employee.") (quoting Faghri v. Univ. of Conn., 621 F.3d. 92, 98 (2d Cir. 2010)).
[272] Bonds v. Milwaukee County, 207 F.3d 969, 977 (7th Cir. 2000), *cert. denied*, 531 U.S. 944 (2000); *see also* Bauer v. Sampson, 261 F.3d 775, 785 (9th Cir. 2001) (workplace interests may outweigh applicant's speech interest where employer-employee relationship will involve "frequent contact which require[s] trust and respect in order to be successful"); Hagan v. Quinn, 867 F.3d 816, 826 (7th Cir. 2017) (employer interest trumps employee right where "the government employer's need for political allegiance from its policymaking employee [sufficiently] outweighs the employee's freedom of expression").
[273] *See also, e.g.*, FEDERAL JUDICIAL CENTER, LAW CLERK HANDBOOK: A HANDBOOK FOR LAW CLERKS TO FEDERAL JUDGES 5,7 (4th ed. 2020), https://www.fjc.gov/sites/default/files/materials/43/Law_Clerk_Handbook_Fourth_Edition.pdf (noting "the close association between judges and law clerks" and the paramount importance of confidentiality and loyalty in that relationship); Guercio v. Brody, 911 F.2d 1179, 1186 (6th Cir. 1990) (referencing the importance of "inter-chamber harmony, cooperation, and collegiality between judges and court personnel"), *cert. denied*, 500 U.S. 904 (1991); GUIDE TO JUDICIARY POLICY, VOL. 2A, CH. 3, *Code of Conduct for Judicial Employees* (2024), https://www.uscourts.gov/sites/default/files/guide-vol02a-ch03-2.pdf (restricting outside activities, including political activities, of law clerks).

authority, however, bears solely on individual hiring decisions. A sweeping hiring ban, precluding consideration of all who have engaged in expressive conduct or speech in connection with disruptive protests, is not within the scope of the precedent governing applicants for sensitive positions. That caselaw and other guidance, which provides a narrow exception in hiring and employment where government interests outweigh employee speech rights, does not address, much less bless, a practice of subjecting a large cohort of prospective applicants to the "stigma, scorn and obloquy"[274] of a government blacklist, and such a hiring ban cannot be justified under *Pickering*, *NTEU*, and the other public employment cases.

VI. THE LAW FIRM BLACKLIST, NEW YORK LABOR LAW AND FREE SPEECH VALUES

The blacklisting by private employers in the McCarthy era made it clear that private as well as public employees can suffer as a result of reactions to government repression. Although the First Amendment does not directly regulate the relationship of private employers and their employees, broader free speech principles arguably do impact these relations, and call for protection of employees, and applicants for employment, engaging in political speech and association. As Professor Eugene Volokh has noted, free speech is a valuable tool for democratic self-government and, as with governmental restrictions, the threat of private employer restrictions can "interfere with such self-government."[275] The *Restatement of Employment Law* explicitly recognizes this concept in proposing common-law free speech protections for private employees, stating: "There is a public interest in employees' personal autonomy because it is critical to engagement in civil life. Employees must be free to express their own ideas and concerns in order for the public sphere to flourish."[276]

New York's Labor Law appears to follow the spirit, if not the letter, of the *Restatement*.[277] That law makes it unlawful for employers to refuse to hire, fire, or otherwise discriminate against employees because of their

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[274] Watkins v. United States, 354 U.S. 178, 197-98 (1957).

[275] Eugene Volokh, *Should the Law Limit Private-Employer-Imposed Speech Restrictions?*, 2 J. FREE SPEECH L. 269, 273-74 (2022) [hereinafter Volokh, *Speech Restrictions*] (discussing, inter alia, arguments for protecting private employee speech on the grounds of democratic self-government, the search for truth, and self-expression and autonomy).

[276] RESTATEMENT OF EMPLOYMENT LAW §7.08 Rep. Notes (cited in Volokh, *Speech Restrictions*, *supra* note 275, at 272). The Restatement concludes that "employers should be liable for firing an employee for 'adhering to political, moral, ethical, religious or other personal beliefs or expressing such beliefs outside of the locations, hours, and responsibilities of employment in a manner that does not refer to or otherwise involve the employer or its business,' unless the employer 'can prove that it had a reasonable and good faith belief that the employee's exercise of an autonomy interest interfered with the employer's legitimate business interests, including its orderly operations and reputation in the marketplace.'" Volokh, *Speech Restrictions*, *supra* note 275 at 272 (quoting RESTATEMENT OF EMPLOYMENT LAW §7.08(a)(2)).

[277] As noted above, New York's Labor Law bears on the Law Firm Blacklist, as New York City is the location of Sullivan & Cromwell's headquarters. *See* note 33 *supra*. Other states have laws similar to New York's. Professor Lakier describes state laws (including New York's) that protect "private-sector workers' freedom of speech and association against employment sanctions, threats and coercion." Lakier, *Non-First Amendment Law of Free Speech*, *supra* note 31, at 2339-41. Although those laws vary greatly in their coverage, and are not found in every state, they do provide private employees and applicants for employment some measure of speech protection. *Id*.

"political activities outside of working hours" or their "legal recreational activities."[278] The statute defines "political activities" as "(i) running for public office, (ii) campaigning for a candidate for public office, or (iii) participating in fund-raising activities for the benefit of a candidate, political party or political advocacy group[.]"[279] The statute defines "recreational activities" as including "any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material[.]"[280] The statute also contains a safe-harbor provision for employers, allowing an employer to take adverse action if the employee's speech "creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest[.]"[281]

Although the New York statute defines "political activities" fairly narrowly in terms of electoral-related functions, the existing caselaw takes a broader view of the scope of the statute. The New York Appellate Division has issued decisions in which it has allowed claims to proceed alleging termination as a result of a discussion "outside of the workplace in which [the plaintiff's] political affiliations became an issue"[282] and as a result of the political activity of attending the funeral of the victim of a hate crime.[283] Those decisions, while providing no analysis, are consistent with the legislative history found in the statement of the bill's sponsor: "we have long since passed the days of company towns, where the company told you when to work, where to live and what to buy in their stores. This bill would insure that employers do not tell us how to think and play on our own time."[284] As Professor Lakier has noted, this provision of New York law can be viewed as "an attempt to prevent employers from using the economic power that the employment relationship gave them to render workers subordinate to them in some important, democratically troubling way."[285]

Under this authority, there is a sound argument that the Law Firm Blacklist violates the New York Labor Law. That law prohibits private firms from refusing to hire applicants based on their political activity. The cases decided under the New York Labor Law indicate that the political activities protected by the law should be construed broadly to include political activity

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[278] N.Y. LAB. LAW § 201-d(2)(a), (c) (McKinney 2023).
[279] *Id.* at § 201-d(1)(a).
[280] *Id.* at § 201-d(1)(b).
[281] *Id.* at § 201-d(3)(a).
[282] Cavanaugh v. Doherty, 243 A.D. 2d 92, 100 (N.Y. App. Div. 1998).
[283] El-Amine v. Avon Products, Inc., 293 A.D. 2d 283 (N.Y. App. Div. 2002). *See* Jonathan Sabin, *Employer Regulation of Employee Political Conduct In and Outside of the Office*, N.Y. L. J. (May 21, 2024),https://www.law.com/newyorklawjournal/2024/05/21/employer-regulation-of-employee-political-conduct-in-and-outside-of-the-office/; Joseph Pace, *Can Private Employees Be Fired for Out-of-Office Political Speech*, 95 N.Y. STATE BAR J. 28 (Mar. 28, 2023), https://nysba.org/can-private-employees-be-fired-for-out-of-office-political-speech/.
[284] Alyce H. Rogers, *Employer Regulation of Romantic Relationships: The Unsettled Law of New York State*, 13 TOURO L. REV. 687, 690 (1997) (quoting Sen. James J. Lack Mem., Ch. 776, N.Y.S. LEGIS. ANN. (1992)).
[285] Lakier, *Non-First Amendment Law of Free Speech*, *supra* note 31, at 2341.

generally and political affiliations.[286] Those cases (while moving beyond the statutory language) not only find support in the legislative history of the New York Labor Law,[287] but more broadly they are also consistent with much of the non-First Amendment law of free speech. There are "numerous local, state, and federal laws that protect the freedom of workers to speak as they wish, and to associate with whom they wish, against the economic coercion of their employers."[288] Those laws and court decisions have come about because "legislators have come to believe just as courts have, that allowing employers unimpeded freedom to use their economic power to constrain their employees' speech threatens the vitality of the marketplace of ideas and undermines the political, and perhaps also social, equality that is a crucial precondition of democracy."[289] The caselaw construing the New York Labor Law, the legislative history, and the breadth of state law support for protecting employee speech, together provide a basis for a reading that blacklisting of law firm applicants based on their protest activity contravenes New York law.

In addition to the argument to be made for the statutory violation, the timing of the Law Firm Blacklist also raises concerns. That blacklist was announced in mid-2024 in the wake of House Education Committee hearings and the Judges' Blacklist.[290] Thus, the Law Firm Blacklist was issued at a time when members of two branches of the federal government had denounced activity by student protesters – activity that consisted of largely peaceful political speech and association.[291] The Law Firm Blacklist was thereby implemented in the same way as a key tactic of the McCarthy era: by following government criticism with a private blacklist.[292]

One possible response to a claim that the New York Labor Law (or another state's law) prohibits a blacklist of or refusal to hire an applicant based on the applicant's political activity is that a juridical entity such as a law firm has a First Amendment right of association pursuant to which it has

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[286] Cavanaugh, 243 A.D. 2d at 100; El-Amine, 293 A.D. 2d at 283.
[287] Rogers, *supra* note 284, at 690.
[288] Lakier, *Non-First Amendment Law of Freedom of Speech*, *supra* note 31, at 2331. Thus, a number of states have legislation that protects private employee speech or political activity from employer retaliation. Some states have enacted laws broadly protecting the expressive autonomy of private-sector employees. For example, Connecticut has a statute barring employment discrimination based on any "exercise . . . of rights guaranteed by the First Amendment." CONN. GEN. STAT. ANN. § 31-51q (West 2020). That statute has been interpreted to apply to private employers the same rules governing public employers under the First Amendment (although the statute may not apply to hiring decisions). *See* Neron v. Amedisys Holding, LLC, No. 3:22-cv-469 (OAW), 2024 WL 1072578, at *9 (D. Conn. Mar. 12, 2024); Cotto v. United Techs. Corp., 738 A.2d 623, 627 (Conn. 1999). California has a statute prohibiting employers from retaliating against employees for engaging in "political activities" that has been interpreted broadly to include participation in protest movements such as the gay rights movement. *See* Hamilton v. Juul Labs, Inc., No. 20-cv-03710-EMC, 2021 WL 275485, at *8, *13 (N.D. Cal. Jan. 27, 2021); Gay Law Students Ass'n v. Pac. Tel. & Tel. Co., 595 P.2d 592, 610 (Cal. 1979). Other states have similar statutes and regulations limiting regulation of speech in the private sector. *See* Volokh, *Private Employees' Speech*, *supra* note 31, at 302-334; Lakier, *Non-First Amendment Law of Free Speech*, *supra* note 31, at 2331-2342.
[289] Lakier, *Non-First Amendment Law of Free Speech*, *supra* note 31, at 2342.
[290] *See* discussion *supra* notes 6-12 and accompanying text
[291] *See* discussion *supra* note 19 and accompanying text.
[292] *See* discussion *supra* notes 108, 144-45 and accompanying text.

the right not to hire anyone whose political views it rejects.[293] That is, a law firm may assert that it has a right to blacklist and the concomitant right not to hire those with whom it disagrees, so as not to convey the message (or be perceived as conveying the message) of those they blacklist.[294] The cases recognizing a First Amendment right of association, however, have involved expressive associations[295] -- and a law firm is a commercial business association, not an expressive association. In the case of a business such as a law firm, "there is only minimal constitutional protection of the freedom of commercial association."[296] In Justice O'Connor's words in her "influential concurrence" in Roberts v. United States Jaycees, "[t]he Constitution does not guarantee a right to choose employees . . . without restraint from the State . . . . [G]overnmental regulation of the commercial recruitment of new . . . employees is valid if rationally related to the government's ends."[297] Referencing the Court's decision in Hishon v. King & Spalding, which upheld a female law firm associate's claim of discrimination in the denial of promotion to partnership, Justice O'Connor stated: "As a commercial enterprise, the law firm could claim no First Amendment immunity from employment discrimination laws, and that result would not have been altered by a showing that the firm engaged even in a substantial amount of activity entitled to First Amendment protection."[298] Similarly here, a law firm should not be able to claim the

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[293] *See, e.g.*, MARTIN H. REDISH, THE LOGIC OF PERSECUTION 12 (2005) (arguing that blacklists based on ideological grounds (*e.g.*, blacklists of Communist Party members) are an "exercise of the . . . First Amendment right of non-association . . .").

[294] In Professor Redish's words, "the right of nonassociation that is grounded in the constitutional guarantee of free expression is properly viewed as an outgrowth of the well-established First Amendment precept that one may not be compelled to utter views which he deems offensive." *Id*. at 13 (citing Wooley v. Maynard, 430 U.S. 705, 715 (1977) (upholding the right of an objector to tape over the motto "Live Free or Die" on his New Hampshire license plate).

[295] The leading case on this issue is Boy Scouts of America v. Dale, 530 U.S. 640 (2000). There, the Boy Scouts expelled James Dale, "an avowed homosexual and gay rights activist" as an assistant scoutmaster – a Scout leader – based on the Boy Scouts expressed view that homosexuality is immoral. Dale challenged that action under New Jersey's public accommodations law, which prohibited the Boy Scouts from discriminating against Dale based on his sexual orientation. The Court, after determining that "the Boy Scouts is an expressive association and that the forced inclusion of Dale would significantly affect its expression," held that application of New Jersey's public accommodations law "runs afoul of the Scouts' freedom of expressive association." *Id*. at 656. Dale's inclusion, according to the Court, would "send a message, both to the youth members and to world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id*. at 653.

[296] Roberts v. U.S. Jaycees, 468 U.S. 609, 634 (1984) (Connor, J., concurring in part and concurring in the judgment). Although a commercial entity may be an "expressive association," entitled to greater constitutional protection, an "ordinary commercial law practice is not" such an association. *Id.* at 636. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 600 (2023) ("the First Amendment extends to all persons engaged in expressive conduct, including those who seek profit (such as speechwriters, artists and web designers)."); Volokh, *Speech Restrictions*, *supra* note 276, at 277, 280-82 ("Some have argued that employers have a constitutional right to refuse to associate with people whose political beliefs they reject. But the Court has never extended the right that far.").

[297] *Roberts*, 468 U.S. at 634-635; *see* Elizabeth Sepper, *The Return of Boy Scouts of America v. Dale*, 68 ST. LOUIS UNIV. L. J. 803, 812 (2024) ("Justice O'Connor's influential concurrence in *Roberts* had drawn a line between predominantly expressive associations and commercial enterprises.").

[298] *Roberts*, 468 U.S. at 637 (citing Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (reversing dismissal of Title VII complaint alleging that law firm discriminated against female associate in denying her admission to partnership and stating: "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protection.")); *see* Volokh, *Speech Restrictions, supra* note 275, at 278-79.

First Amendment right of association as a shield against New York's Labor Law protections.

A law firm might also assert the related argument that the New York Labor Law prohibition on discriminating against political protesters is a form of compelled speech, improperly requiring the firm to hire attorneys who voice a message disavowed by the firm. A similar argument was before the Court in Rumsfeld v. Forum for Academic and Institutional Rights, Inc. ("FAIR").[299] There, an association of law schools – FAIR – sought to preclude the military from recruiting on their campuses because of the military's discrimination based on sexual orientation. Congress responded by passing the Solomon Amendment, under which institutions of higher education that denied military recruiters access equal to that provided to other recruiters would lose certain federal funding.[300] FAIR sought an injunction against enforcement of the Solomon Amendment, arguing that the application of the statute to the law schools violated their First Amendment rights.[301] FAIR argued that requiring the law schools to host military recruiters was a form of compelled speech, whereby the government was "forc[ing] one speaker [the law schools] to host or accommodate another speaker's [the recruiter's] message."[302] FAIR said the military recruiters' presence on campus would be seen as an endorsement by the schools of the recruiters' speech and should not be allowed, as it would interfere with the law schools' messaging.[303] The Court rejected this argument, holding that there is "little likelihood" that the recruiters' views would be mistaken for the views of the law schools and there is nothing in the federal statute that restricts what the law schools can say about military policy.[304] Similarly, law firm applicants (or interns or summer associates) participating in political protests outside of the office are not likely to be understood as speaking on behalf of the firm. At any rate, the firm can disavow that speech or activity, either generally or in any given instance.[305] The out-of-office speech and political activities of applicants and untenured interns or summer associates is just that – extracurricular activity undertaken by adults on their own time. These future employees (or temporary employees) are not slated for entry as policy-making managers (at least in the vast majority of cases),

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[299] Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006) (Roberts, C.J., delivering the opinion of the Court).
[300] *Id.* at 51.
[301] *Id.* at 63.
[302] *Id. See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) (holding that under the First Amendment a state law cannot require a parade to include a group whose message the parade's organizer does not wish to send).
[303] *Rumsfeld*, 547 U.S. at 63.
[304] *Id.* at 65. The Court noted in this regard that the law schools' recruiting services are "not inherently expressive" as required by *Hurley*. *Rumsfeld*, 547 U.S. at 64. As discussed above, law firms similarly are not expressive associations.
[305] *See* Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 260 (2013) ("when an employee speaks about political issues on her own time, her speech is not likely to be understood as expressing her employer's views (at least where she was neither hired specifically as a spokesperson or lobbyist nor occupies such a senior position in the company as to be understood as speaking for it at all times) . . . In any event, the employer can always disavow the employee's off-work speech – whether through a general disclaimer of responsibility for anything an employee says outside the workplace or in response to a specific act of speech that the employer, customers or coworkers find particularly offensive.").

and there is little basis for arguing that an employee-protective statute, such as New York's Labor Law, infringes in this situation on the firm's free speech rights.[306]

Another argument is that the refusal to hire blacklisted applicants could itself be viewed as symbolic expression of a law firm's position, constituting "expressive conduct" that falls under the First Amendment.[307] This argument, too, was addressed and rejected in *Rumsfeld v. FAIR.* The argument failed there, as it does here, because it is not the conduct that is expressive, it is the speech that accompanies it. Under the Court's symbolic speech cases, the conduct must be "inherently expressive" to warrant First Amendment protection. Burning the American flag, for example, is expressive conduct that has been held to warrant First Amendment protection.[308] By contrast, in *Rumsfeld v. FAIR*, "[t]he expressive component of [the] law school's actions is not created by the conduct itself but by the speech that accompanies it."[309] Similarly in the case of a law firm denying employment to an applicant based on participation in a protest, it is the refusal to hire that would trigger the New York Labor Law, and not the speech related to that decision.

Although the First Amendment likely does not provide a private law firm a defense against enforcement of the New York Labor Law, the applicability of that law in the case of potential employees who have engaged in political protest remains untested and unclear. The cases construing that statute, which have allowed its application in contexts beyond the electoral-related actions identified in the statutory language without providing any analysis, may not carry the day in the face of a strong litigation challenge. A law firm also, like a federal judge, necessarily reviews applicants for suitability, compatibility and trustworthiness. Indeed, Justice Stewart, dissenting in *Branti v. Finkel*, characterized the District Attorney's office in that case as "a firm of lawyers in the public sector" and stated, "I can think of few occupational relationships more instinct with the necessity of mutual confidence and trust than that kind of professional association."[310] Nevertheless, just as with the Judges' Blacklist, screening applicants is one thing; the announcement of a blacklist of all students who engage in political protest activity or who affiliate with particular political

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[306] FAIR also argued that requiring the law schools to accept the recruiters amounted to compelled speech insofar as "the recruiting assistance provided by the schools often includes elements of speech" (*e.g.*, in the form of scheduling emails and other communications). *Id*. at 61. The Court stated that such speech, however, does not trigger First Amendment scrutiny as it is "plainly incidental" to the regulation of conduct. The Court provided a clarifying example: "the fact that [a law prohibiting discrimination on the basis of race] will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Id*.

[307] *See* United States v. O'Brien, 391 U.S. 367, 376 (1968) (recognizing that expressive conduct may be entitled to First Amendment protection).

[308] Texas v. Johnson, 491 U.S. 397 (1989).

[309] *Rumsfeld*, 547 U.S. at 66.

[310] Branti v. Finkel, 445 U.S. 507, 520 (1980) (Stewart, J., dissenting).

groups is quite another.[311] As Professor Michael Schmidt has stated, the practice of blacklisting is "corrosive to American democracy and to a free speech culture on which the First Amendment depends."[312] The law firm's action is particularly egregious given its timing, directly on the heels of government action condemning these same protesters. Such a blacklist is fundamentally wrong and, in light of the role of members of the legal profession in the defense and protection of constitutional rights,[313] a decidedly unsound undertaking.

CONCLUSION

Peaceful political protest and freedom of association are at the heart of the First Amendment. The Judges' hiring ban on disruptive protesters as well as all those who have attended Columbia University – using their power as government officials to coerce the school to change its viewpoints and suppress student speech and protest – is plainly at variance with First Amendment precedent, including the Supreme Court's 2024 decision in *NRA v. Vullo*.[314] The law firm policy is arguably inconsistent with the provisions of the New York Labor Law protecting employee speech rights. Even if that statute does not apply to the law firm policy, however, that policy – under which potential applicants are notified that their simple presence at a protest, participation in a protest, or association with those who protest, potentially disqualifies them from employment – is fairly subject to condemnation as inconsistent with free speech principles, especially where, as here, that policy is effectuated in tandem with government action. The legacy of McCarthyism haunts these blacklisting practices, where speech and expressive association that falls under the aegis of the First Amendment is targeted.

Blacklisting in the McCarthy era stemmed from the government's adoption of a loyalty program and a quasi-official blacklist, and soon became a mainstream phenomenon in both the public and private sectors. Its growth was enabled by the complicity of politicians, lawyers and the courts, including the Supreme Court. Blacklisting became pervasive, and protest was silenced. Professor Goldstein summarizes the effect at the time on student protest at institutions of higher education:

> One of the clearest indicators of the long-term effects of the Truman-McCarthy period was the political lethargy of American college students throughout the

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[311] As noted above, the law firm's policy clearly goes beyond screening. *See* discussion *supra* notes 11-19 and accompanying text. The intent of the law firm's policy is to disqualify those who have participated in political protests ("even if they weren't using problematic language but were involved with a protest where others did") or have associated with protest groups that the law firm condemns. *See* Flitter, *supra* note 10. The effect of the policy is the same as that of any blacklist: chilling free speech and deterring political dissent.

[312] Michael Schmidt, *Book Note: The Logic of Persecution*, 41 HARV. C.R.-C.L. L. REV. 591, 596 (2006).

[313] *See* Zacharias, *supra* note 36, at 1608-09; MODEL RULES, *supra* note 36.

[314] 602 U.S. 175 (2024).

> 1950's, which earned them the appellation, "The Silent Generation." The number of activist students during the entire decade – although increasing in the last two or three years of the 1950's – was miniscule, and most left-wing organizations on campus that had been active in the previous twenty years were virtually moribund.[315]

The Judges' Blacklist and the Law Firm Blacklist, which are now operating concurrently with congressional and executive branch actions similarly targeting protesters, raise the specter of a comparable wave of political repression. These hiring bans clearly will have, and undoubtedly have already had, the effect of chilling speech and association. Simply put, where prominent members of the legal profession blacklist political protesters, it will inevitably deter aspiring lawyers from voicing dissent. It is fair to look to the McCarthy era for insight in analyzing these developments, and it is appropriate to register serious concern that lawyers and judges are at the forefront of these efforts. Rather than abetting these measures, the legal profession should instead be leading the battle against actions to cabin speech and limit political dissent, as once the lawyers – the foot soldiers of our Constitution – begin to abandon the struggle, the prospect of maintaining those freedoms dims considerably.

[315] GOLDSTEIN, POLITICAL REPRESSION, *supra* note 61, at 381-82.

Terminating Democracy: The Antiabortion Movement's Attempted Subversion of Direct Democracy Since *Dobbs*.

DEBORAH MACHALOW*

INTRODUCTION

In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court's conservative majority proclaimed that it was returning authority to regulate or prohibit abortion "to the people and their elected representatives."[1] The Court, and its supporters, painted *Dobbs* as a "win for democracy" because "the American people g[o]t their voice back."[2] Since *Dobbs*, support for legal abortion has increased,[3] yet elected officials continue supporting draconian abortion restrictions, forcing Americans to turn to ballot measures[4] to express their policy preferences.[5] In the first two years after *Dobbs*, reproductive rights achieved universal success at the ballot box in citizen-initiated and legislative-referred measures, but that streak ended in November 2024 after the antiabortion movement redoubled efforts at every stage of the initiative process to silence and mislead voters

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[1] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022).

[2] *See* David Landau & Rosalind Dixon, Dobbs, *Democracy, and Dysfunction*, 2023 WIS. L. REV. 1569, 1574–75 (2023) (identifying examples from *Dobbs* that "are heavily laden with references to democracy"); *Id.* at 1576–77 (describing "discourse among commentators who have justified" *Dobbs* in terms of democracy and quoting Professor Helen Alvaré and Senator Mitch McConnell); *see also infra* nn.14–16 and surrounding text.

[3] *See e.g.*, Christine Fernando & Amelia Thomson-Deveaux, *Support for Legal Abortion Has Risen Since Supreme Court Eliminated Protections, AP-NORC Poll Finds*, ASSOCIATED PRESS (July 9, 2024, 10:21 EDT), https://apnews.com/article/abortion-trump-biden-election-2024-dobbs-498d14f6e2bbfe1f313f006ad089de4e ("Seven in 10 Americans think abortion should be legal in all or most cases, a slight increase from last year[.]"); PEW RSCH. CTR., BROAD PUBLIC SUPPORT FOR LEGAL ABORTION PERSISTS 2 YEARS AFTER DOBBS 3 (May 13, 2024), https://www.pewresearch.org/wp-content/uploads/sites/20/2024/05/PP_2024.5.13_abortion_REPORT.pdf ("63%[] say abortion should be legal in all or most cases. This share has grown 4 percentage points since 2021").

[4] As a note on terminology: "initiative" or "ballot measure" refers to a process of citizen lawmaking, in which citizens propose a law or constitutional amendment, obtain the signatures necessary to put that proposal on the ballot, before voters approve or disapprove it on election day. "Referendum," on the other hand, refers to "citizens gather[ing] signatures to place a disputed law . . . on the ballot for voters to consider. Unfortunately, the popular press often refers to initiatives as referendums." DANIEL A. SMITH & CAROLINE J. TOLBERT, EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES x–xii (2007). This article will focus only on citizen-initiated constitutional amendments.

[5] *See e.g.*, Kate Zernike, *Missouri and South Dakota Move Toward Abortion Rights Ballot Questions*, N.Y. TIMES (May 3, 2024), https://www.nytimes.com/2024/05/03/us/abortion-rights-missouri-south-dakota.html.

to prevent them from enacting their pro-choice preferences.[6] These antidemocratic efforts—which succeeded in Arkansas, Florida, Nebraska, and South Dakota—provide further evidence that restrictions on reproductive freedom "go[] hand in hand with creeping authoritarianism."[7]

This Article will begin with the democratic rationale purportedly underlying *Dobbs* before describing the importance of voting and direct democracy. Then, it will catalog the efforts of the antiabortion movement to stymie direct democracy in Michigan, Ohio, Arizona, Arkansas, Florida, Missouri, Montana, Nebraska, Nevada, and South Dakota.[8] These efforts included: (1) attempts to dissuade voters from signing petitions to get proposals on the ballot; (2) attempts to encourage people to withdraw their signatures; (3) intimidation of canvassers and petition-signers; (4) dissemination of misinformation about the scope and impact of the proposals if enacted; (5) use of public offices to oppose, delay, publicly mischaracterize, or thwart proposals; (6) attempts to restrict the initiative process; (7) litigation to remove proposals from the ballot or to invalidate measures; (8) contemplation or actually placing competing abortion-related proposals on the ballot; and (9) obstruction or attempted invalidation of approved amendments. Finally, this Article ties these efforts to prevent, stifle, and overturn pro-choice votes to backsliding democracy.

I. *DOBBS* AND DEMOCRACY: THE EMPTY PROMISE OF ALLOWING EACH STATE TO REGULATE ABORTION "AS ITS CITIZENS WISH."

In 1973, the Supreme Court concluded that the Constitution protected "a woman's decision whether or not to terminate her pregnancy" in certain circumstances.[9] While laypeople can easily name *Roe*, since 1992, *Planned Parenthood of Southeastern Pennsylvania v. Casey* provided the governing standard of review while "retain[ing]" and "reaffirm[ing]" "the essential holding of *Roe*."[10] The result in *Casey* was "roughly in line with national democratic opinion on the question of access to abortion."[11] Even so,

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[6] *Id.*; Allison McCann & Amy Schoenfeld Walker, *How Ballot Measures Will Change Abortion Access*, N.Y. TIMES (Nov 6,2024), https://www.nytimes.com/interactive/2024/11/06/us/elections/abortion-ballot-results-laws-election.html; *see also* Molly E. Carter, *Regulating Abortion Through Direct Democracy: The Liberty of All Versus the Moral Code of a Majority*, 91 B. U. L. REV. 305, 312–15 (2011) (showing the 2024 election results are more in line with historical norms: before *Dobbs*, abortion ballot measures achieved inconsistent success).

[7] *See* Katherine Tangalakis-Lippert, *Undermining of Abortion Rights Is Extremely Rare and 'Goes Hand in Hand with Creeping Authoritarianism' Experts Warn*, BUS. INSIDER (May 2, 2022, 23:37 ET), https://www.businessinsider.com/backsliding-democracy-abortion-rights-hand-in-hand-with-creeping-authoritarianism-2022-5.

[8] Coloradoans also approved a citizen-initiated constitutional amendment protecting abortion access and removing a ban on using government funds to pay for abortions in 2024. *See* Jennifer Brown, *Amendment 79 Passes: Colorado Will Protect Abortion in State Constitution, Allow Public Spending on Procedure*, COLO. SUN (Nov. 5, 2024, 20:30 ET), https://coloradosun.com/2024/11/05/colorado-amendment-79-results/ However, unlike the initiative battles discussed herein, the opposition was anemic and appears not to have engaged in the same antidemocratic attacks seen in other states.

[9] Roe v. Wade, 410 U.S. 113, 152–53 (1973).

[10] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845–46 (1992).

[11] Landau & Dixon, *supra* note 2, at 1608; *see also* Mary Ziegler, *The End of Roe v. Wade*, 22 AM. J. BIOETHICS 16, 16 (2022) (explaining that nationwide, "more Americans support than oppose the right to an abortion in most scenarios—including cases in which the life or health of the mother is at stake, the

beginning in the 1980s, "anti-abortion activists agitating for the end of *Roe* demanded the [C]ourt return the issue of abortion 'to the people.'"[12]

Dobbs delivered.[13] The Court described *Roe* and *Casey* as "short-circuit[ing] the democratic process by closing it to the large number of Americans who dissented in any respect from *Roe*" before overruling both decisions to "allow each State to regulate abortion as its citizens wish."[14] As the Court put it, "'[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.'"[15] In short, "the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives."[16] As such, the majority indicated, "the political process was the proper venue for resolving the competing interests at stake in the abortion debate."[17]

Yet, "*Dobbs* cannot be genuinely understood to rest on or to further democratic engagement, as the majority insists. Instead, the majority's invocation of democracy is yet another discursive move that deploys the vernacular and values of democracy for other ends."[18] "[T]he Court's appeal to democracy [in *Dobbs* was] shallow, underdeveloped, and profoundly cynical" for a number of discrete reasons: (1) the overemphasis on state legislatures, which "are often the least representative institutions in state government," (2) minimizing the role of state courts, state and officials, and direct democracy in state-level democracy; (3) ignoring the prospect of federal legislation on abortion; (4) a "fixat[ion] on deploying democracy in one direction—limiting, rather than expanding, access to abortion"; (5) a simplistic equation of voting to political power, ignoring women's underrepresentation in elected office, as lobbyists, and as contributors to political campaigns; (6) relying on a history and tradition analysis premised on laws enacted while women were not "full and equal members of the polity"; and (7) a complete failure "to grapple with the ways in which withdrawing the abortion right would restrict the full democratic participation and equal citizenship of women."[19] Looking to the future,

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fetus could be born with severe health problems, the pregnancy resulted from rape or the woman does not want to be pregnant," but that support drops after fetal viability).

[12] Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 729, 739–42 (2024); Tessa Stuart, *Republicans Are Torching Democracy to Deny Women Abortions*, ROLLING STONE (June 22, 2023), https://www.rollingstone.com/politics/politics-features/abortion-rights-roe-dobbs-ohio-democracy-1234775783/.

[13] *See* Mary Ziegler, *Should Constitutional Rights Reflect Popular Opinion? Interpreting Dobbs v. Jackson Women's Health Organization*, 6 MODERN AM. HIST. 88, 91 (2023) ("The *Dobbs* decision came after decades of rights-focused organizing. *Dobbs* vindicated antiabortion activists and conservative lawyers who had hoped to create a Court that would care more about interpretive method and political ideology than about popular opinion.").

[14] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 230–31, 269 (2022); *Id.* at 302 ("The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.").

[15] *Id.* at 232 (internal citation omitted).

[16] *Id.* at 292.

[17] Murray & Shaw, *supra* note 12, at 731.

[18] *Id.* at 734.

[19] *Id.* at 763–66, 768–73.

"despite its broad endorsement of democratic deliberation, the Supreme Court has not spoken its final word on [abortion]."[20]

In *Dobbs*, the Court "rejected a right that it ha[d] recognized for [nearly] fifty years, thereby leaving the issue to the mercy of deeply dysfunctional state legislative processes," leading to "strange, countermajoritarian results out of step with public opinion."[21] A clear majority of Americans did not want *Roe* overturned[22] and *Dobbs* "widened the gap between public preferences and public policy, both nationwide and within many states."[23] Dissatisfied with restrictive abortion laws and recognizing the low chances of ousting elected officials who disagreed with them on abortion, Americans have turned to the initiative process (where available) seeking to protect or restore abortion access within their states.[24] In response, the antiabortion movement attempted to stymie these efforts at every turn—elevating policy over democracy.

II. VOTING AND DIRECT DEMOCRACY.

Voting is fundamental to both our national identity and our government's functioning: it "shapes citizens' attitudes towards and interactions with democracy, and how [citizens] see [their] place within it."[25] Voting has been widely accepted and celebrated—even "by citizens who in other respects disagree so deeply"—such that voting "occupies a central place in the democratic imagination, the focal point of democratic hopes," and "has become recognized as a central pillar of democratic citizenship; so much so that the struggle for democracy and equal citizenship is often equated with the expansion of voting rights and opportunities."[26] Voting not

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[20] *Id.* at 807.

[21] Landau & Dixon, *supra* note 2, at 1609. Instead, the Court could—should?—have promoted democracy in *Dobbs* by: (1) delaying implementation "to allow for legislative changes, citizens' initiatives, and other democratic forms of response"; or (2) invalidating "legislation on the books that was inconsistent with the prior *Casey* framework," requiring legislatures to "pass new laws regulating abortion and reflecting democratic deliberation in the changed legal environment." *Id.* at 1610–12.

[22] Ziegler, *supra* note 11, at 16; *see also* Gary Langer, *More Say Politics, Not the Law, Drive Supreme Court Decisions: POLL*, ABC NEWS (May 9, 2023, 06:01 ET.), https://abcnews.go.com/Politics/politics-law-drive-supreme-court-decisions-poll/story?id=99168846 (by mid-2023, "66% of Americans opposed *Dobbs*, including 54% who strongly opposed it").

[23] Matthew A. Baum, Alauna Safarpour, & Kristin Lunz Trujillo, *Kansas Vote for Abortion Rights Highlights Disconnect between Majority Opinion on Abortion Laws and Restrictive State Laws Being Passed after Supreme Court Decision*, THE CONVERSATION (Aug. 3, 2022, 13:06 ET), https://theconversation.com/kansas-vote-for-abortion-rights-highlights-disconnect-between-majority-opinion-on-abortion-laws-and-restrictive-state-laws-being-passed-after-supreme-court-decision-187138.

[24] *See* Landau & Dixon, *supra* note 2, at 1580 ("Empirically, high levels of partisan gerrymandering are often correlated with draconian—and anti-majoritarian—restrictions on access to abortion."); Sara Carter, Alice Clapman, & Alexi Comella, *Politicians Take Aim at Ballot Initiatives*, BRENNAN CTR. FOR JUST. (Jan. 16, 2024), https://www.brennancenter.org/our-work/research-reports/politicians-take-aim-ballot-initiatives (explaining that approximately half of states permit citizens to directly propose laws or constitutional amendments). To be clear, direct democracy is not the only possible way to protect abortion access. Instead, this article focuses on citizen-initiated ballot measures because that is a method that has largely proven successful post-*Dobbs* in securing abortion access, even where legislators are hostile to abortion rights.

[25] EMILEE BOOTH CHAPMAN ELECTION DAY: HOW WE VOTE AND WHAT IT MEANS FOR DEMOCRACY xi (2022).

[26] *Id.* at 11, 21. "The practice of popular voting instantiates democratic values" while "perform[ing] functions that support a healthy democratic system" since "[t]he practice of popular voting in contemporary

only provides "a uniquely easy and egalitarian way for citizens to access political influence," but also "combines an ambition toward universal participation, a concrete and transparent application of equality, and a rhythm of decisive, consequential, participatory moments to create a singular experience of democratic citizenship."[27] "[V]oting represents an important moment in democratic life because it is an occasion when the ultimate decision-making procedure includes *each and every* member of the polity on manifestly equal terms"; it reminds us that democracy is "a collective activity of self-rule undertaken by a community of equals."[28] Disappointed voters accept election results because they respect the process and understand that the outcome resulted from shared activity.[29] "Even though citizens may have different political preferences or policy goals, decision-making in a democracy is something that we are committed to doing together," with "*each* citizen . . . an equal agent in democratic self-rule."[30] For these reasons, "[p]opular voting is *the* central practice of modern democracies."[31]

Similarly, "ballot measures are an essential part of American democracy in many states and give voters an important tool to enact needed (and popular) policy changes," thereby "bypass[ing] unresponsive legislatures that ignore or defy their constituents."[32] "Fundamentally, the philosophical underpinnings of direct democracy sprung from the Populist faith that government should be founded on the acquiescence of the governed," with ballot measures "symboliz[ing] the return of government to the people."[33] Ballot measures are becoming more important given that

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democracies is constituted not only by formal equality and widespread opportunities for participation; it is also constituted by a standard of approximately universal participation and by the creation of participatory moments able to command widespread attention." *Id.* at 22; *see also* Gary Fields & Amelia Thomson-Deveaux, *Yes, We're Divided. But New AP-NORC Poll Shows Americans Still Agree on Most Core American Values*, ASSOCIATED PRESS (Apr. 3, 2024, 06:46 ET), https://apnews.com/article/ap-poll-democracy-rights-freedoms-election-b1047da72551e13554a3959487e5181a (reporting that 91% of Americans consider the rights to vote and equal protection to be either extremely or very important to our national identity, but that "only approximately 3 in 10 Americans believe the nation's democracy is functioning well").

[27] CHAPMAN, *supra* note 25, at 4, 6. Of course, voting is not the only way in which citizens participate in democracy: "Citizens also influence public life through protest, petition, campaigning, and adding their voice to public deliberation." *Id.* at xii–xiii. However, voting "is more tightly linked to models of good citizenship than other participatory acts" and "is the only participatory act widely thought to be a *necessary* component of good citizenship." *Id.* at 25–26 (emphasis in original).

[28] *Id.* at 37–38, 40.

[29] *Id.* at 11, 85–86.

[30] *Id.* at 163.

[31] *Id.* at 214.

[32] Mac Brower, *Republicans Hint at Why They Are Restricting Ballot Measures in These States*, DEMOCRACY DOCKET, (Feb. 27, 2023), https://www.democracydocket.com/analysis/republicans-hint-at-why-they-are-restricting-ballot-measures-in-these-states/; Jeff Milchen, *After Progressive Ballot Victories, GOP Wages War on Citizen Lawmaking*, COMMON DREAMS (Feb. 19, 2023), https://www.commondreams.org/opinion/ballot-initiatives-republicans This is especially true given "Republican attempts to limit voting and gerrymander electoral districts," which create and perpetuate minority rule. *Ibid.* Historically, direct democracy has "disproportionately been used to promote conservative policies over progressive ones." Thom Reilly, *Legislative Inaction and Dissatisfaction with One-Party Control Lead to More Issues Going Directly to Voters in Ballot Initiatives, with 60% of Them in Six States*, THE CONVERSATION (Mar. 21, 2024, 08:23 EDT), https://theconversation.com/legislative-inaction-and-dissatisfaction-with-one-party-control-lead-to-more-issues-going-directly-to-voters-in-ballot-initiatives-with-60-of-them-in-six-states-222129.

[33] SMITH & TOLBERT, *supra* note 4, at 19–20.

"Americans are increasingly dissatisfied with . . . representative democracy."[34]

The initiative process permits citizens to draft legislation or state constitutional amendments, and, if enough signatures are collected, to place their proposal before voters.[35] Proponents of ballot initiatives contend that they: (1) "most accurately measure public opinion on a given issue"; (2) produce "more democratic legitimacy and strengthen democratic government generally by allowing the people to speak directly"; (3) "are less susceptible to the influences of special interest groups than are representative politics"; and (4) "produce 'open, educational debate,' leading citizens to develop civic virtue and inducing them to participate in politics."[36] Political science research "suggests that citizen lawmaking may [itself] indirectly strengthen American democracy."[37] As to amending state constitutions, specifically, "amendment is itself an important state constitutional right," which "recognizes the people's sovereignty as an active, ongoing commitment."[38] Additionally, "highly salient, constitutional [ballot measures] can garner unusually high turnout."[39]

"Historically, because of gerrymandering and other structural distortions . . ., the legislative process often has not accurately reflected voters' will, particularly when it comes to abortion."[40] "Citizen-initiated ballot measures provide a direct pathway for the electorate to decide whether or not abortion should be legal in their state, regardless of how their elected representatives have decided to approach abortion policy."[41] Interestingly,

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[34] Reilly, *supra* note 32.

[35] Carter, *supra* note 6, at 308. This is distinguishable from legislatively-referred proposals, which begin in the legislature before being submitted to the voters for approval. *Id.*; *see also Maryland Question 1, Right to Reproductive Freedom Amendment (2024)*, BALLOTPEDIA, https://ballotpedia.org/Maryland_Question_1,_Right_to_Reproductive_Freedom_Amendment_(2024) (last visited Mar. 18, 2026); *New York Proposal 1, Equal Protection of Law Amendment (2024)*, BALLOTPEDIA, ballotpedia.org/New_York_Proposal_1,_Equal_Protection_of_Law_Amendment_(2024) (last visited Mar. 18, 2026); *California Proposition 1, Right to Reproductive Freedom Amendment (2022)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_1,_Right_to_Reproductive_Freedom_Amendment_(2022) (last visited Mar. 18, 2025); *Vermont Proposal 5, Right to Personal Reproductive Autonomy Amendment (2022)*, BALLOTPEDIA, https://ballotpedia.org/Vermont_Proposal_5,_Right_to_Personal_Reproductive_Autonomy_Amendment_(2022) (last visited Mar. 18, 2026).

[36] Carter, *supra* note 6, at 315–17. There is some support for this: Empirically, "with respect to voter turnout, civic engagement, and political efficacy, direct democracy does indeed have positive effects on citizens"; "[c]itizens given more opportunities to directly make policy decisions are more likely to perceive that 'people like me have a say about what the government does' and are more likely to claim that 'public officials care about what people like me think.'" SMITH & TOLBERT, *supra* note 4, at 84, 137.

[37] SMITH & TOLBERT, *supra* note 4, at 143.

[38] Jessica Bulman-Pozen & Miriam Seifter, *The Right to Amend State Constitutions*, 133 YALE L. J. F. 191, 192 (2023); *Id.* at 195 ("Amendment is itself a core democratic right underlying the project of constitutional self-determination."). Unlike the federal Constitution, state constitutions "have been regularly transformed since the eighteenth century," with over 7,000 amendments adopted. *Id.* at 192, 194.

[39] CHAPMAN, *supra* note 25, at 110.

[40] Alice Clapman, *Arizona Legislators Maneuvering to Take Abortion Decision Away from Voters*, BRENNAN CTR. FOR JUST. (Apr. 30, 2024), https://www.brennancenter.org/our-work/analysis-opinion/arizona-legislators-maneuvering-take-abortion-decision-away-voters .

[41] Mabel Felix, Laurie Sobel, & Alina Salganicoff, *Addressing Abortion Access through State Ballot Initiatives*, KAISER FAM. FOUND. (Feb. 9, 2024), https://www.kff.org/womens-health-policy/issue-brief/addressing-abortion-access-through-state-ballot-initiatives. There is, of course, a risk that some voters may not recognize the complexity of abortion policy or the implications of their vote. While this is especially true when misinformation runs rampant, this risk may be countered by the ascendancy of abortion policy since *Dobbs*. *See* Carter, *supra* note 6, at 326.

a majority of Americans believe that abortion regulations *should* be determined via public "referendum"—including 59% of Republicans.[42] Some scholars have argued that any abortion right is best secured "through political and legislative victories" as stemming "from contemporary understandings of equality and citizenship."[43] While statutes can change with the composition of the legislature, constitutional amendments "provid[e] stronger, more stable protections and chang[e] the judicial review of abortion laws," while also "plac[ing] issues directly in front of voters."[44] In states whose laws are more restrictive than citizens want, "a citizen-initiated ballot measure is a way to enact constitutional protections for abortion without directly involving the legislature or Governor," that, once adopted, cannot be repealed by state officials.[45]

In order for voting—including on ballot measures—"to effectively perform its role in democracy, its procedures must produce outcomes that exhibit a general tendency of positive responsiveness to citizens' preferences" in ways that "substantially affect the character of a community's political life."[46] However, voting's efficacy is threatened in multiple ways: (1) voter suppression tactics that prevent votes from being cast and weighed equally;[47] (2) misalignment between voters' ballots and their stated values, such as "when citizens' voting decisions are based on irrelevant or false information, or when significant cognitive biases affect their interpretation of the information they do have";[48] and (3) politicians who treat election results as advisory, opting "to disregard, revise, or filter electoral results."[49] In recent years, Republicans have attempted to rely on these tactics,[50] as prominently seen in their efforts to impede direct democracy vis-à-vis abortion, interfering with "the ability of a sufficiently

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[42] Stephanie Perry, Marc Trussler, Josh Clinton, & John Lapinski, *Vast Majority of Republicans Support Abortion Exceptions for Rape, Incest and Mother's Health*, NBC NEWS (Oct. 17, 2022 08:52 EDT), https://www.nbcnews.com/politics/2022-election/vast-majority-republicans-support-abortion-exceptions-rape-incest-moth-rcna52237. Interestingly, "[t]hree-quarters of reproductive age women in the United States oppose letting states decide whether abortion is legal," including over "two-thirds of those who live in states with abortion bans and gestational limits" on abortion." *See* Nathaniel Weixel, *Most Women Oppose Leaving Abortion Laws to the States, Across Party Lines: Poll*, THE HILL (Aug. 14, 2024, 05:00 ET), https://thehill.com/policy/healthcare/4826547-most-women-oppose-leaving-abortion-laws-to-the-states-across-party-lines-poll/.

[43] Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L. J. 1394, 1404 (2009). Politics is better than relying on judicial decree because "[r]ights found by courts can also be abandoned by courts" making the "hostage to the whims of the people on the [court]." *Id.* at 1414.

[44] Felix, Sobel, & Salganicoff, *supra* note 41.

[45] *Id.*

[46] CHAPMAN, *supra* note 25 at 102, 114.

[47] *See id.* at 118.

[48] *See id.* at 68.

[49] *See id.* at 113.

[50] *See* Milchen, *supra* note 32 ("Republican politicians increasingly deem [ballot initiatives] an unacceptable intrusion into their powers and push bills to undermine ballot initiatives on three different fronts: erecting barriers to initiatives reaching the ballot, making passage more difficult and corrupting voters' intent post-passage."); *see also* Bulman-Pozen & Seifter, *supra* note 38, at 206 ("In more than half the states with a popular-initiative process, state legislatures have attempted to make the amendment process harder to use or to change the rules to thwart amendments they disfavor. . . . Rather than oppose policies that the people might pursue through state constitutional amendment, some state legislatures are trying to subvert the right to amend itself." Voters in some states have spurned these efforts *See, e.g.*, *id.* at 221).

unified and motivated public to do as it pleases, without externally imposed constraints."[51]

III. THE ANTIABORTION MOVEMENT'S EFFORTS TO SUBVERT DIRECT DEMOCRACY.

Recognizing that Americans have become more supportive of abortion rights, the antiabortion movement—aided by likeminded public officials—have tried to prevent voters from supporting abortion at the ballot box through any available means.[52] This Section will examine the efforts of the antiabortion movement in states with abortion-related citizen-initiated ballot measures in 2022, 2023, and 2024, organized chronologically and then alphabetically. Only in 2024 did the antiabortion movement defeat abortion-protection efforts in Arkansas, Florida, Nebraska, and South Dakota.[53]

A. Michigan

With *Dobbs* pending, in early 2022, the ACLU of Michigan, Michigan Voices, and Planned Parenthood Advocates of Michigan formed Reproductive Freedom for All ("RFFA"), an organization to spearhead efforts to place a proposed state constitutional amendment on the November 2022 ballot.[54] The proposal sought to protect "a fundamental right to reproductive freedom," allowing individuals "to make and effectuate decisions about all matters relating to pregnancy, including but not limited

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[51] CHAPMAN, *supra* note 25, at 101. Unfortunately, this connection between the antiabortion movement and voting restrictions goes beyond the movement's efforts to stymie direct democracy: "Antiabortion groups like Susan B. Anthony List have become more involved in advocating for voting restrictions and the White Christian nationalist movement." Saskia Brechenmacher & Erin Jones, *Beyond the Women's March: Women's Rights and Mobilization in the U.S. Democracy Movement*, *in* ON THE FRONT LINES: WOMEN'S MOBILIZATION FOR DEMOCRACY IN AN ERA OF BACKSLIDING 17 (Saskia Brechenbacher, Erin Jones, and Özge Zihnioğlu. eds., 2024).

[52] *See* Stuart, *supra* note 12 ("Republicans across the country—including in many reliably conservative states—are confronting the fact that majorities of voters are not backing their extreme anti-abortion agenda. Instead of changing their policies to better reflect their constituents[']views, they're working to make it harder for voters to express them."). Notably, "Republican efforts to restrict the ballot measure process" are not limited to abortion, but rather are a broader response to voters approving "policies via ballot measures that Republican lawmakers would not have supported." *See* Brower, *supra* note 32; Carter, Clapman, & Comella, *supra* note 24.

[53] Additional citizen-initiated ballot measures to expand abortion rights may be forthcoming. *See e.g.*, Andru Zodrow, *Idaho Reproductive Rights Group Files Draft Petitions to Restore Abortion Rights*, NON-STOP LOCAL (Aug. 17, 2024), https://www.khq.com/news/idaho-reproductive-rights-group-files-draft-petitions-to-restore-abortion-rights/article_27bb9c4e-5cc1-11ef-84ef-b3bb411045cb.html (identifying Idaho proposals that could appear on ballots in 2026). The antiabortion movement is already on the attack *See* Kelcie Moseley-Morris, *Group Organizing Idaho Abortion-Rights Initiative Files Lawsuit Over Ballot Language*, IDAHO SUN (Jan. 31, 2025), https://idahocapitalsun.com/2025/01/31/group-organizing-idaho-abortion-rights-initiative-files-lawsuit-over-ballot-language/ (discussing lawsuit challenging: (1) Idaho Attorney General's ballot title for proposed legislation to protect contraception, fertility treatment, pregnancy-related decision-making, and abortion in certain circumstances and (2) the Idaho Division of Financial Management's fiscal impact statement); Susan Rinkunas, *Republicans Prove There Was a Big Catch about 'Leaving Abortion to the States'*, DEMOCRACY DKT. (Feb. 25, 2025), https://www.democracydocket.com/opinion/republicans-prove-there-was-a-big-catch-about-leaving-abortion-to-the-states/ (discussing Idaho Republicans' proposal to raise the vote threshold necessary to amend the state constitution, which is seen as an effort to prevent liberalization of the state's abortion ban).

[54] *See* Brad Dress, *Michigan Group Launches Petition for Ballot Initiative to 'Explicitly Affirm' Abortion Rights*, THE HILL (Jan. 7, 2022, 10:46 ET), https://thehill.com/policy/healthcare/588731-michigan-group-launches-petition-for-ballot-initiative-to-explicitly-affirm/.

to prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care."[55] This right could not be "infringed upon unless justified by a compelling state interest achieved by the least restrictive means"—yet, "the state may regulate the provision of abortion care after fetal viability" except for abortions "that, in the professional judgment of an attending health care professional, [are] medically indicated to protect the life or physical or mental health of the pregnant individual."[56]

After *Dobbs*, the status of abortion in Michigan was unclear due to a 1931 law banning abortion except to preserve the life of the pregnant person and litigation by Governor Whitmer and Planned Parenthood seeking to invalidate that law.[57] Despite Citizens to Support MI Women and Children's efforts to discourage people from signing petitions,[58] RFFA collected more signatures than any other ballot measure in the state's history—753,759—far surpassing the 425,000 required.[59]

Undeterred by public support for the initiative, opponents challenged the petitions, arguing that the spacing between words was insufficient,[60] "turn[ing] out in force for a meeting of the Board of State Canvassers" to protest, leading "the board [to] split along party lines, with two Republicans voting no and two Democrats voting yes," preventing the measure from

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[55] STATE OF MICH., HOUSE FISCAL AGENCY, "REPRODUCTIVE FREEDOM FOR ALL" PETITION, BALLOT PROPOSAL 22-3 (2022).

[56] *Id.* A "compelling" state interest was limited to "protecting the health of an individual seeking care, consistent with accepted clinical standards of practice and evidence-based medicine" without "infring[ing] on that individual's autonomous decision-making." *Id.* "Fetal viability" meant "the point in pregnancy when, in the professional judgment of an attending health care professional and based on the particular facts of the case, there is a significant likelihood of the fetus's sustained survival outside the uterus without the application of extraordinary medical measures."

[57] *See e.g.*, Kate Wells, *Confusion Roiled Michigan for Days as Abortion Rights Changed Hour to Hour*, NPR (Aug. 5, 2022, 12:12 ET), https://www.npr.org/2022/08/05/1115666725/confusion-roiled-michigan-for-days-as-abortion-rights-changed-hour-to-hour ("When Dr. Audrey Lance, an OB-GYN at Northland Family Planning Centers in Metro Detroit, got to work Monday morning, abortion was legal in the state of Michigan. By noon, it wasn't. Then by 5 p.m., it was legal again, with at least some certainty it would probably stay that way, at least until a hearing Wednesday."); *see also* Planned Parenthood of Mich. v. Attorney General of State of Mich., No. 22-000044-MM, 2022 WL 2103141 (Mich. Ingham Cnty. Ct. Cl. May 17, 2022); Complaint, Whitmer v. Linderman, No. 22-193498-CZ (Mich. Oakland Cnty. Cir. Ct. Apr. 7, 2022).

[58] *See* Alice Miranda Ollstein, *The Supreme Court Could End Abortion in Michigan. The Race Is on to Let Voters Have Their Say*, POLITICO (June 9, 2022, 04:30 ET), https://www.politico.com/news/2022/06/09/the-supreme-court-could-end-abortion-in-michigan-00038259 (reporting that Citizens to Support MI Women and Children confronted canvassers and created a "tip line" to report where petitioners had been spotted); Yue Stella Yu, *Abortion Foes Launch Campaign Against 'Anything Goes' Michigan Ballot Measure*, BRIDGE MICH. (May 24, 2022), https://www.bridgemi.com/michigan-government/abortion-foes-launch-campaign-against-anything-goes-michigan-ballot-measure (describing misleading statements opposing the proposed amendment).

[59] Jake Johnson, *Rebuking GOP Officials, Michigan Supreme Court Puts Abortion Rights Initiative on Ballot*, COMMON DREAMS (Sept. 9, 2022), https://www.commondreams.org/news/2022/09/09/rebuking-gop-officials-michigan-supreme-court-puts-abortion-rights-initiative-ballot.

[60] *See* Reproductive Freedom for All v. Bd. of State Canvassers, 978 N.W.2d 854, 854 (Mich. 2022); *see also* Dave Boucher & Clara Hendrickson, *Michigan Abortion Rights Advocates Ask State Supreme Court to Put Amendment on Ballot*, DETROIT FREE PRESS (Sept. 1, 2022, 19:08 ET), https://www.freep.com/story/news/politics/elections/2022/09/01/abortion-rights-group-supreme-court-amendment-on-ballot/65467606007/ (reporting that opponents argued "that the proposed amendment appears to smoosh multiple words together, creating one long list of letters they deem indecipherable").

appearing on ballots.[61] RFFA appealed to the Michigan Supreme Court, which directed the Board of State Canvassers "to certify the [RFFA] petition as sufficient for placement on the November 8 general election ballot" because the proposed amendment's "full text" appeared—"regardless of the existence or extent of the spacing"—in 8-point type and "there [we]re sufficient signatures to warrant certification."[62]

On November 8, 2022, Michigan voters approved Proposal 3, enshrining reproductive freedom in the state constitution.[63]

That was not the end. After floating the idea of a counter-ballot initiative,[64] in November 2023, antiabortion politicians, Right to Life of Michigan, and others sued Governor Whitmer, Attorney General Nessel, and Secretary of State Benson, alleging that Proposal 3 created a unique, "super-right, immune from all legislative action," which: (1) "causes great harm to women by exempting them from the legal protections afforded . . . [by] the Fourteenth Amendment"; (2) "deprives parents of the right to direct the upbringing and education of their minor children" regarding "reproduction"; (3) "overrides" objections to "procedures involving 'reproduction'" in violation of the First Amendment; and (4) "violates the Guarantee Clause of the United States Constitution by nullifying the legitimate authority of a co-equal branch of government."[65] The lawsuit further alleges that "Proposal 3 is contrary to the strong public policy to protect innocent human life that prevailed in Michigan for many decades," "turn[ing] a blind eye to the existence of . . . innocent human life" and "deny[ing] it the legal protection every human life deserves," thereby defying "irrefutable biological facts, logic, and commonsense," which made Proposal 3 "nothing short of evil" in violation of the Fourteenth Amendment.[66] In late September 2025, the district court dismissed the lawsuit, but plaintiffs filed an appeal, which remains pending at the time of this writing.

B. Ohio

Within a week of *Dobbs*, abortion-rights supporters in Ohio began contemplating a ballot measure to amend the state constitution to restore abortion access after the state's heartbeat law went into effect,[67] recognizing

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[61] Sara Burnett, *Michigan Women Fight to Preserve Abortion, 1 Chat at a Time*, ASSOCIATED PRESS (Oct. 1, 2022, 00:48 EDT),https://apnews.com/article/abortion-2022-midterm-elections-us-supreme-court-health-government-and-politics-3433fb0f0b2fe1d00e0ed86d642a49d0.

[62] *Reproductive Freedom for All*, 978 N.W.2d at 854–55.

[63] Alice Miranda Ollstein, *Michigan Votes to Put Abortion Rights into State Constitution*, POLITICO (Nov. 9, 2022, 03:43 EST), https://www.politico.com/news/2022/11/09/michigan-abortion-amendment-results-2022-00064778.

[64] Allison R. Donahue, *Anti-Abortion Coalition Forms Against Michigan Reproductive Rights Ballot Measure*, MICH. ADVANCE (May 24, 2022, 04:25 ET),https://michiganadvance.com/2022/05/24/anti-abortion-coalition-forms-against-michigan-reproductive-rights-ballot-measure/.

[65] *See* Complaint at 2-3, Right to Life of Mich. v. Whitmer, No. 1:23-cv-01189 (W.D. Mich. filed Nov. 8, 2023).

[66] *Id.* at 16, 19.

[67] Preterm-Cleveland v. Yost, No. 1:19-cv-00360, 2022 WL 2290526 (S.D. Ohio W.D. June 24, 2022). The heartbeat law was in effect for eighty-two days before being enjoined under the state constitution's Health Care Freedom Amendment. *See generally* Preterm-Cleveland v. Yost, No. A2203203, 2022 WL 4283155 (Ohio Ct. C.P. Hamilton Cnty. Sept. 14, 2022); Jessie Balmert, *Ohio Judge Extends Order*

that the earliest that proposal could appear on ballots was November 2023.[68] This proposal sought to add Article I, Section 22 to the state constitution to protect a "right to make and carry out one's own reproductive decisions, including" decisions about abortion.[69] It would not create an unrestricted right to abortion, instead the state could regulate "using the least restrictive means to advance the individual's health in accordance with widely accepted and evidence-based standards of care," as well as prohibit abortion after fetal viability ("determined on a case-by-case basis")—except "if in the professional judgment of the pregnant patient's treating physician [abortion] is necessary to protect the pregnant patient's life or health."[70]

Antiabortion politicians repeatedly tried to derail the proposal. First, after *Dobbs*-inspired anger impacted the 2022 midterm elections,[71] Ohio Republicans proposed amending the state constitution to make ballot initiatives harder to pass "to block voters from enshrining a right to reproductive care into the state constitution."[72] This proposal would have required: (1) signatures from at least 5% of electors in each of Ohio's eighty-eight counties; and (2) at least 60% of voters approving the proposal.[73] The 60%-threshold seems to have been based on public opinion polling and the results of abortion-related ballot measures in other states.[74]

Republicans scheduled a special election in August 2023 for voters to consider the proposed changes to the initiative process, "Issue 1"—even though the state legislature had previously banned August special elections as too expensive.[75] For some antiabortion politicians, the costs were irrelevant: "If we save 30,000 lives as a result of spending $20 million, I think that's a great thing," said Ohio Senate President Matt Huffman, tying the estimated costs of the August 2023 election to the estimated number of abortions in Ohio annually.[76] Secretary of State Frank LaRose, who initially proposed raising the approval standard for constitutional amendments, acknowledged that August's Issue 1 was "100% about keeping a radical pro-

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Blocking Six-Week Abortion Ban Through Oct. 12, CIN. ENQUIRER (Sept. 27, 2022 16:17 ET), https://www.cincinnati.com/story/news/politics/2022/09/27/ohio-abortion-ban-on-hold-for-14-days-judge-orders/69521885007/.

[68] Nick Evans, *Whaley Calls for Amendment Codifying Roe While State Lawmakers Plan Sweeping Restrictions*, OHIO CAP. J. (June 30, 2022, 03:50 ET),https://ohiocapitaljournal.com/2022/06/30/whaley-calls-for-amendment-codifying-roe-while-state-lawmakers-plan-sweeping-restrictions/.

[69] *See* OHIO CONST. art. 1, § 22

[70] *Id.*

[71] *See, e.g.*, Deborah Machalow, *Screwed But Not Even Kissed: The Parade of Reproductive and Economic Horribles Likely to Follow* Dobbs, 26 J. GENDER, RACE & JUST. 81, 131 n.273 (2023).

[72] Brower, *supra* note 32; *see also* Poppy Noor, *How Republicans Are Trying to Block Voters from Having a Say on Abortion*, THE GUARDIAN (Dec. 19, 2022, 05:00 ET), https://www.theguardian.com/world/2022/dec/19/abortion-rights-votes-ballot-initiatives-republican-stop-referendum).

[73] *See* S.J. Res. 2, 135th Gen. Assemb., (Ohio 2023) (as enrolled).

[74] *See* Jason Lange, Gabriella Borter & Joseph Ax, *Ohio Abortion Rights Fight Highlights Republican Electoral Vulnerabilities*, REUTERS (May 10, 2023, 17:28 ET), https://www.reuters.com/world/us/ohio-abortion-rights-fight-highlights-republican-electoral-vulnerabilities-2023-05-10/.

[75] *See* Adam Edelman, *Ohio Banned August Elections. Then the GOP Planned One that Could Help Preserve an Abortion Ban*, NBC NEWS (May 27, 2023, 05:00 ET), https://www.nbcnews.com/politics/elections/ohio-banned-august-elections-gop-planned-one-help-preserve-abortion-ba-rcna85635.

[76] *See* Lange, Borter & Ax, *supra* note 74.

abortion amendment out of our constitution."[77] If this proposal passed, the reproductive freedom ballot initiative would have needed to start over to comply with the new requirements. Voters resoundingly rejected August's Issue 1.[78]

Second, the antiabortion movement sought to mislead or confuse voters into voting against the reproductive freedom initiative, which appeared on November 2023 ballots as "Issue 1."[79] Proponents were concerned about "widespread misinformation peddled by antiabortion groups and Republicans about what the amendment would do as well as misleading ballot language."[80] The League of Women Voters of Ohio noted voters' concerns about "false claims that the amendment [would] allow[] for unmitigated access to abortion" and the proposal's impact on parental rights; "largely echo[ing] the rhetoric coloring ads from Protect Women Ohio," an organization opposed to November's Issue 1 and which "produced a slew of clips warning that, if successful, the amendment w[ould] eliminate the requirement for a parent's consent in making decisions on whether their child can obtain an abortion, remove health and safety protections for birthing people, and open the floodgates on late-term abortions."[81] As the election drew near, Ohio voters were bombarded with "an array of misleading claims over how [Issue 1] could influence abortion care, gender-related health care, parental consent and more."[82] Opposition advertisements complained "about the legal ramifications of the measure's

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[77] *See* Morgan Trau, *Ohio Sec. of State LaRose Admits Move to Make Constitution Harder to Amend is '100% About… Abortion*,*'* NEWS 5 CLEVELAND (June 2, 2023, 18:34 ET), https://www.news5cleveland.com/news/politics/ohio-politics/ohio-sec-of-state-larose-admits-move-to-make-constitution-harder-to-amend-is-100-about-abortion (quoting LaRose as saying "It's 100% about keeping a radical pro-abortion amendment out of our constitution the left wants to jam it in there this coming November" and that his proposal was "one of the ways we can make sure they aren't successful"); *see also* Letter from Brian Stewart, Rep., Ohio H.R., to All House GOP Members (Dec. 14, 2022), https://x.com/AndrewJTobias/status/1603130384744534016 (tying the "Ohio Constitutional Protection Amendment" to preventing liberals from "do[ing] an end run around [the legislature]," starting with abortion).

[78] *See* Julie Carr Smyth & Samantha Hendrickson, *Voters in Ohio Reject GOP-Backed Proposal that Would Have Made it Tougher to Protect Abortion Rights*, ASSOCIATED PRESS (Aug. 9, 2023, 09:26 ET), https://apnews.com/article/ohio-abortion-rights-constitutional-amendment-special-election-227cde039f8d51723612878525164f1a.

[79] Ohio law requires consecutive numbering of ballot questions per election, hence voters being presented with two different Issue 1s in 2023. *See* OHIO REV. CODE § 3505.06(F). During the campaign, many believed that the confusing nomenclature surrounding the related ballot questions was intentionally caused by LaRose. *See* Adam Edelman, *Ohio Abortion-Rights Supporters Worry About Ballot Confusion in November*, NBC NEWS (Oct. 7, 2023, 12:00 ET), https://www.nbcnews.com/politics/elections/ohio-abortion-rights-supporters-ballot-confusion-november-issue-1-rcna118397. Recognizing this confusion, Republicans proposed a bill that would have provided a unique number for each question. *See* H.B. 271, 135th Gen. Assemb., Reg. Sess. (Ohio 2023); *see also* Andrew J. Tobias, *Which Issue 1? Ohio House Bill Would Resolve Confusion over Numbering Future State Issues*, CLEVELAND.COM (Sept. 20, 2023, 14:39 ET), https://www.cleveland.com/news/2023/09/which-issue-1-ohio-house-bill-would-resolve-confusion-over-numbering-future-state-issues.html ("One of the bill's sponsors, state Rep. Adam Mathews, said the proposal is meant to avoid repeat Issue 1s" since "he's heard from voters, reporters and activists who have described tripping over which Issue 1 is which, and/or described the challenges of explaining and promoting the difference to others.").

[80] Tatyana Tandanpolie, *Ohio Republicans Use Taxpayer Funds to Boost "Absolutely False" Anti-Abortion Claims Ahead of Vote*, SALON (Nov. 6, 2023, 05:30 ET), https://www.salon.com/2023/11/06/ohio-use-taxpayer-funds-to-boost-absolutely-false-anti-abortion-claims-ahead-of-vote/.

[81] *Id.*

[82] Christine Fernando & Ali Swenson, *Ohio Is About to Vote on Abortion Rights. Misinformation About the Proposal Is Rampant*, ASSOCIATED PRESS (Nov. 2, 2023, 12:40 ET), https://apnews.com/article/abortion-ohio-constitutional-amendment-election-misinformation-d7b3d8273389a432b011964c14959789.

health exception, its open-ended definition of reproductive healthcare, and how it protects the rights of 'individuals,' rather than 'women' or 'adults,'" creating a "gateway[] to children getting abortions and gender-related surgeries without their parents' consent," permitting access "to a federally banned abortion procedure" ("partial-birth abortion"), as well as legalizing infanticide, child sex trafficking, and pedophilia.[83]

Likewise, Ohio's antiabortion politicians interjected themselves into the fray with more misinformation. In September 2023, the Ohio Senate launched the *On the Record* blog, which it described as an "online newsroom," promising "to deliver the real story directly to the people."[84] Issue 1 featured prominently—including "articles from state senators that repeat[ed] the claims" of Protect Women Ohio, as well as "claims [that] the amendment would allow for 'the dismemberment of fully conscious children.'"[85] In October, Ohio's governor and first lady starred in a video repeating the inaccurate claims of Protect Women Ohio and encouraging Ohioans to vote against Issue 1 because it "just goes too far" and was "not right for Ohioans."[86] Around the same time, Ohio Attorney General Dave Yost issued a "legal analysis to make [Issue 1's] impacts on Ohio law more understandable."[87] While he claimed that the memo was "designed only to describe what the legal effects of Issue 1 will be,"[88] his analysis was a parade of presumed horribles that was "nothing more or less than a biased political hit piece that [wa]s intended to confuse the voters and weaken support for the amendment."[89] Yost's analysis tracked the hyperbolic claims of others opposing the initiative, premised on his "exclusive scrutiny test," while ignoring the fact that many existing abortion restrictions would survive the Amendment's passage.[90]

Despite the rampant misinformation, in November 2023, Ohioans voted to add Article I, Section 22 to the Ohio Constitution, effective on December 7, 2023.[91]

Antiabortion politicians did not gracefully accept defeat. Immediately after Issue 1 passed, twenty-seven Ohio House Republicans stated their plan to obstruct the amendment.[92] House Speaker Jason Stephens issued a

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[83] *Id.*

[84] Tandanpolie, *supra* note 80. As the executive director of Harvard's Shorenstein Center on Media, Politics and Public Policy noted, the blog presented misinformation that was "explicitly masquerading as fact," which would "likely cause constituents' overall trust in state institutions and their representatives to further decline." *Id.*

[85] *Id.*

[86] *Id.*; Fernando & Swenson, *supra* note 82.

[87] Dave Yost, *Issue 1 on the November 2023 Ballot: A Legal Analysis by the Ohio Attorney General*, OHIO ATT'Y GEN., at 1 (Oct. 5, 2023), https://www.ohioattorneygeneral.gov/SpecialPages/FINAL-ISSUE-1-ANALYSIS.aspx.

[88] *Id.* at 1.

[89] Marc Dann & Jeffrey A. Crossman, *Former Ohio AG and AG Candidate Issue Rebuttal to Issue 1 Legal Analysis Put Out by Current AG*, OHIO CAP. J. (Oct. 23, 2023, 04:30 ET), https://ohiocapitaljournal.com/2023/10/23/former-ohio-ag-and-ag-candidate-issue-rebuttal-to-issue-1-legal-analysis-put-out-by-current-ag/.

[90] *See* Dann & Crossman, *supra* note 89.

[91] *See* OHIO CONST. art. I, § 22.

[92] *See* Morgan Trau (@MorganTrau), X (Nov. 8, 2023), https://twitter.com/MorganTrau/status/1722398058833457566 (sharing press release from Ohio Representatives).

statement: "The legislature has multiple paths that we will explore to continue to protect innocent life. This is not the end of the conversation."[93] Even Ohio Governor Mike DeWine, who claimed that he accepted the will of the people, left open the door to change, stating that the "[p]eople will decide if they are comfortable with what we voted on, or they will decide that it maybe needs to be changed or tweaked."[94] A week after the election, Senate President Huffman, suggested a 15-week abortion ban—after stating that Issue 1 "isn't the end" but rather "really just the beginning of a revolving door of ballot campaigns to repeal or replace Issue 1."[95] Some "far-right representatives" went so far as to propose stripping the judiciary of power to interpret or enforce Issue 1, such that "[t]he Ohio General Assembly shall have the *exclusive* authority over implementing Ohio Issue 1," thereby withdrawing "[*a*]*ll* jurisdiction" from the "courts of the State of Ohio" and requiring the "immediate dismiss[al]" of all lawsuits and the vacatur of prior decisions—threatening criminal conviction and impeachment for judges who failed to comply.[96]

Finally, AG Yost continues seeking to preserve medically unnecessary restrictions on abortion access, forcing the courts to weigh in on Issue 1's meaning and import.[97] This strategy may yet prove fruitful, given the Ohio Supreme Court's new Republican supermajority.[98]

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[93] Lynna Lai, *Ohio GOP Lawmakers Considering Options to Combat Issue 1*, 3NEWS INVESTIGATES (Nov. 9, 2023, 01:40 ET), https://www.wkyc.com/article/news/investigations/3news-investigates-ohio-gop-lawmakers-making-plans-lessen-undo-issue-1/95-b17cbcbf-2b0e-4bb5-a79c-11b905ace05f.

[94] *See* Morgan Trau, *Ohio Gov. DeWine 'Accepts' Will of the People on Abortion, Marijuana, but Hold on*, NEWS 5 CLEVELAND (Nov. 10, 2023, 12:38 ET), https://www.news5cleveland.com/news/politics/ohio-politics/ohio-gov-dewine-accepts-will-of-the-people-on-abortion-marijuana-but-hold-on.

[95] Morgan Trau, *Abortion Access Is Protected in Ohio. Now What?*, NEWS 5 CLEVELAND (Dec. 9, 2023, 10:54 ET), https://www.news5cleveland.com/news/local-news/we-follow-through/abortion-access-is-protected-in-ohio-now-what [hereinafter *Now What?*] (quoting Huffman's November 7, 2023 statement); Morgan Trau, *Ohio Senate GOP Floats Idea of 15-Week Abortion Ban Despite Voters Saying No*, NEWS 5 CLEVELAND (Nov. 15, 2023, 19:21 ET), https://www.news5cleveland.com/news/politics/ohio-politics/ohio-senate-gop-floats-idea-of-15-week-abortion-ban-despite-voters-saying-no (reporting Huffman saying that "clearly there is a majority of people in Ohio" that support a fifteen-week ban, despite "no statistics to prove this, and based on the language of Issue 1, the voters chose not to have any restrictions before viability.").

[96] *See* Morgan Trau, *Some Ohio GOP Lawmakers Attempting to Undermine Democratic Process After Voters Protect Abortion*, NEWS 5 CLEVELAND (Nov. 13, 2023, 17:17 ET), https://www.news5cleveland.com/news/politics/ohio-politics/some-ohio-gop-lawmakers-attempting-to-undermine-democratic-process-after-voters-protect-abortion (reporting on Representatives Jennifer Gross, Bill Dean, Melanie Miller, and Beth Lear's proposal). This proposal appears dead. *See id.* (according to Case Western law professor Jonathan Entin: "Whatever authority the legislature might have to tinker with the jurisdiction of the state courts, it cannot eviscerate a rights-granting provision of the state constitution."); *see also Now What?*, *supra* note 95 (reporting Ohio House Speaker saying this proposal was "dead on arrival").

[97] *See e.g.*, Brief Of State Defendants-Appellants, Preterm-Cleveland v. Yost, No. C 2400668 (Ohio Ct. App. 1st App. Dist. Hamilton Cnty. Mar. 19, 2025); State Defendants' Response to Plaintiffs' Motion for Judgment on the Pleadings, Preterm Cleveland v. Yost, No. A 2203203 (Ohio Ct. C.P. Hamilton Cnty. Mar. 29, 2024); *see also* Brendan Pierson, *Ohio Seeks to Revive Parts of Abortion Law Despite Amendment*, REUTERS (Nov. 26, 2024, 17:01 ET), https://www.reuters.com/legal/government/ohio-seeks-revive-parts-abortion-law-despite-amendment-2024-11-26/.

[98] Megan Henry, *Republicans Win All Three Ohio Supreme Court Races, Increasing Hold over Court to 6–1*, OHIO CAP. J. (Nov. 5, 2024, 23:12 ET), https://ohiocapitaljournal.com/2024/11/05/republicans-win-all-three-ohio-supreme-court-races-increasing-hold-over-court-to-6-1-ap-projects/.

C. Arizona

In Arizona post-*Dobbs*, abortion's legality was largely in flux. When *Dobbs* was decided, "almost every clinic in Arizona immediately stopped providing abortions, worried that a ban passed in 1864 might now outlaw the procedure entirely," as argued by the then-state attorney general, even though the legislature had approved a fifteen-week abortion ban months earlier.[99] "Over the next three and a half months, the laws would bounce from court to court as different judges offered different interpretations of the right to abortion in Arizona[.]"[100] Finally, in April 2024, the Supreme Court of Arizona determined that the pre-statehood abortion ban (permitting abortion only to save the pregnant person's life) was enforceable and did not need to be "harmonize[d]" with the 15-week restriction.[101] The next month, the legislature repealed the 1864 law, but that repeal only took effect in mid-September 2024.[102]

Meanwhile, in August 2023, the ACLU of Arizona, Affirm Sexual and Reproductive Health, Arizona List, Healthcare Rising, NARAL Arizona, and Planned Parenthood Advocates of Arizona began the initiative process, resulting in Arizona for Abortion Access's September 12, 2023 application to amend the state constitution.[103] The Arizona Abortion Access Act ("AAA") proposed adding a section to the state constitution, declaring "a fundamental right to abortion," which the state could only interfere with before fetal viability if "justified by a compelling state interest," which is "achieved through the least restrictive means"; likewise the state could not interfere with abortion after fetal viability if the procedure "in the good faith judgment of a treating health care professional, is necessary to protect the life or physical or mental health of the pregnant individual."[104]

The antiabortion movement sought to block the AAA from reaching the ballot. Opponents, including the It Goes Too Far campaign, misled voters about the proposal's potential impact, contending it "would permit abortions up to birth for effectively any reason" and obviate "critical and common

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[99] Shefali Luthra, *An 'Insane Roller Coaster': In Arizona, Abortion Is Legal One Day and Outlawed the Next*, THE 19TH (Oct. 20, 2022, 06:00 ET), https://19thnews.org/2022/10/arizona-abortion-bans-laws-decisions-uncertainty/.

[100] *Id.*

[101] *See* Planned Parenthood Ariz., Inc. v. Mayes, 545 P.3d 892, at ¶¶ 2, 42–3 (Ariz. 2024).

[102] *See* Sejal Govindarao, *Arizona's 1864 Abortion Ban Is Officially off the Books*, ASSOCIATED PRESS (Sept. 14, 2024, 00:02 EDT), https://apnews.com/article/arizona-abortion-ban-repeal-ac4a1eb97efcd3c506aeaac8f8152127; Melissa Quinn, *Arizona Abortion Rights Advocates Submit Double the Signatures Needed to Put Constitutional Amendment on Ballot*, CBS NEWS (July 3, 2024, 15:19 EDT), https://www.cbsnews.com/news/arizona-abortion-rights-constitutional-amendment-ballot/.

[103] Jonathan J. Cooper, *Abortion Rights Advocates Push for 2024 Ballot Initiative in Arizona*, ASSOCIATED PRESS (Aug. 8, 2023, 21:52 EDT), https://apnews.com/article/abortion-arizona-ballot-voters-2024-a7ea711840cbe2103a9c75c4c4dd4ef3; *A Constitutional Amendment Amending Article II, Constitution of Arizona, by Adding Section 8.1; Relating to the Fundamental Right to Abortion Petition* (Sept. 12, 2023), https://apps.arizona.vote/electioninfo/assets/47/0/BallotMeasures/I-05-2024%20Arizona%20for%20Abortion%20Access.pdf [hereinafter "AAA"].

[104] AAA, *supra* note 103 (capitalization changed). The AAA's definitions of "compelling state interest" and "fetal viability" largely track those found in Michigan's Proposal 3. *Id.*

sense safety standards" including parental notification.[105] The antiabortion movement discouraged people from signing the petitions "everywhere signatures [we]re gathered—making their case at festivals, libraries, big box parking lots and coffee shops across Arizona,"[106] as well as in the Legislature where Republicans signed a Declaration in Support of the Sanctity of Human Life urging voters to reject the AAA.[107] While some initiative opponents merely sought to reach voters before they signed petitions, others took a different approach: "tracking the location of signature-gatherers on a private Telegram channel, filming them, interrupting their work, and calling security to get them removed from high-traffic spots."[108] Opponents also encouraged people to contact the Secretary of State to remove their signatures, pushed "religious leaders to denounce the ballot initiative from the pulpit and counsel parishioners against signing," and planned "'pep rallies'" and a "'dorm storm.'"[109] Some "quiz[zed] signature-gatherers about the amendment and tap[ed] their answers," so that inaccuracies "c[ould] be presented as evidence that all the signatures that volunteer gathered [we]re tainted by misinformation and invalid."[110]

During the petitioning phase, Republican legislators floated a potential "ballot-flooding strategy"—having the legislature place multiple abortion-related proposals on the ballot—to confuse voters out of approving the AAA.[111] Specifically, this plan required the legislature to refer three different ballot measures to voters: (1) a proposal deceptively called the "Arizona Abortion Protection Act" or "Protecting Pregnant Women and

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[105] *See* Jeremy Duda, *Advocates Say Criticism of Abortion Ballot Measure is Misleading*, AXIOS PHX (May 13, 2024), https://www.axios.com/local/phoenix/2024/05/13/abortion-ballot-viability-exemptions-debate-arizona; Alex Tabet, *Arizona Abortion Rights Amendment Backers Say[] They've Gathered Signatures Needed for 2024 Ballot*, NBC NEWS (Apr. 2, 2024, 10:00 ET), https://www.nbcnews.com/politics/2024-election/arizona-abortion-rights-amendment-backers-says-gathered-signatures-nee-rcna145922; *see also* Alice Miranda Ollstein, *'Our Prayer is That it Doesn't Even Reach the Ballot': Inside Arizona's Abortion Battle*, POLITICO (Mar. 6, 2024, 09:40 ET), https://www.politico.com/news/2024/03/06/arizona-abortion-referendum-battle-00145089/ ("Abortion opponents' talking points in Arizona are nearly identical to those deployed in past state initiative fights—with a focus on abortion later in pregnancy and parental consent for minors seeking abortion.").

[106] Ollstein, *supra* note 105 (The antiabortion movement "lean[ed] particularly hard on the 'decline to sign' strategy in Arizona because there they lack[ed] the policies and levers of power conservatives [we]re using in other states—from a Republican attorney general willing to challenge the ballot measure in court to a legislative supermajority eager to change the rules—to make it harder for proposed amendments to qualify for the ballot.").

[107] *See* Complaint Arizona for Abortion Access v. Toma, at 22 , No. CV2024-017968 (Ariz. Super. Ct. Maricopa Cnty., July 10, 2024).

[108] Ollstein, *supra* note 105.

[109] *Id.*

[110] *Id.* Canvassers for AAA were encouraged "to offer the text of the amendment to" the person recording and "thank them for their time." *Id.* The opposition had lawyers ready to scrutinize collected signatures). Tabet, *supra* note 105.

[111] *See* Kevin Stone, *Arizona Republican Lawmakers Consider Ballot Strategy to Counter Abortion Rights Initiative*, KTAR NEWS (Apr. 16, 2024, 13:03 ET), https://ktar.com/story/5570365/arizona-republican-lawmakers-consider-ballot-strategy-to-counter-abortion-rights-initiative/ This is categorically different than the dueling ballot measures proposed in Colorado, where the Colorado Life Initiative began collecting signatures *before* Coloradans for Protecting Reproductive Freedom. *See Proposed Initiative 81* (Colo. 2023), https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2023-2024/81Final.pdf; Proposed Initiative 89 (Colo. 2023), https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2023-2024/89Final.pdf. Only the latter proposal appeared on November 2024 ballots.

Safe Abortions Act," which would "protect[the] Legislature's authority to 'enact laws'" and codify "widely supported protections/restrictions on abortion," including bans on "partial-birth abortions," "[d]iscriminatory [a]bortions," the sale of aborted fetuses, and abortions performed on minors without parental consent or court order"; (2) the "Reproductive Care and Abortion Act," which would "only allow abortion until the beginning of the 15th week" of pregnancy—a deceptively-named fourteen-week ban; and (3) the "Heartbeat Protection Act," which would permit abortion until the start of the sixth week of pregnancy—a deceptively-named five-week ban.[112] The goal: "pull votes from AAA."[113] Republicans also considered a conditional enactment referral, titled the "Reasonable Limits on Arizona Abortion Access Act," which would take effect *only* if the AAA passed, and would declare that the right to abortion "is not absolute and shall not be interpreted to prevent the Legislature from reasonably regulating abortion consistent with binding authority from the Supreme Court of the United States."[114] As the Brennan Center explained, this strategy "isn't only deceptive—it perverts the political process to thwart the will of the people and defy the preferences of the majority of voters. It's antidemocratic."[115] Ultimately, Republicans did not pursue this strategy.

Despite the antiabortion decline-to-sign efforts, Arizona for Abortion Access turned in over 823,000 signatures on the July 3, 2024 deadline—significantly more than the ~384,000 required.[116] On August 12, 2024, the Arizona Secretary of State's office certified 577,971 signatures, qualifying the AAA to appear on the ballot.[117]

The antiabortion movement then sought to prevent voters from approving the AAA. First, the GOP-led Arizona Legislative Council used the term "unborn human being" instead of "fetus" in its proposed voter-information pamphlet over Arizona for Abortion Access's objection, prompting Arizona for Abortion Access to sue.[118] While the Maricopa County Superior Court concluded that the use of "'unborn human being'"

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[112] *See* Linley Wilson, *Legislative Strategies for Regulating Abortion*, at 14–20, https://www.documentcloud.org/documents/24548815-abortionpp .
[113] *Id.* at 23.
[114] *Id.* at 22.
[115] Alice Clapman, *Arizona Legislators Maneuvering to Take Abortion Decision Away from Voters*, BRENNAN CTR. FOR JUST. (Apr. 30, 2024), https://www.brennancenter.org/our-work/analysis-opinion/arizona-legislators-maneuvering-take-abortion-decision-away-voters-0.
[116] *See* Quinn, *supra* note 102.
[117] Rio Yamat, *With Over 577,000 Signatures Verified, Arizona Will Put Abortion Rights on the Ballot*, ASSOCIATED PRESS (Aug. 12, 2024, 22:18 ET), https://apnews.com/article/arizona-abortion-ballot-petitions-ff88d989019a1e4bf10fabd5d7acc801.
[118] *See* Compl., Arizona for Abortion Access v. Toma, at 2, 4, 10 (Ariz. Super. Ct. Maricopa Cnty. July 10, 2024).

was "packed with emotional and partisan meaning,"[119] the Arizona Supreme Court allowed the language to be used and "sent to all voters in the state."[120]

Second, Arizona Right to Life ("ARL") sued seeking to remove the AAA from ballots, contending that the proposal was misleading and too confusing for voters to comprehend.[121] Specifically, ARL contended that the AAA was too permissive regarding post-viability abortions and gave abortion providers too much power to determine when an abortion was warranted.[122] Further, ARL complained that the definition of "compelling governmental interest" "erase[d] all other compelling governmental interests except making the abortion safer for women."[123] According to ARL, the only appropriate remedy was to keep the AAA off the November ballot.[124] The Maricopa County Superior Court rejected these claims and, in a brief opinion, the Arizona Supreme Court unanimously affirmed.[125]

These efforts to derail the AAA were unsuccessful. As Election Day drew near, support for the proposal grew.[126] Ultimately, voters approved the AAA.[127] Weeks later, healthcare providers sued to invalidate the state's 15-week abortion ban.[128] The fifteen-week law was permanently enjoined in early March 2025.[129] Yet, Arizona Republicans have proposed new restrictions on abortion, including a proposed ballot measure to overturn the

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[119] Aabshar Ghassi, *Arizona Court Bars Wording of Abortion-Related Ballot Initiative Pamphlet in Constitutional Amendment Case*, JURISTNEWS (July 29, 2024, 10:13 ET), https://www.jurist.org/news/2024/07/arizona-court-bars-wording-of-abortion-related-ballot-initiative-pamphlet-in-constitutional-amendment-case/.

[120] Sejal Govindarao, *Ruling: Fetus Can Be Referred to as 'Unborn Human Being' in Arizona Abortion Measure Voter Pamphlet*, ASSOCIATED PRESS (Aug. 14, 2024, 20:26 ET), https://apnews.com/article/arizona-abortion-rights-ballot-measure-b0ea37c92692533da109fd74a07b25f7; Arizona for Abortion Access v. Toma, No. CV-24-0167-AP/EL, 2024 WL 3905591, at 3–4 (Ariz. Aug., 14 2024). Similarly, in 2023, the Ohio Supreme Court permitted the phrase "an unborn child" to be used instead of "fetus" on ballot language. *See* State ex rel. Ohioans United for Reproductive Rights v. Ohio Ballot Bd, 174 Ohio St. 3d 285 (2023), at ¶ 44.

[121] Gloria Rebecca Gomez, *In Lawsuit to Block Abortion Rights Ballot Measure, Foes Claim It Is 'Too Confusing' for Voters*, ARIZ. MIRROR (July 26, 2024, 09:22 AM), https://azmirror.com/2024/07/26/in-lawsuit-to-block-abortion-rights-ballot-measure-abortion-foes-claim-it-is-too-confusing-for-voters/.

[122] *Id.*

[123] *Id.*

[124] *Id.* Originally, ARL alleged improprieties in the petitioning process, but later dropped those allegations. *See* Howard Fischer, *Right-to-Life Group Drops Part of Lawsuit to Challenge Abortion Measure*, ARIZ. CAP. TIMES (July 30, 2024), https://azcapitoltimes.com/news/2024/07/30/right-to-life-groups-drops-part-of-lawsuit-to-challenge-abortion-measure/.

[125] Howard Fischer, *Judge Rejects Bid to Knock Abortion Measure off Arizona Ballot*, TUCSON.COM (Aug. 5, 2024), https://tucson.com/news/local/government-politics/elections/justice-william-montgomery/article_0a242952-533a-11ef-aa94-c7532b0cf1df.html; Ariz. Right to Life v. Fontes, No. CV-24-0180-AP/EL, 2024 WL 3887061 (Ariz. Aug. 20, 2024).

[126] Kate Scanlon, *Poll Shows Majority of Voters in Arizona, Nevada Favor Abortion Referendums*, NAT'L CATH. Rep. (Aug. 30, 2024), https://www.ncronline.org/news/poll-shows-majority-voters-arizona-nevada-favor-abortion-referendums (reporting late August Fox News poll finding 73% of Arizonans supported the AAA); Irena Li, *Abortion-Rights Ballot Measures Are Leading in the Polls*, ABC NEWS (June 7, 2024, 13:42 ET), https://abcnews.go.com/538/abortion-rights-ballot-measures-leading-polls/story?id=110877241 (reporting the average of four polls found "58 percent of voters said they would support such an amendment").

[127] Katherine Davis-Young, *Arizona Voters Pass Constitutional Amendment Guaranteeing Abortion Access*, NPR (Nov. 6, 2024, 04:20 ET), https://www.npr.org/2024/11/06/g-s1-32937/arizona-abortion-amendment-results.

[128] Compl., Reuss v. Arizona (Dec. 3, 2024), https://www.documentcloud.org/documents/25431552-reuss-v-arizona-15-week-abortion-ban-challenge/.

[129] *See* Reuss v. Arizona, No. CV2024-034624, at 1-2 (Ariz. Super. Ct. Maricopa Cnty., Mar. 4, 2025).

AAA and allow the legislature to protect "prenatal life at all stages of development."[130]

D. Arkansas

When *Roe* fell, Arkansas's trigger law became effective, banning abortion except to save the life of the pregnant person in the case of a medical emergency. In 2023, Arkansas reported zero abortions within its borders, earning Americans United for Life's designation as the most "pro-life" state in the country.[131] Yet, that policy does not appear representative of Arkansans' preferences: a 2022 University of Arkansas public opinion poll concluded that "only about 14% of voters support a total ban on abortion, while 21% said it should be legal under any circumstances. The vast majority, 58%, said it depends."[132] In November 2023, For AR People, through its ballot question committee, Arkansans for Limited Government ("AFLG"), announced that it would seek to amend the state constitution in 2024 to liberalize the abortion regime.

On January 23, 2024, Attorney General Tim Griffin certified the ballot title and name for the Arkansas Abortion Amendment of 2024—on AFLG's third request.[133] The proposal did not seek to approximate *Roe* or *Casey*; instead, it would amend the state constitution to provide that the state

> shall not prohibit, penalize, delay, or restrict abortion services (1) in cases of rape, (2) in cases of incest, (3) in cases of a fatal fetal anomaly, or (4) when, in a physician's good-faith medical judgment, abortion services are needed to protect a pregnant female's life or to protect a pregnant female from a physical disorder, physical illness, or physical injury,

or in any case "within 18 weeks of fertilization."[134] Planned Parenthood and the ACLU of Arkansas did not support the proposal due to concerns that the limited proposal would squander the one and only opportunity to revise the

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[130] Rinkunas, *supra* note 53; Adam Edelman, *Republicans Plow Ahead with Anti-Abortion Agenda in States Where Voters Approved Constitutional Amendments*, NBC NEWS (Apr. 12, 2025, 06:00 ET),https://www.nbcnews.com/politics/politics-news/republicans-anti-abortion-agenda-states-constitutional-amendments-rcna200606.

[131] George Fabe Russell & Todd A. Price, *A Fight for Abortion Rights in America's Most Pro-Life State Could Ripple Across the South*, USA TODAY (June 24, 2024, 06:03 ET),https://www.usatoday.com/story/news/politics/elections/2024/06/24/arkansas-abortion-ballot-measure-lacks-national-support-heres-why/74072900007/.

[132] Austin Gelder, Benjamin Hardy, Matt Campbell & David Ramsey, *Labor and Delivery: How a Volunteer-Powered Group Gathered 102K Signatures for the Arkansas Abortion Amendment*, ARK. TIMES (July 30, 2024, 13:21 ET), https://arktimes.com/arkansas-blog/2024/07/30/labor-and-delivery-how-a-volunteer-powered-group-gathered-102k-signatures-for-the-arkansas-abortion-amendment.

[133] Ka'Tani Gouch & Adam Roberts, *Arkansas Attorney General Certifies Ballot Language on Abortion Referendum*, 4029 NEWS (Jan. 24, 2024, 06:51 ET), https://www.4029tv.com/article/arkansas-abortion-referendum/46510237; Letter from Tim Griffin, Ark. Att'y Gen., to Steven Nichols (Jan. 23, 2024), https://ag-opinions.s3.amazonaws.com/uploads/2024-004.pdf.

[134] Griffin Letter, *supra* note 133, at 4.

state constitution.[135] AFLG, with the support of over six-hundred healthcare professionals, believed its proposal was more likely to succeed than a broader proposal.[136]

Despite the narrowness of the proposal, the antiabortion movement attacked it and ultimately prevented it from going before voters.

Opponents described the proposal as permitting abortion "until birth" and lodged a decline to sign campaign.[137] They tried to intimidate petitioners: "Organizers and volunteer signature-gatherers regularly deal[t] with harassment and intimidation in the field."[138] "[A] conservative group posted online the names of nearly 80 paid signature gatherers that it obtained through a public records request," while individual petitioners reported being called a "murderer," being threatened ("I'm going to find you and kill you"), and being followed.[139] The legislature also adopted a resolution opposing the proposal and encouraging voters to reject the amendment.[140]

AFLG sought to gather 150,000 signatures—significantly more than 'the required 90,704 (in 50/75 counties) to qualify for the November 2024 ballot.[141] AFLG submitted approximately 101,000 signatures on July 5, 2024, falling short of its goal.[142] Five days later, Secretary of State John Thurston rejected the petitions, claiming that AFLG failed to submit required paid-canvasser statements and only 87,382 signatures were

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[135] *See* Susan Rinkunas, *When the Road to Bad Abortion Laws is Paved with Good Intentions*, SLATE (Jan. 3, 2024, 05:45 ET),https://slate.com/news-and-politics/2024/01/abortion-arkansas-ballot-roe-limited-government.html . The proposal would have covered 99% of Arkansas' pre-*Dobbs* abortions. *See* Russell & Price, *supra* note 131.

[136] Rinkunas, *supra* note 135; Letter from More than 600 Arkansas Healthcare Professionals, *Arkansas Medical Professionals Support the Arkansas Abortion Amendment; Call for Voters to Put Healthcare Decisions Back to Patients and Their Providers*, https://arliberty.org/open-letter/.

[137] *See e.g.*, Rose Mimms, *Decline to Sign the Arkansas Abortion-until-Birth Mandate*, NAT'L REV. (Mar. 20, 2024, 06:30 ET), https://www.nationalreview.com/2024/03/decline-to-sign-the-arkansas-abortion-until-birth-mandate/ (claiming that "the amendment's broad language would force no-limit abortions on the people of our state and mandate the removal of even the most basic limits on the profit-driven abortion industry," while permitting "birthday abortions" since "no law will be able to police them" making this proposal "worse than *Roe v. Wade*").

[138] Barbara Rodriguez & Grace Panetta, *'They Want Us to Be Scared': Protesters Target Organizers for Abortion Ballot Measure in Arkansas*, THE 19TH (June 14, 2024, 05:00 ET), https://19thnews.org/2024/06/arkansas-abortion-ballot-measure-harassment/.

[139] *Id.*; *see also* Knez Walker, Marjorie McAfee & Aria Young, *Arkansas Residents Petition to Vote on Abortion Rights Amendment*, ABC NEWS (July 10, 2024, 08:56 ET), https://abcnews.go.com/Politics/arkansas-residents-petition-vote-abortion-rights-amendment/story?id=111772472 (describing negative experiences of canvassers). One canvasser reported police informing her that "both Gov. Sarah Huckabee Sanders and the Arkansas Martin Luther King Jr. Commission did not want her and others canvassing" at her sidewalk location and threatened to arrest her for obstructing traffic. Tess Vrbin, *Publication of Abortion Amendment Canvasser List Is Intimidation, Ballot Question Committee Says*, ARK. ADVOCATE (June 7, 2024, 15:40 ET), https://arkansasadvocate.com/2024/06/07/publication-of-abortion-amendment-canvasser-list-is-intimidation-ballot-question-committee-says/).

[140] H.R. 1003, 94th Gen. Assemb., 2d Extraordinary Sess. (Ark. 2024).

[141] Jacqueline Froelich, *Statewide Ballot Petition Initiative Launched to Overturn Arkansas' Abortion Ban*, KUAF (Feb. 21, 2024, 13:08 CST), https://www.kuaf.com/show/ozarks-at-large/2024-02-21/statewide-ballot-petition-initiative-launched-to-overturn-arkansas-abortion-ban. In 2023, voters rejected a constitutional amendment that would have required signatures be collected from fifty counties instead of fifteen, but then the legislature changed the initiative requirements anyway. Stephanie Kirchgaessner, *How a Rightwing Machine Stopped Arkansas's Ballot Initiative to Roll Back One of the Strictest Abortion Bans*, THE GUARDIAN (Apr. 29, 2025, 07:03 ET), https://www.theguardian.com/us-news/2024/oct/29/arkansas-abortion-ban-ballot.

[142] Andrew DeMillo, *Arkansas Election Officials Reject Petitions Submitted for an Abortion-Rights Ballot Measure*, ASSOCIATED PRESS (July 10, 2024, 22:06 ET), https://apnews.com/article/abortion-arkansas-ballot-measure-9375891a74f6eecb13110ac07eb8c529.

collected by unpaid volunteers.[143] For initiative petitions supported by signatures obtained by paid canvassers, state law required the submission of "[a] statement identifying the paid canvassers by name" and "[a] statement signed by the sponsor indicating that ["before each paid canvasser solicited signatures"] the sponsor: (i) [p]rovided a copy of . . . the Secretary of State's initiatives and referenda handbook . . .; and (ii) [e]xplained the requirements under Arkansas law for obtaining signatures."[144] On July 11, AFLG responded that it *had* submitted the required statements—even though Thurston's office had discouraged it from doing so.[145] Results from a Freedom of Information Act request suggested the accuracy of AFLG's contentions.[146]

AFLG sued, seeking to force Thurston to count the submitted signatures.[147] The Arkansas Supreme Court required the state to conduct an initial count of signatures collected by *unpaid* volunteers, the results of which found that AFLG fell short of the required signatures through unpaid volunteers alone.[148] On August 22, 2024, the Arkansas Supreme Court affirmed its order requiring Thurston's office to count the signatures collected by volunteers, denying all further relief.[149] According to the majority, AFLG's submission of certifications *before* the July 5, 2024, deadline were insufficient since everything needed to be submitted together, "'[a] statement' is not multiple statements," and the statements submitted covered only "some of the paid canvassers."[150] "AFLG needed 90,704 signatures to complete the first stage of the initial facial count to proceed to the verification stage. As it failed to obtain this number of signatures, AFLG is not entitled to any further relief"—so ended the fight to restore some abortion access in 2024.[151]

Two of the three dissenting justices saw the situation quite differently. As Justice Baker explained, the majority repeatedly rewrote the statute

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[143] *Id*.

[144] ARK. CODE ANN. § 7-9-111(f) (West 2024).

[145] Adam Roberts, *Arkansas Group Behind Abortion Initiative Says it Followed All the Rules*, 4029 TV (July 11, 2024, 17:03 ET), https://www.4029tv.com/article/arkansas-abortion-signatures-response/61573905. *See also* Letter from Lauren Cowles, Exec. Dir. of AFLG. to John Thurston, Ark. Sec'y of State, (July 10, 2024), https://www.documentcloud.org/documents/24804078-2024-07-11-response-to-secretary-thurston-with-enclosure-1-1.

[146] *See* Gelder, *supra* note 132.

[147] *See* Andrew DeMillo, *Arkansas Is Sued for Rejecting Petitions on an Abortion-Rights Ballot Measure*, ASSOC. PRESS NEWS (July 16, 2024, 16:59 ET), https://apnews.com/article/arkansas-abortion-ban-lawsuit-ballot-measure-f5b8125263212437e9b5b2afd80906bc .

[148] George Fabe Russell, *Legal Battle Continues over Arkansas Abortion Amendment*, SW TIMES RECORD (July 30, 2024, 14:28 ET), https://www.swtimes.com/story/news/politics/elections/2024/07/30/arkansas-abortion-measure-legal-wrangling-continues-over-signatures/74591601007/; Tess Vrbin, *Arkansas Secretary of State Defends Rejection of Proposed Abortion Amendment*, ARK. ADVOC. (July 29, 2024, 12:30 ET),https://arkansasadvocate.com/2024/07/29/arkansas-secretary-of-state-defends-rejection-of-proposed-abortion-amendment/; Andrew DeMillo, *Arkansas Court Orders State to Count Signatures Collected by Volunteers for Abortion-Rights Measure*, ASSOCIATED PRESS (July 24, 2024, 11:03 ET),https://apnews.com/article/abortion-petitions-arkansas-court-a789b60496e9103800ac890c4e2eb229.

[149] Cowles v. Thurston, 695 S.W.3d 60, 62 (Ark. 2024).

[150] *Id.* at 64.

[151] *Id.* at 67. Interestingly, the Arkansas Supreme Court also nixed a ballot initiative seeking to expand medical marijuana—but did so approximately two weeks before Election Day and after ballots had already been printed. *See Paschall v. Thurston*, 699 S.W.3d 352, 355 (2024).

outlining the required submissions for paid-canvasser-supported initiative petitions since the statute itself "demonstrates that there is no contemporaneous filing requirement."[152] Instead, the contemporaneous-filing requirement "was made up out of whole cloth by the [Secretary of State] and inexplicably ratified by the majority of this court" contradicting "the rules of statutory construction [which] do not permit [the court] to read into a statute words that are not there."[153] Justice Baker added that AFLG's affiliate "submitted multiple paid canvasser training certifications," including one on June 27, 2024, that listed "all paid canvassers that had been hired by that date"—which was sufficient because it "was not a 'partial attempt' to comply" with the statute.[154] She added, "[i]t is absurd to hold that a certification cannot be submitted early, and by concluding otherwise, the majority has added yet another obstacle that prevents Arkansans from exercising their constitutional rights."[155] The dissent would have ordered Thurston "to conduct an initial count of all signatures, including those gathered by paid canvassers, and a verification analysis . . ., grant a thirty-day provisional cure period, and order conditional certification of the proposed amendment."[156]

AFLG vowed to continue fighting,[157] but the fight may be more difficult given legislation making signature-collection more difficult.[158]

E. Florida

In 1989, the Supreme Court of Florida held that the state constitution's privacy clause protected a pregnant person's ability to decide whether to continue a pregnancy.[159] The court explained that "prior to the end of the first trimester, the abortion decision must be left to the woman and may not be significantly restricted by the state"; after that, "the state may impose significant restrictions only in the least intrusive manner designed to safeguard the health of the mother."[160] Viability marked the point at which the state's interest became compelling since that was the point at which the fetus would "become[] capable of meaningful life outside the womb through standard medical measures"—as long as "the mother's health is not

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[152] *Cowles*, 695 S.W.3d at 69 (Baker, J., dissenting).
[153] *Id.* at 69–70.
[154] *See id.*at 70.
[155] *Id.* at 70.
[156] *Id.* at 71. The remaining dissenting justice likewise would have "order[ed] the Secretary to complete a statutorily mandated initial count of signatures, including those signatures obtained by the paid canvassers; continue with the intake process; grant a provisional cure period," and "order a conditional certification of the proposed amendment," but also to submit the findings to the court. *Id.* at 68 (Kemp, C.J., dissenting).
[157] Daniel Breen & Josie Lenora, *Arkansas Supreme Court Effectively Rejects Abortion Amendment*, LITTLE ROCK PUB. RADIO (Aug. 22, 2024, 11:46 ET), https://www.ualrpublicradio.org/local-regional-news/2024-08-22/arkansas-supreme-court-effectively-rejects-abortion-amendment.
[158] Tess Vrbin, *Federal Lawsuit Challenges Arkansas' Restrictions on Citizen-Led Ballot Initiatives*, NEWS FROM THE STATES (Apr. 21, 2025, 18:42 ET), https://www.newsfromthestates.com/article/federal-lawsuit-challenges-arkansas-restrictions-citizen-led-ballot-initiatives (identifying changes to the initiative process adopted in 2025).
[159] *See generally In re* T.W., 551 So. 2d 1186 (Fla. 1989).
[160] *Id.* at 1193.

jeopardized."[161] This holding was reaffirmed in 2003.[162] Even so, in 2022, Florida enacted a 15-week abortion ban,[163] which was quickly challenged and enjoined, but due to a quirk of state law, the injunction was stayed when the state appealed.[164] While that litigation was pending, the state approved a six-week abortion ban.[165] On April 1, 2024, the Florida Supreme Court concluded that the state constitution's privacy clause did *not* protect abortion, triggering the six-week ban's effectiveness thirty days later.[166]

Anticipating the Florida Supreme Court's likely reversal, Floridians Protecting Freedom, Inc. ("FPF") proposed an Amendment to Limit Government Interference with Abortion (later, "Amendment 4"), which would add a new section to the state constitution: "Limiting government interference with abortion.—Except as provided in Article X, Section 22, no law shall prohibit, penalize, delay, or restrict abortion before viability or when necessary to protect the patient's health, as determined by the patient's healthcare provider."[167] To get on the ballot, supporters needed signatures of 25% of voters in half of the state's congressional districts—891,523 signatures in total.[168] FPF submitted 997,035 valid signatures over a month before the February 1, 2024 deadline.[169]

Under Florida law, the state supreme court reviews proposed constitutional amendments before they can appear on the ballot.[170] This review is meant to be "deferential," and limited to: "(1) 'the compliance of the text of the proposed amendment or revision with s. 3, Art. XI of the State Constitution'; (2) 'the compliance of the proposed ballot title and substance with s. 101.161'; and (3) 'whether the proposed amendment is facially invalid under the United States Constitution,'" such that a proposed amendment will be invalidated "'only if it is shown to be clearly and conclusively defective.'"[171]

Opponents—including then-Attorney General Ashley Moody[172]—raised a number of challenges to the amendment, seeking to keep it off ballots: (1) Amendment 4 violated the single-subject requirement because it

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[161] *Id.* at 1194.
[162] *See generally N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612 (Fla. 2003).
[163] H.B. 5, 122nd Leg., 2d Reg., Sess. (Fla. 2022).
[164] Planned Parenthood of Sw. & Cent. Fla. v. State, 384 So. 3d 67, 73 (Fla. 2024).
[165] *See* FLA. STAT. § 390.0111 (2024).
[166] *Planned Parenthood of Sw. & Cent. Fla.,* 384 So. 3d at 71; FLA. STAT. § 390.0111 (2024).
[167] Amendment 4 (Fla. 2024), https://initiativepetitions.elections.myflorida.com/InitiativeForms/Fulltext/Fulltext_2307_EN.pdf; Kimberly Leonard & Arek Sarkissian, *Abortion-Rights Groups Have Never Faced a State Like Florida*, POLITICO (May 1, 2024, 05:00 ET), https://www.politico.com/news/2024/05/01/florida-abortion-rights-ballot-measure-00154944.
[168] *See Amendment to Limit Government Interference with Abortion*, FLA. DIV. OF ELECTIONS, https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=83927&seqnum=1.
[169] *See Id.*; Arek Sarkissian & Alice Miranda Ollstein, *'People of Florida Aren't Stupid': State High Court Grapples with Abortion Measure*, POLITICO (Feb. 7, 2024, 12:54 ET), https://www.politico.com/news/2024/02/07/florida-abortion-ballot-initiative-00140141.
[170] FLA. CONST. art. IV, § 10.
[171] Advisory Opinion to the Attorney General re: Limiting Government Interference with Abortion, 384 So. 3d 122, 127–28 (Fla. 2024) (internal citations omitted).
[172] *See* Brendan Farrington, *Florida Attorney General, Against Criticism, Seeks to Keep Abortion Rights Amendment off 2024 Ballot*, ASSOCIATED PRESS (Nov. 1, 2023, 17:46 ET), https://apnews.com/article/abortion-ashley-moody-florida-politics-0db0a1a4deb47fa1b82410b7670b16e3.

addressed pre- and post-viability abortions;[173] (2) its "ballot title and summary fail[ed] to fairly inform voters of the chief purpose of the amendment," namely "to effectively provide for abortion on demand, up until the moment of birth";[174] (3) its title was "misleading" because the proposal "d[id] more than 'limit' government interference with abortion," which was "improper inflammatory political rhetoric," and failed to define key terms: "viability," "health," and "healthcare provider";[175] and (4) it suffered from facial invalidity due to the federal ban on "partial-birth abortions."[176] During oral argument, some justices "echo[ed] the talking points of anti-abortion groups . . . claiming the measure would greenlight abortions 'through all nine months' of pregnancy, and warning that it could allow tattoo artists and other non-physicians to perform the procedure."[177]

Despite the court's rightward shift, on the same day that the Florida Supreme Court erased the state constitutional right to access abortion, it cleared the way for the proposed constitutional amendment to appear on the November 2024 ballot.[178]

After qualifying for the ballot, Amendment 4 faced a state-led opposition campaign[179]—in addition to the standard misleading opposition of purported overbreadth, deception, and danger.[180]

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[173] Advisory Opinion, 384 So. 3d at 129. A similar argument had been made and rejected in Ohio. *See* State *ex rel.* DeBlase v. Ohio Ballot Bd., 229 N.E.3d 13 (Ohio 2023).

[174] Advisory Opinion, 384 So. 3d at 133.

[175] *Id.* at 133–34. Attorney General Moody contended that the proposal's vagueness was intentional: it was designed "to lay ticking time bombs that will enable abortion proponents later to argue that the amendment has a much broader meaning than voters would ever have thought." Farrington, *supra* note 172.

[176] Advisory Opinion, 384 So. 3d at 138.

[177] Sarkissian & Ollstein, *supra* note 169.

[178] Advisory Opinion, 384 So. 3d at 139. Two justices concurred, specifically explaining that the outcome was animated by "the constitutional principle that '[a]ll political power is inherent in the people,'" adding that "questions of justice are appropriately at the heart of the voters' assessment of a proposed amendment like the one under review." *Id.* at 139 (Muñiz, C.J., concurring).

[179] In addition to using their official duties to oppose Amendment 4, the state's attorney general, chief financial officer, and agriculture commissioner pledged $600,000 to the campaign to defeat Amendment 4. Yacob Reyes, *DeSantis Goes All-In against Florida's Abortion Rights Amendment*, AXIOS (Sept. 9, 2024), https://www.axios.com/local/tampa-bay/2024/09/09/ron-desantis-amendment-4-abortion-rights-floridain. In fact, DeSantis demanded his fellow elected Republicans oppose Amendment 4. *See* Anthony Man, *DeSantis Demands Republicans Publicly Oppose Amendment to Add Abortion Rights to Florida Constitution*, S. FLA. SUN SENTINEL (Sept. 9, 2024, 16:10 ET), https://www.sun-sentinel.com/2024/09/09/desantis-demands-republicans-publicly-oppose-amendment-to-add-abortion-rights-to-florida-constitution/.

[180] Max Greenwood, *The Entire Country Is Getting Involved in the Campaign in Florida over Abortion*, MIAMI HERALD (July 10, 2024, 10:42 ET), https://www.miamiherald.com/news/politics-government/article289548412.html; Romy Ellenbogen, *Florida Abortion Amendment Raises $12 Million in 2 Months Since Making Ballot*, TAMPA BAY TIMES (June 11, 2024), https://www.tampabay.com/news/florida-politics/elections/2024/06/10/florida-abortion-amendment-ban-pregnancy-marijuana-desantis/; Brendan Farrington, *Florida Asks State Supreme Court to Keep Abortion Rights Amendment off the November Ballot*, ASSOCIATED PRESS (Feb. 7, 2024, 13:07 ET), https://apnews.com/article/florida-abortion-election-2024-17540f14ed2880f03a2bb14274b03ed3; Anna Claire Vollers, *Despite GOP Headwinds, Citizen-Led Abortion Measures Could Be on the Ballot in 9 States*, MO. INDEP. (June 21, 2024, 12:00 ET), https://missouriindependent.com/2024/06/21/despite-gop-headwinds-citizen-led-abortion-measures-could-be-on-the-ballot-in-9-states/; Maria Briceno & Samantha Putterman, *Florida Abortion Amendment Wouldn't Let Tattoo Artists, Receptionists Decide Health Risk Exception*, POLITIFACT (May 10, 2024), https://www.politifact.com/factchecks/2024/may/10/paul-renner/florida-abortion-amendment-wouldnt-let-tattoo-arti/; Politifact, *No, a Florida Ballot Measure Wouldn't 'Mandate Abortion up to Birth,' as Gov. Ron DeSantis Says*, NBC MIAMI (May 3, 2024, 19:29 ET), https://www.nbcmiami.com/news/politics/politifact/politifact-abortion-amendment-4-florida-ron-desantis/3302340/.

First, the Financial Impact Estimating Conference ("FIEC") proposed—and the Supreme Court approved—biased language in the financial impact statement accompanying Amendment 4 on the ballot. FIEC's initial statement predated the Florida Supreme Court's April 1, 2024 decisions and, initially, the FIEC declined to amend it. FPF sued and a state trial court found the original statement to be "inaccurate and now misleading," ordering the FIEC to revise it "consistent with the circumstances on the ground today."[181] This decision was appealed, staying the trial court's decision.[182] Even so, the FIEC—at the urging of legislative leaders and with new, antiabortion representatives from the governor's office and the legislature as members—met on July 1, 2024, to listen to public testimony and begin rewriting the financial impact statement.[183] The FIEC met again the following week and Chris Spencer, the governor's FIEC representative, "pushed the panel to include potential litigation costs if the amendment is passed" even though such costs are not usually included.[184] The resulting rewritten statement predicted that Amendment 4's approval would decrease "live births" and increase abortions within the state, including an "even greater" increase "if the amendment invalidate[d] laws requiring parental consent before minors undergo abortions and those ensuring only licensed physicians perform abortions."[185] In a six-to-one decision, the Florida Supreme Court rejected FPF's challenge to the rewritten statement because FPF had "actively participated in the Estimating Conference process" so it had "waived or forfeited any reasonable claim to extraordinary relief" since their petition only "challenge[d] the Estimating Conference's authority to issue th[e] statement."[186]

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[181] Dara Kam, *Judge Orders a Revised 'Financial Impact Statement' for a Florida Abortion Amendment*, WLRN (June 6, 2024, 15:32 EDT), https://www.wlrn.org/health/2024-06-06/judge-orders-a-revised-financial-impact-statement-for-a-florida-abortion-amendment.

[182] *See* Jim Saunders, *Florida Urges an Appeals Court to Reject the Ruling on the Abortion Impact Statement*, HEALTH NEWS FLA. (June 23, 2024, 16:00 ET), https://health.wusf.usf.edu/health-news-florida/2024-06-23/florida-urges-an-appeals-court-to-reject-the-ruling-on-the-abortion-impact-statement.

[183] Chirstine Jordan Sexton, *Economists Review Impact of Abortion Rights Amendment … Again*, FLA. POLITICS (July 1, 2024), https://floridapolitics.com/archives/682389-economists-review-impact-of-abortion-rights-amendment-again/; Arek Sarkissian, *Abortion Rights Groups Argue Florida Is Trying to Throw up Barriers to Amendment*, POLITICO (June 30, 2024, 07:00 ET), https://www.politico.com/news/2024/06/30/florida-abortion-ballot-measure-cost-00165803.

[184] Ana Goni-Lessan, *DeSantis, Florida House Pay Outsiders to Influence Financial Statement on Abortion Measure*, TALLAHASSEE DEMOCRAT (July 8, 2024, 17:09 ET), https://www.tallahassee.com/story/news/politics/2024/07/08/desantis-pays-outsider-to-speak-at-abortion-financial-impact-panel/74328375007/.

[185] Arek Sarkissian, *Florida Abortion Rights Brawl Transforms Normally Boring Budget Committee into a Battleground*, POLITICO (July 17, 2024, 15:34 EDT), https://www.politico.com/news/2024/07/16/florida-abortion-ballot-measure-cost-00168799. By its express terms, Amendment 4 would have preserved the legislature's right to require parental notification. *See* FLA. CONST. art. X, § 22.

[186] Floridians Protecting Freedom, Inc. v. Passidomo, 392 So. 3d 777, 778 (Fla. 2024). Accordingly, the financial impact statement that appeared with Amendment 4 on the ballot read:

> The proposed amendment would result in significantly more abortions and fewer live births per year in Florida. The increase in abortions could be even greater if the amendment invalidates laws requiring parental consent before minors undergo abortions and those ensuring only li-

Second, in September 2024, multiple media outlets reported "a broad—and unusual—effort by Gov. Ron DeSantis' administration to inspect thousands of *already verified and validated* petitions for Amendment 4 in the final two months before Election Day."[187] The secretary of state "ordered elections supervisors in at least [six] counties to send to Tallahassee at least 36,000 petition forms already deemed to have been signed by real people"[188] due to concerns about allegedly "fraudulent signatures."[189] Multiple people reported being visited by police inquiring about petitions to get Amendment 4 on the ballot.[190] As the ACLU of Florida stated: "[t]his is what state-authorized election interference looks like."[191] These efforts culminated in a 348-page report alleging fraudulent acts and an October lawsuit seeking to remove Amendment 4 from ballots and invalidate it if it passes.[192] The lawsuit relied on the report's conclusion that 16.4% of petitions were invalid, meaning that "the amendment only got 833,521 valid petitions statewide, falling short of the 891,523 requirement."[193] Yet, independent review of the Office of Election Crimes and Security's report found that the report "include[d] apparent factual misstatements, questionable methodology and inaccurate numbers."[194] This suit was

> censed physicians perform abortions. There is also uncertainty about whether the amendment will require the state to subsidize abortions with public funds. Litigation to resolve those and other uncertainties will result in additional costs to the state government and state courts that will negatively impact the state budget. An increase in abortions may negatively affect the growth of state and local revenues over time. Because the fiscal impact of increased abortions on state and local revenues and costs cannot be estimated with precision, the total impact of the proposed amendment is indeterminate.

See id. at 780 (emphasis added).

[187] *See, e.g.*, Romy Ellenbogen, Justin Garcia & Lawrence Mower, *DeSantis' Election Police Questioned People Who Signed Abortion Petitions*, TAMPA BAY TIMES (Sept. 6, 2024), https://www.tampabay.com/news/florida-politics/elections/2024/09/06/florida-abortion-amendment-petition-signature-fraud-voters/ (emphasis added).

[188] *Id.*

[189] Kathryn Varn, *DeSantis Administration Cites Rejected Signatures to Justify Abortion Amendment Probe*, AXIOS (Sept. 11, 2024), https://www.axios.com/local/tampa-bay/2024/09/11/desantis-abortion-amendment-investigation-petitions.

[190] *See* Ellenbogen, Garcia & Mower, *supra* note 187.

[191] Jessica Corbett, *'Unhinged and Undemocratic': Florida Cops Question Abortion Petition Signers*, COMMON DREAMS (Sept. 6, 2024), https://www.commondreams.org/news/florida-amendment-4.

[192] *See* Romy Ellenbogen, *Lawsuit Filed to Try to Remove Florida Abortion Amendment from Ballot*, TAMPA BAY TIMES (Oct. 16, 2024), https://www.tampabay.com/news/florida-politics/elections/2024/10/16/florida-abortion-amendment-4-desantis-fraud-2024-election/; FLA. DEPT. OF STATE OFFICE OF ELECTION CRIMES & SEC., *Interim Report to Legislature on Initiative Petition Fraud Related to the Abortion Initiative (23-07)* (Oct. 11, 2024), https://files.floridados.gov/media/708442/oecs-interim-report-10-11-2024.pdf; Ashleigh Fields, *DeSantis Admin Claims Abortion Rights Groups Committed Petition Fraud: Report*, THE HILL (Oct. 12, 2024, 23:08 ET), https://thehill.com/homenews/state-watch/4930650-desantis-admin-claims-abortion-rights-groups-committed-petition-fraud-report/.

[193] Ellenbogen, *supra* note 192. Of course, the statutory deadline for challenging the validity of signatures elapsed before the suit was filed—to say nothing of the hundreds of thousands of votes already cast. *See Id.*

[194] Tony Pipitone, *Lawsuit to Invalidate Abortion Rights Amendment Relies on Flawed State Report*, NBC MIAMI (Oct. 25, 2024, 7:32 PM), https://www.nbcmiami.com/investigations/lawsuit-to-invalidate-abortion-rights-amendment-relies-on-flawed-state-report/3455308/.

dropped after Election Day.[195] FPF dropped its challenge to the fine and disbanded in December 2024.[196]

Third, in September, the Florida Agency for Health Care Administration launched a website opposing Amendment 4 purporting to promote "transparency" and the "Truth" while spreading misinformation.[197] As the executive director of the ACLU of Florida noted, "[t]his kind of propaganda issued by the state, using taxpayer money and operating outside of the political process sets a dangerous precedent" and "is irresponsible and an attempt to sabotage the vote."[198] On September 12, 2024, FPF sued the state over the website's misinformation—and related television and radio advertisements—alleging a misuse of taxpayer funds and asking the court to stop the messaging immediately.[199] A state trial court tossed FPF's suit citing the upcoming election as a basis for why FPF lacked standing.[200]

Fourth, in October, the Florida Department of Health threatened to sue multiple local television stations that aired an ad supporting Amendment 4, claiming that the advertisement violated state law as a "nuisance" to people's health.[201] Specifically, the letter contended that the advertisement was "false" and "if believed, would likely have a detrimental effect on the lives and health of pregnant women in Florida."[202] Days later, the purported author of the letter was no longer with the Department of Health, having

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[195] *See* Jackie Llanos, *Abortion Amendment Legal Disputes Winding Down after Loss at Polls*, NEWS FROM THE STATES (Nov. 15, 2024, 12:34 ET), https://www.newsfromthestates.com/article/abortion-amendment-legal-disputes-winding-down-after-loss-polls.

[196] Christine Sexton, *Political Group Behind Abortion Rights Campaign Disbands*, KIOWA CNTY. PRESS (Dec. 31, 2024, 5:23 AM), https://kiowacountypress.net/content/political-group-behind-abortion-rights-campaign-disbands.

[197] *See Florida Is Protecting Life: Don't Let the Fearmongers Lie to You*, FLA. AGENCY FOR HEALTH CARE ADMIN., https://floridahealthfinder.com/FloridaCares; *see also* Nathaniel Weixel, *Florida State Health Agency Comes Out Against Abortion Ballot Amendment*, THE HILL (Sept. 6, 2024, 17:23ET), https://thehill.com/policy/healthcare/4866611-florida-state-health-agency-abortion-rights-ballot-amendment/.

[198] Weixel, *supra* note 197.

[199] Kate Payne, *Florida Sued for Using Taxpayer Money on Website Promoting GOP Spin on Abortion Initiative*, ASSOCIATED PRESS (Sept. 13, 2024, 12:24 ET), https://apnews.com/article/florida-abortion-amendment-4-website-lawsuit-de510053ee9799d6d6da3d4b203052f3. Two other lawsuits were filed alleging that state officials—namely, the governor, attorney general, and secretary of AHCA—were "unlawfully us[ing] their offices and agencies to interfere with" voting on Amendment 4. *See* Time-Sensitive Petition for Writs of Quo Warranto, Writs of Mandamus, and All Writs Relief at 10 and 18, Richardson v. Sec'y, Florida Agency for Health Care Admin., 395 So.3d 500 (2024) (No. SC2024-1314), available at https://www.documentcloud.org/documents/25116616-58cd2b59-e06b-4fae-ab40-90e5bf3d4b28; Jackie Llanos, *Florida Dems File Complaint against State Agency Webpage Opposing Abortion Amendment*, FLA. PHOENIX (Sept. 13, 2024, 6:40 PM), https://floridaphoenix.com/2024/09/13/florida-dems-file-complaint-against-state-agency-webpage-opposing-abortion-amendment/; Jim Rosica, *Florida Supreme Court Fast-Tracks Case over DeSantis 'Interference' in Abortion Amendment*, TALLAHASSEE DEMOCRAT (Sept. 11, 2024, 13:25 ET),https://www.palmbeachpost.com/story/news/politics/elections/2024/09/11/gov-desantis-sued-for-abuse-of-power-in-abortion-amendment-opposition/75172184007/.

[200] *See* Christine Sexton, *Tallahassee Trial Judge Tosses Challenge to State Abortion Webpage*, NEWS FROM THE STATES (Sept. 30, 2024, 18:36 ET), https://www.newsfromthestates.com/article/tallahassee-trial-judge-tosses-challenge-state-abortion-webpage .

[201] *See* Alanna Vagianos, *DeSantis Was Directly Behind Ominous Threats to TV Channels over Pro-Choice Ads, Former Official Says*, HUFFPOST (Oct. 21, 2024), https://www.huffpost.com/entry/ron-desantis-threats-tv-channels-pro-choice-abortion-ads_n_67169d54e4b011ffe5177377; Rhian Lubin, *DeSantis Administration Threatens Local TV Station for Airing Abortion Rights Campaign Ads*, INDEP. (Oct. 7, 2024, 23:06 ET), https://www.independent.co.uk/news/world/americas/us-politics/desantis-threatens-tv-station-abortion-advert-b2624767.html.

[202] Vagianos, *supra* note 201.

resigned from his position.[203] FPF sued Joseph Ladapo, the Florida Surgeon General, and John Wilson, the purported author of the threatening letters, alleging political censorship.[204] In that lawsuit, John Wilson attested that he "did not draft the letters or participate in any discussions about [them]" before they were sent; instead, "Ryan Newman, General Counsel for the Executive Office of the Governor, and Jed Doty, Deputy General Counsel for the Executive Office of the Governor, directed [him] to send them under [his] name and on the behalf of the Florida Department of Health."[205] FPF obtained a temporary restraining order preventing "further actions to coerce, threaten, or intimate repercussions directly or indirectly to television stations, broadcasters, or other parties for airing Plaintiff's speech, or undertaking enforcement action against Plaintiff for running political advertisements or engaging in other speech protected under the First Amendment."[206]

As Election Day approached, these efforts had their intended effect: Polls in June and July 2024 found that 69% of registered voters supported Amendment 4, but an August 2024 poll found a significant drop in support.[207] Ultimately, DeSantis's weaponization of the state paid off: Amendment 4 obtained support from only 57.2% of voters—falling short of the 60% supermajority required.[208] Victory was not enough for DeSantis; in 2025, he signed legislation making citizen-initiated constitutional amendments significantly more difficult to enact.[209]

F. Missouri

Missouri banned abortion the day that the Supreme Court announced *Dobbs*, except "in cases of medical emergency"—which was "an affirmative defense."[210] Resulting uncertainty led doctors to tell pregnant people that "they ha[d] to wait until their lives [we]re in more immediate danger to get

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[203] Nikki McCann Ramirez, *Florida Official Throws DeSantis Under Bus for Bid to Block Pro-Abortion Ads*, ROLLING STONE (Oct. 21, 2024), https://www.rollingstone.com/politics/politics-news/desantis-blame-bid-block-anti-abortion-ads-1235139153/.

[204] *See* Floridians Protecting Freedom, Inc. v. Ladapo, 754 F. Supp. 3d 1165 (N.D. Fla. Oct. 17, 2024).

[205] Aff. of John Wilson, *Floridians Protecting Freedom, Inc. v. Ladapo*, No. 4:24-CV-00419-MW-MAF (N.D. Fla. Oct. 21),https://docs.google.com/viewerng/viewer?url=https://big.assets.huffington-tonpost.com/athena/files/2024/10/21/6716a034e4b019cef4eb3ef8.pdf .

[206] *Floridians Protecting Freedom*, 754 F. Supp. 3d at 1178. As the court succinctly put it, "To keep it simple for the State of Florida: it's the First Amendment, stupid." *Id.* at 117.

[207] Miranda Nazzaro, *Florida Polls Show Abortion Measure Falling Short*, THE HILL (Aug. 15, 2024, 12:42 ET), https://thehill.com/policy/healthcare/4829471-florida-abortion-poll-amendment/; Nathaniel Weixel, *New Poll Shows Florida Abortion Amendment Winning, Outperforming Democrats*, THE HILL (July 30, 2024, 17:10 ET), https://thehill.com/policy/healthcare/4801375-florida-abortion-ballot-initiative/; Mitch Perry, *Shock Poll? New Fox News Survey Has Trump over Biden by Just 4 Points in Florida*, FLA. PHOENIX (June 7, 2024, 09:41 ET), https://floridaphoenix.com/2024/06/07/shock-poll-new-fox-news-survey-has-trump-over-biden-by-just-4-points-in-florida/.

[208] *Florida Amendment 4 Election Results: Right to Abortion*, N.Y. TIMES (Nov. 6, 2024), https://www.nytimes.com/interactive/2024/11/05/us/elections/results-florida-amendment-4-right-to-abortion.html.

[209] *See* Kathryn Varn, *DeSantis Takes Aim at Citizen Initiatives, Citing Abortion Amendment*, AXIOS TAMPA BAY (Jan. 14, 2025), https://www.axios.com/local/tampa-bay/2025/01/14/desantis-special-session-amendment-ballot-measures; Mitch Perry, *Restrictions on Constitutional Amendment Process Clears the Florida Legislature*, NEWS FROM THE STATES (May 2, 2025, 15:15 ET), https://www.news-fromthestates.com/article/restrictions-constitutional-amendment-process-clears-florida-legislature.

[210] *See* MO. REV. STAT. §§ 188.017(2)–(4).

an abortion."[211] Missourians largely disagreed with the state's strict abortion law. A 2022 public opinion poll found that a majority of likely voters (58%) believed that pregnant people should be able to legally obtain an abortion during the first eight weeks of pregnancy, while larger majorities believed abortion should be legal when the pregnant person's life was in danger (87%) or in cases of rape (75%) or incest (79%).[212] In a 2023 poll, 55% of Missourians stated that abortion should be legal in all or most cases compared to the 11% who said it should be illegal in all cases.[213]

Despite repeated efforts by antiabortion politicians to keep the Right to Reproductive Freedom Initiative off the ballot, Missourians approved it in November 2024, becoming the first state to overturn a near-total abortion ban via citizen-led ballot measure.[214] The proposed constitutional amendment would protect individuals' rights to make decisions about "all matters relating to reproductive health care, including but not limited to prenatal care, childbirth, postpartum care, birth control, abortion care, miscarriage care, and respectful birthing conditions."[215] Specifically, it would prevent the state from "restricting" reproductive freedom—such actions would be "presumed invalid," "unless the Government demonstrate[d] that such action [wa]s justified by a compelling governmental interest achieved by the least restrictive means."[216] The proposal would permit the state to "regulate . . . abortion after Fetal Viability"—so long as the state did not "restrict an abortion that in the good faith judgment of a treating health care professional [wa]s needed to protect the life or physical or mental health of the pregnant person."[217] This

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[211] *See* MO. REV. STAT. § 188.015(8); Chris Walker, *Treatments for Ectopic Pregnancies in Missouri Are Delayed Due to "Trigger Law,"* TRUTHOUT (June 29, 2022), https://truthout.org/articles/treatments-for-ectopic-pregnancies-in-missouri-are-delayed-due-to-trigger-law/.

[212] Galen Bacharier, *Abortions, Now Illegal in Missouri, Rose Last Year for the First Time in More than a Decade*, SPRINGFIELD NEWS-LEADER (Sept. 12, 2022), https://www.news-leader.com/story/news/local/missouri/2022/09/12/missouri-abortion-increases-2021-before-ban-procedure-illegal-roe-v-wade/8062187001/.

[213] ABORTION VIEWS IN ALL 50 STATES: FINDINGS FROM PRRI'S 2023 AMERICAN VALUES ATLAS 12–13 (2023), https://www.prri.org/research/abortion-views-in-all-50-states-findings-from-prris-2023-american-values-atlas/ [hereinafter "PRRI 2023"]. More recent polling found that "only 10 percent of respondents said abortion should be completely banned—with close to 45 percent saying it should be allowed as a matter of personal choice" in Missouri. Jason Rosenbaum, *Missouri Advocates Gather Signatures for Abortion Legalization, but GOP Hurdle Looms*, NPR (Feb. 28, 2024, 11:55 ET), https://www.npr.org/2024/02/28/1234278254/missouri-advocates-gather-signatures-for-abortion-legalization-but-gop-hurdle-lo.

[214] *See* Kate Zernike, *Missouri Voters Pass Measure to Protect Abortion rights and End Ban*, N.Y. TIMES (Nov. 5, 2024), https://www.nytimes.com/2024/11/05/us/missouri-abortion-measure.html; PROPOSED MO. ART. I, § 36 (2024), https://moconstitutionalfreedom.org/wp-content/uploads/2024/01/Missourians-for-Constitutional-Freedom-Amendment.pdf [hereinafter "MO. REPROD. FREEDOM INITIATIVE"].

[215] MO. REPROD. FREEDOM INITIATIVE, Art. I, § 36.2.

[216] *Id.* § 36.3. The proposal defines a compelling governmental interest as being "for the limited purpose and ha[ving] the limited effect of improving or maintaining the health of a person seeking care," while "consistent with widely accepted clinical standards of practice and evidence-based medicine," without "infring[ing] on that person's autonomous decision-making." *Id.*

[217] *Id.* § 36.4. The definition of "fetal viability," mirrors that found in Michigan's Proposal 3. *Id.* § 36.8(1).

language resulted from public negotiation over competing initiative proposals.[218]

Antiabortion politicians and their supporters tried repeatedly to derail the proposed amendment.[219]

First, Attorney General Andrew Bailey temporarily halted progress on a proposed reproductive rights amendment because he disagreed with the state auditor's estimate of costs.[220] Auditor Scott Fitzpatrick, who is responsible for determining the cost of implementing ballot measures, estimated that approving the constitutional amendment would cost the state approximately $51,000 in reduced local tax revenues.[221] Bailey disagreed, estimating "that the cost would be closer to between $12.5 billion and $51 billion because of potential violations of federal Medicaid laws and lost tax revenue from fewer citizens—people who would be born if abortion weren't an option."[222] A state court concluded that Bailey lacked "authority to substitute his own judgment for that of the Auditor," ending the standoff and allowing initiative supporters to begin collecting signatures.[223] On appeal, the Missouri Supreme Court agreed:

> Nothing in section 116.175 gives the Attorney General authority to question the Auditor's assessment of the fiscal impact of a proposed petition. . . . Because the circuit court in this case did not err in finding there was no defect in the 'legal form and content' of the fiscal note summaries prepared by the Auditor concerning [the] proposed initiative petitions, the Attorney General's refusal to perform the plain, unequivocal, and

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[218] *See* Daniel Desrochers, Jonathan Shorman, & Kacen Bayless, *In Abortion Rights Vote, Missouri Could Do Something No State Has Before*, KANSAS CITY STAR (July 10, 2024, 07:00 ET),https://www.kansas-city.com/news/politics-government/article289577256.html .

[219] *See* Zernike, *supra* note 5 ("The state's Republican leaders have attempted to keep the measure from going before voters for more than a year."); Jason Rosenbaum, *Missouri's Strict Abortion Ban Could Change. Even a GOP-Led Group Thinks It Should*, NPR (Oct. 9, 2023, 05:00 ET), https://www.npr.org/2023/10/09/1203643423/missouris-strict-abortion-ban-could-change-even-a-gop-led-group-thinks-it-should (reporting one antiabortion state senator saying: "I do not want any measure going to the vote of the people specifically when it comes to abortion, because that life has an interest in being protected in this state.").

[220] Summer Ballentine, *Missouri Judge Orders End to GOP Officials' Standoff over Proposed Abortion Rights Ballot Measure,* ASSOCIATED PRESS (June 20, 2023), https://apnews.com/article/missouri-abortion-ballot-measure-b3275e82ae6ea06336795902a7c19736. The language for the November 2024 ballot was finalized in January 2024; before that, Missourians for Constitutional Freedom had submitted almost a dozen proposed ballot initiatives (and a conservative organization, Missouri Women and Family Research Fund, had submitted six others) to expand abortion access in the state. *See* Rosenbaum, *supra* note 219.

[221] Ballentine, *supra* note 220; *See also* MO. REV. STAT. § 116.175.3 (auditor's task was, in fifty words or less, to "state the measure's estimated cost or savings, if any, to state or local entities . . . in language neither argumentative nor likely to create prejudice either for or against the proposed measure").

[222] Summer Ballentine, *Judge Weighs Missouri GOP Dispute over Estimated Cost of Allowing Abortions*, ASSOCIATED PRESS (June 7, 2023, 17:04 ET), https://apnews.com/article/missouri-abortion-ballot-measure-trial-983ee235dbba4184f2140fe45fc14624.

[223] Ballentine, *supra* note 220.

> ministerial duty of approving those summaries (and informing the Auditor he has done so) cannot be justified.[224]

Because of the dispute, the Secretary of State could not "complete his duty by certifying the official ballot titles for the proposed petitions," which had delayed the start of signature collection to qualify the proposal for the ballot.[225] Put another way, the certification of the ballot title was "held up solely by the Attorney General's unjustified refusal to act," so the court ordered Bailey "forthwith to comply with the circuit court's permanent writ of mandamus."[226]

Second, Secretary of State John Ashcroft prepared summary statements for the proposed amendments, using language "that could have inflamed fears that [approval] would lead to dangerous and unregulated abortions," prompting the measure's supporters to sue to block the language.[227] The Missouri Court of Appeals unanimously concluded that: (1) "the summary statements [we]re insufficient and unfair for mentioning only abortion" since the proposed amendments addressed other aspects of reproductive care; (2) "the Secretary's description of the initiatives as allowing 'dangerous, unregulated, and unrestricted abortions, from conception to live birth, without requiring a medical license or potentially being subject to medical malpractice' [wa]s inaccurate and d[id] not give voters 'a sufficient idea of what the proposed amendment[s] would accomplish'"; (3) use of the term "right to life" made the statement "partisan and objectionable"; (4) use of "the phrase 'nullify longstanding Missouri law" was "unduly vague, if not misleading" given *Roe*'s forty-nine-year reign; (5) the phrase "partial birth abortion" was "argumentative, prejudicial, and misleading," as well as "politically charged," and its use failed to identify a probable effect of the proposals given federal law; (6) the phrasing "guaranteeing the right of any woman, including a minor, to end the life of their unborn child at any time" was not an accurate description of the viability provisions, nor did that language "accurately reflect the legal and probable effects" of the proposals; and (7) the language "prohibit any municipality, city, town, village, district, authority, public subdivision, or public corporation having the power to tax or regulate or the state of Missouri from regulating abortion procedures" did

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[224] State ex rel. Fitz-James v. Bailey, 670 S.W.3d 1, 4 (Mo. 2023).
[225] *Id.* at 5, 11.
[226] *Id.* at 11, 13 n.10. Thereafter, opponents of the reproductive freedom initiative sued "challenging the sufficiency and fairness of the Auditor's fiscal notes and fiscal note summaries," raising similar arguments as the AG, and asking for the fiscal note summary to be amended to account for the "millions of dollars annually" in "reduced tax revenues" and possible "billions of dollars annually" in increased "health care costs to the State." *See* Kelly v. Fitzpatrick, 677 S.W.3d 622, 626, 629 (Mo. Ct. App. 2023). The court of appeals affirmed the trial court's decision that the Auditor's notes and summaries were "fair and sufficient." *Id.* at 626.
[227] Zernike, *supra* note 5. Ashcroft has a history of stymying popular participation in revising Missouri's abortion laws. *See* Summer Ballentine, *Missouri Abortion Law Critics Won't Seek Signatures for Vote*, ASSOCIATED PRESS (Aug. 15, 2019, 17:29 ET), https://apnews.com/article/a7232cb029634a3a96e8a96946d7ba25 (reporting complaints about Ashcroft "dragging his feet to process the [referendum] petition" to overturn an eight-week abortion ban, leaving petitioners "only two weeks to gather the more than 100,000 voter signatures required to put it on the 2020 ballot").

not "accurately reflect the legal and probable effects" of the proposals.[228] The Court of Appeals then bypassed Ashcroft's office and directly certified revised summary statements to the Secretary of State.[229] Even so, Ashcroft continued to portray the initiative as extreme, claiming it would allow "abortion from conception until the very last second that the last toenail leaves the birth canal."[230]

Third, the Republican-controlled legislature—like in Ohio a year before—sought to legislatively refer a constitutional amendment making it harder for citizens to approve the reproductive freedom measure.[231] Most notably, instead of requiring a simple majority vote across the state, under the legislature's proposal, citizen initiatives would only be approved "if a majority of the votes cast thereon statewide and also a majority of the votes cast thereon in each of more than half of the congressional districts in the state are in favor."[232] This "change would [have] hand[ed] rural residents more power," since "[a] coalition of rural congressional districts would have effective veto control over amendments, no matter how popular a measure might [be] in Kansas City or St. Louis."[233] The plan was if the legislature referred the proposed initiative process changes, then the governor would have placed that proposal on the August 2024 primary ballot before voters could vote on the Reproductive Freedom Initiative in November.[234] However, infighting among the state Senate's Republican supermajority—which held twenty-four out of thirty-four seats—prevented it from ending a fifty-hour filibuster by Democrats[235] of the proposed changes to the initiative

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[228] Fitz-James v. Ashcroft, 678 S.W.3d 194, 204, 208–10, 213 (Mo. Ct. App. 2023).
[229] *Id.* at 216–18.
[230] Anna Spoerre, *Anti-Abortion Groups Say More Aggressive Approach Necessary to Stop Missouri Amendment*, MO. INDEP. (May 2, 2024, 05:55 ET), https://missouriindependent.com/2024/05/02/missouri-abortion-amendment-march-life/.
[231] S.J.R. 74, 48, 59, 61 & 83, 102d Gen. Assemb. (Mo. 2024), https://www.senate.mo.gov/24info/pdf-bill/perf/SJR74.pdf; Anna Spoerre, *Democrats Pull All-Night Filibuster of Bill Making it Harder to Amend Missouri Constitution*, MO. INDEP. (May 14, 2024), https://missouriindependent.com/2024/05/14/democrats-filibuster-bill-amend-missouri-constitution/; *see also* Bulman-Pozen & Seifter, *supra* note 38, at 222 (quoting Missouri House Speaker as arguing that the reproductive freedom amendment would "[a]bsolutely" pass without revisions to the initiative process and that '[i]f the Senate fails to take action on [initiative petition] reform, . . . the Senate should be held accountable for allowing abortion to return to Missouri") (internal citations omitted); Summer Ballentine, *GOP Fighting, 50-Hour Democratic Filibuster Kill Push to Make Amending Missouri Constitution Harder*, ASSOCIATED PRESS (May 17, 2024), https://apnews.com/article/missouri-constitution-amendment-democracy-democrat-voters-filibuster-7996412ccfdfb5b8ee4aa28d77c34610 (reporting Senator Rick Brattin saying: "That's what this fight has been about all along: protecting life.").
[232] S.J.R. 74, 48, 59, 61 & 83, 102d Gen. Assemb. (Mo. 2024).
[233] Kacen Bayless, *Missouri Senate Debates Curbing Direct Democracy Amid Campaign for Abortion Rights Vote*, KAN. CITY STAR (Feb. 13, 2024), https://www.kansascity.com/news/politics-government/article285429772.html. While Republicans claimed "that the state constitution [was] too easy to change," of the sixty-nine citizen-led initiative petitions voted on between 1910 and 2022, only twenty-eight passed. *Id.* According to an analysis conducted by the *Missouri Independent*, the "concurrent majority standard" proposed would mean that "as few as 23% of voters could defeat a ballot measure." *See* Spoerre, *supra* note 231.
[234] Bayless, *supra* note 233.
[235] Ballentine, *supra* note 231. Technically, the filibuster "focused on GOP efforts to include 'ballot candy' that would add unrelated issues about immigrants voting and foreign fundraising to the question." *See* Spoerre, *supra* note 231.

process.[236] Accordingly, that proposal, "a top GOP priority, seen as a method to undercut a likely November ballot measure enshrining abortion rights in the Constitution," did not move forward.[237]

Fourth, the antiabortion movement launched a "Decline to Sign" campaign to convince voters not to sign petitions to put the reproductive freedom measure on ballots.[238] As part of this campaign, as in other states, opponents made false claims about the proposal that it: "goes farther than Roe," "would harm health and safety protections for mothers," and "will eliminate parental consent laws."[239] Antiabortion activists "set up a hotline to report the location of signature gatherers so volunteers could show up and hand out 'Decline to Sign' materials" and used "texts, phone calls and videos" to "fram[e] the petition's sponsors as out-of-state extremists with designs to steal people's personal data."[240] The "Decline to Sign" campaign also "encouraged [supporters] to stall signature gatherers" to delay the collection of additional signatures.[241] Despite these efforts, over 380,000 Missourians signed petitions.[242] The antiabortion movement tried to find those "who regret[ted] signing—or who mistakenly signed," to ensure those signatures did not count towards the required signature amount.[243] As of May, "the Secretary of State's office ha[d] received about 140 requests for signature withdrawals."[244]

Despite these efforts, on August 13, 2024, the Missouri Secretary of State's office certified the initiative to appear on the November 2024 ballot as "Amendment 3."[245]

Sixth, that same day, Secretary Ashcroft's office published the "fair ballot language statement," intended to be posted next to the sample ballot at every polling place.[246] The proposed language read:

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[236] Jason Hancock, *'A Bizarre Session': Missouri Lawmakers Head Home After Year Defined by Gridlock, Infighting*, MO. INDEP. (May 17, 2024), https://missouriindependent.com/2024/05/17/a-bizarre-session-missouri-lawmakers-head-home-after-year-defined-by-gridlock-infighting/.

[237] *Id.*; *see also* Spoerre, *supra* note 231 ("Republicans have pushed to change the initiative petition process for years, but the effort picked up steam more recently as a campaign to restore abortion access in Missouri advanced closer to appearing on the ballot.").

[238] Elly Laliberte, *'Decline to Sign' Campaign Discourages Voters from Signing Abortion Amendment Petition*, KOMO (Apr. 29, 2024), https://www.komu.com/news/state/decline-to-sign-campaign-discourages-voters-from-signing-abortion-amendment-petition/article_1efc53bc-0656-11ef-a03c-7b1c166a69ce.html .

[239] Spoerre, *supra* note 230.

[240] *Id.*; Laliberte, *supra* note 238.

[241] *See* Spoerre, *supra* note 230.

[242] *See* Zernike, *supra* note 5.

[243] Spoerre, *supra* note 230.

[244] *Id.*

[245] David A. Lieb, *Initiative to Enshrine Abortion Rights in Missouri Constitution Qualifies for November Ballot*, ABC 27 (Aug. 13, 2024, 16:20 EDT), https://www.abc27.com/news/us-world/ap-initiative-to-enshrine-abortion-rights-in-missouri-constitution-qualifies-for-november-ballot/; Ellie Compton & John Murphy, *Abortion, Sports Betting Petitions Will Appear on November Ballot After Certification*, KOMU (Aug. 13, 2024), https://www.komu.com/news/state/abortion-sports-betting-petitions-will-appear-on-november-ballot-after-certification/article_99c9aee2-5989-11ef-b50b-0faa851d9be5.html.

[246] Anna Spoerre, *Abortion-Rights Proponents Sue Missouri Secretary of State Over Fair Ballot Language*, MO. INDEP. (Aug. 20, 2024, 16:32 ET), https://missouriindependent.com/2024/08/20/missouri-secretary-state-ashcroft-lawsuit-abortion/.

> A **"yes"** vote will enshrine the right to abortion at any time of pregnancy in the Missouri Constitution. Additionally, it will prohibit any regulation of abortion, including regulations designed to protect women undergoing abortions and prohibit any civil or criminal recourse against anyone who performs an abortion and hurts or kills the pregnant women.
>
> A **"no"** vote will continue the statutory prohibition of abortion in Missouri.
>
> If passed, this measure may reduce local taxes while the impact to state taxes is unknown.[247]

Dr. Anna Fitz-James, on behalf of Missourians for Constitutional Freedom sued seeking new language, contending that the proposed language was "unfair, insufficient, inaccurate, misleading, argumentative, prejudicial and blatantly contradicts the Court of Appeals' decision invalidating the Secretary of State's official ballot title for the same measure."[248] Instead of providing "a true and impartial statement of the effect of a vote for and against the measure," she argued, the ballot language statement "echoe[d] the Secretary of State's original, misleading summary statement that was rejected by the Court of Appeals" and, as "fundamentally inconsistent with the official ballot title," would lead to voter confusion.[249]

After a September 4, 2024, bench trial, the court agreed with Fitz-James: "Intentional or not, the secretary's language sows voter confusion about the effects of the measure" and was "unfair, inaccurate, insufficient and misleading."[250] First, the statement that a vote in favor would "enshrine the right to abortion *at any time of pregnancy*" contradicted the proposed amendment's language, "giv[ing] voters the wrong idea" and misleading them "into believing that no regulation of abortion will be allowed[.]"[251] Second, the statement that voting in favor would "prohibit any regulation of abortion" likewise contradicted the proposed amendment's language "and state[d] the opposite of the effect of the Amendment[,]" thereby "mislead[ing] voters into thinking that the Amendment w[ould] not permit any regulation, [which wa]s inaccurate."[252] Third, the language about how "the Amendment w[ould] 'prohibit any civil or criminal recourse" was "contrary to the language of the Amendment and w[ould] give voters the

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[247] Petition by Petitioner at ¶17, Fitz-James v. Ashcroft, No. 24AC-CC06970 (Mo. Cole Cnty. Cir. Ct. Aug. 16, 2024).
[248] *Id.* at 1–3.
[249] *Id.* at ¶¶ 21–22, 26.
[250] Fitz-James v. Ashcroft, No. 24AC-CC06970, at 6, 8 (Mo. Cole Cnty. Cir. Ct. Sept. 5, 2024).
[251] *Id.* at 6–7.
[252] *Id.* at 7.

mistaken impression that the Amendment w[ould] allow physicians to perform abortions negligently or criminally[,]" suggesting that "the Amendment w[ould] shield abortion providers from liability for medical malpractice" and "permit[] a doctor to murder a pregnant person on the operating table without any risk of prosecution, when the Amendment has no such effect."[253] Fourth, "[t]he singular focus of the fair ballot language on abortion misleads voters into believing that abortion is the only topic of the measure, when it is not."[254] Ultimately, the court rewrote the fair ballot language, modeled off the summary statement for the Amendment approved by the court of appeals.[255]

That was not the only attempt to derail Amendment 3 between certification and Election Day. Days after Ashcroft certified the measure for the ballot, Republican legislators (joined by an anti-abortion activist) sued, seeking to reverse the certification.[256] Specifically, plaintiffs argued that the certification was improper because: (1) the petitions "fail[ed] to specify" the "laws and constitutional provisions that would be repealed, directly or by implication"; (2) the proposed amendment "illegally include[d] more than one subject"; and (3) the signatures needed to put Amendment 3 on the ballot were obtained through misleading petitions.[257] According to plaintiffs, Amendment 3 would create an "unlimited in scope" "fundamental right to reproductive freedom[,]'" which would lead to "a campaign of 'judicial sterilization,' systematically neutralizing all laws, existing or future, that attempt to limit this new, limitless 'right[.']"[258] Missourians for Constitutional Freedom was permitted to intervene.[259]

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[253] *Id.* at 7–8.
[254] *Id.* at 8.
[255] *Fitz-James*, No. 24AC-CC06970, at 10. The court certified the following language:

> A **"yes"** vote establishes a constitutional right to make decisions about reproductive health care, including abortion and contraceptives, with any governmental interference of that right presumed invalid; removes Missouri's ban on abortion; allows regulation of reproductive health care to improve or maintain the health of the patient; requires the government not to discriminate, in government programs, funding, and other activities, against persons providing or obtaining reproductive health care; and allows abortion to be restricted or banned after Fetal Viability except to protect the life or health of the woman.
> A **"no"** vote will continue the statutory prohibition of abortion in Missouri. If passed, this measure may reduce local taxes while the impact to state taxes is unknown.

[256] *See generally* Petition by Petitioner, Coleman v. Ashcroft, No. 24AC-CC07285 (Mo. Cole Cnty. Cir. Ct. Aug. 22, 2024).
[257] *Id.* at ¶¶ 2–3. The plaintiffs also asked the court to declare unconstitutional the statute limiting the time to appeal the legal sufficiency of initiative petitions after certification for the ballot under the Missouri Constitution's reservation "to the people the power to enact or reject amendments to the Constitution by initiative petition." *Id.* at ¶ 5.
[258] *Id.* at ¶¶ 30, 32. Plaintiffs then described a presumed parade of horribles flowing from Amendment 3. *See Id.* at ¶¶ 31–50.
[259] *See* Motion to Intervene, Coleman v. Ashcroft, No. 24AC-CC07285 (Mo. Cole Cnty. Cir. Ct. Aug. 27, 2024); Judgment, Coleman v. Ashcroft, No. 24AC-CC07285, at 1 (Mo. Cole Cnty. Cir. Ct. Sept. 6, 2024) [hereinafter "Coleman Judgment"].

After bemoaning "the profound effect of pre-election review of an initiative petition[,]"[260] the court agreed with plaintiffs, concluding that the petitions improperly failed to include a "disclaimer" identifying the "sections of existing law or of the constitution which would be repealed by the measure."[261] The court proceeded to identify "several examples" of Missouri statutes that would be repealed, acknowledging that "some attenuated and not directly related statutes and provisions" could not be identified without litigation.[262] Thus, the initiative petition was "insufficient," requiring the court to "enjoin the secretary of state from certifying the measure and all other officials from printing the measure on the ballot."[263] Yet, the court stayed execution of the injunction due to "the gravity of the unique issues involved . . . and the lack of direct precedent on point" until September 10, 2024, the ballot certification deadline.[264]

Secretary of State Ashcroft then purported to decertify Amendment 3, removing it from the November election ballot before the Missouri Supreme Court could hear oral argument: "On further review in light of the circuit court's judgment, I have determined the petition is deficient[,]" purporting to undo the "administrative[] certif[ication]" from August.[265]

On September 10, the Missouri Supreme Court heard oral argument and, mere hours before the deadline for printing absentee ballots, issued a one-page ruling requiring Ashcroft to "certify to local election authorities that Amendment 3 be placed on the November 5, 2024, general election ballot" and to "take all steps necessary to ensure that it is on said ballot."[266] In the brief order, the court explained that pursuant to state law, Ashcroft had certified Amendment 3 "as sufficient prior to th[e] deadline, and any action taken to change that decision weeks after the statutory deadline expired is a nullity and of no effect."[267] Ten days later, the court released three opinions, showing a 4-3 split.[268]

During the general election campaign, opponents focused on tying Amendment 3 to gender-affirming care for transgender youth, which is already illegal in Missouri.[269]

On Election Day, a majority of voters approved Amendment 3 and hours later, Planned Parenthood challenged Missouri's abortion

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[260] Coleman Judgment, *supra* note 259, at 2–3.
[261] *Id.* at 5–6.
[262] *Id.* at 8–9. In short, "the defendant-intervenor Fitz-James' failure to include any statute or provision that will be repealed, especially when many of these statutes are apparent, is in blatant violation of the sufficiency requirements under 116.050.2(2) RSMo." *Id.* at 9.
[263] *Id.* at 9.
[264] Coleman, No. 24AC-CC07285, at 10.
[265] *See* Letter from John R. Ashcroft, Mo. Sec'y of State, to Tori Schafer (Sept. 9, 2024), RE: INITIATIVE PETITION CIRCULATED BY ANNA FITZ-JAMES (2024-086), https://www.courts.mo.gov/fv/c/Exhibit%20A.PDF?courtCode=SC&di=201731.
[266] Coleman v. Ashcroft, No. SC100742, at 1 (Mo. Sept. 10, 2024) (en banc).
[267] *Id.*
[268] *See* Coleman v. Ashcroft, 696 S.W.3d 347 (Mo. 2024) (en banc).
[269] *See* Jeremy Kohler, *Opponents of Missouri Abortion Rights Amendment Turn to Anti-Trans Messaging and Misinformation*, PROPUBLICA (Oct. 18, 2024, 05:00 ET), https://www.propublica.org/article/missouri-abortion-rights-amendment-anti-transgender-campaign-messaging. This messaging was seen nationwide in states considering abortion ballot measures.

restrictions.[270] In late December 2024, a state trial court preliminarily enjoined the abortion ban and some other restrictions.[271] In mid-February 2025, that same court, on a motion for reconsideration, preliminarily enjoined other restrictions.[272]

That is not the end of the story.[273] In late May, the state Supreme Court directed the trial court to vacate the preliminary injunctions and "reevaluate . . . [the] request for preliminary injunctive relief in light of [the correct] standard."[274] The trial court vacated the injunctions, reimposing the state's abortion ban, and the litigation continues.

Further, Missouri has a history of legislative action to undo successful ballot measures.[275] Before and after Election Day, opponents suggested changing or repealing Amendment 3.[276] At the end of the next legislative session, the state Senate approved a joint resolution (previously passed by the House) to put a new proposed constitutional amendment before voters in or before November 2026 that would repeal the Reproductive Freedom Initiative and only allow abortion "in cases of medical emergency, fetal anomaly, rape, or incest"—and only in the first trimester for the last two circumstances—as well as reserve legislative power to "regulate the provision of abortions, abortion facilities, and abortion providers."[277] The proposal would also ban "[f]etal organ harvesting" and gender-affirming care for minors.[278] While time will tell what will happen with the new "Amendment 3,"[279] some Missourians seem to have had enough and are

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[270] *See* Zernike, *supra* note 214; *see generally* Petition by Plaintiff, Comprehensive Health of Planned Parenthood Great Plains v. Missouri, No. 2416-CV31931 (Mo. Jackson Cnty. Cir. Ct. Nov. 6, 2024).

[271] *See generally* Order, Comprehensive Health of Planned Parenthood Great Plains v. State, No. 2416-CV31931 (Mo. Jackson Cnty. Cir. Ct. Dec. 20, 2024).

[272] Order, Comprehensive Health of Planned Parenthood Great Plains v. State, No. 2416-CV31931, at 3 (Mo. Jackson Cnty. Cir. Ct. Feb. 14, 2025).

[273] *See* Anna Spoerre, *Failed GOP Attempt to Keep Abortion off Missouri Ballot Could Foreshadow Fight to Come*, MO. INDEP. (Sept. 25, 2024, 05:55 ET), https://missouriindependent.com/2024/09/25/amendment-3-challenges-abortion-missouri-legislation/ (quoting Senator Coleman, "'This is not the end all be all, . . . [a]nd I think you will see efforts, win or lose, for Missourians to get another say in this.'").

[274] Peremptory Writ at 2, State ex rel. Kehoe v. Zhang, No. SC101026 (Mo. May 27, 2025).

[275] Spoerre, *supra* note 273 (citing instances in 1940, 2010, and 2018 when the legislature counteracted voter-approved legislation or constitutional amendment).

[276] *See* Anna Spoerre, *Republican Lawmakers Propose Constitutional Amendments to Overturn Amendment 3*, NEWS TRIBUNE (Dec. 22, 2024, 04:00 ET), https://www.newstribune.com/news/2024/dec/22/republican-lawmakers-propose-constitutional/; Hannah Falcon, *Missouri Lawmakers Pre-File Over a Dozen Bills, Resolutions on Abortion in Response to Amendment Three Passing*, KY3 (Dec. 6, 2024, 18:32 ET), https://www.ky3.com/2024/12/06/missouri-lawmakers-pre-file-over-dozen-bills-resolutions-abortion-response-amendment-three-passing/; Kacen Bayless, *Top MO Republican Said He'd Respect Voters' Will. Now He's Open to Changing Abortion Law*, KAN. CITY STAR (Nov. 20, 2024, 4:50 PM), https://www.kansascity.com/news/politics-government/article295879274.html; John Murphy, *Lawmakers and Lawyers Have Some Paths to Restricting Abortion After Amendment 3 Passage*, KOMU (Nov. 10, 2024), https://www.komu.com/news/elections/election_report/lawmakers-and-lawyers-have-some-paths-to-restricting-abortion-after-amendment-3-passage/article_43eb2af8-9e23-11ef-abab-0ba7763d369a.html ; Anna Claire Vollers, *Conservatives Push to Declare Fetuses as People, with Far-Reaching Consequences*, MO. INDEP., (Aug. 5, 2024. 12:00 ET), https://missouriindependent.com/2024/08/05/conservatives-push-to-declare-fetuses-as-people-with-far-reaching-consequences/.

[277] H.R.J. Res. 73, 103d Gen. Assemb., Reg. Sess. (2025), MO. CONST. art. I, § 36(a).

[278] *Id.* at 9.

[279] *See* Jacob Richey, *Missouri Appeals Court Rewrites Ballot Language for Amendment to Ban Most Abortions Again*, KOMU (Dec. 4, 2025), https://www.komu.com/news/state/missouri-appeals-court-rewrites-ballot-language-for-amendment-to-ban-most-abortions-again/article_fccf8dce-4416-46cb-823c-1d50cbbe362d.html.

organizing for a 2026 constitutional amendment to limit the Legislature's power to modify citizen initiatives.[280]

G. Montana

In 1999, the Montana Supreme Court concluded that the state constitution's right to individual privacy protected "procreative autonomy," including "the right to seek and to obtain . . . a pre-viability abortion, from a health care provider of [one's] choice."[281] Even so, the Republican-controlled legislature repeatedly sought to restrict abortion access.[282] In November 2023, Montanans Securing Reproductive Rights ("MSRR") proposed an amendment to explicitly protect abortion in the state constitution.[283] The proposed constitutional amendment, later known as "CI-128," would protect "a right to make and carry out decisions about one's own pregnancy, including the right to abortion," which "shall not be denied or burdened unless justified by a compelling government interest achieved by the least restrictive means."[284] Yet, it would allow the state to regulate abortion "after fetal viability" except that it could not "deny or burden access to an abortion that, in the good faith judgment of a treating health care professional, is medically indicated to protect the life or health of the pregnant patient."[285]

The antiabortion movement, again aided by antiabortion politicians, attempted to derail the proposal, most notably, by trying to keep it off the ballot entirely.

First, Montana Attorney General Austin Knudsen halted the initiative process by concluding that the proposal was "legally insufficient" because

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[280] *See Some Voters Are Pushing Back on Lawmakers' Efforts to Overturn Citizen Ballot Initiatives*, SPECTRUM NEWS (Mar. 21, 2025, 07:28 ET), https://spectrumlocalnews.com/mo/st-louis/news/2025/03/21/voters-pushing-back-on-efforts-to-overturn-ballot-initiative [hereinafter "*Voter Pushback*"].

[281] Armstrong v. State, 989 P.2d 364, 370 (Mont. 1999).

[282] *See, e.g.*, S.B. 154, 68th Leg., Reg. Sess. (Mont. 2023) ("The right of individual privacy as referenced in the Montana constitution . . . does not create, and may not be construed as creating or recognizing, a right to abortion or to governmental funding of abortion."); *see also* Weems v. State, 529 P.3d 798 (Mont. 2023) (relying on *Armstrong* to invalidate law limiting provision of abortion care to licensed physicians and physician assistants); Order Granting Summary Judgment, Planned Parenthood of Mont. v. State, No. DV-21-999 (Mont. Yellowstone Cnty. Dist. Ct. Feb. 29, 2024) (striking down 20-week abortion ban, telehealth abortion ban, 24-hour waiting period, mandated consent form, and required offer of ultrasound/fetal heart tone); John Riley, *MT Supreme Court Rules Three Abortion Laws from 2021 Are Unconstitutional*, KTVH (June 9, 2025, 19:52 ET), https://www.ktvh.com/news/montana-news/mt-supreme-court-rules-three-abortion-laws-from-2021-are-unconstitutional; Matt Volz, *Montana Designs New Hurdles for Abortion Clinics Ahead of Vote to Protect Access*, KFF HEALTH NEWS (Aug. 1, 2024), https://kffhealthnews.org/news/article/montana-abortion-clinics-hurdles-oversight-november-ballot-access/.

[283] *See* Austin Amestoy & Mara Silvers, *Abortion Initiative Reignites Republicans' Frustrations with Montana Supreme Court*, MONT. PUB. RADIO (Apr. 10, 2024, 09:54 ET), https://www.mtpr.org/montana-news/2024-04-10/abortion-initiative-reignites-republicans-frustrations-with-montana-supreme-court.

[284] Constitutional Initiative No. 128 (Mont. 2024) [hereinafter *CI-128*]. "A government interest is compelling only if it clearly and convincingly addresses a medically acknowledged, bona fide health risk to a pregnant patient and does not infringe on the patient's autonomous decision making." *Id.*

[285] *Id.* "Fetal viability" was defined as "the point in pregnancy when, in the good faith judgment of a treating health care professional and based on the particular facts of the case, there is a significant likelihood of the fetus's sustained survival outside the uterus without the application of extraordinary medical measures." *Id.*

it "logroll[ed] multiple distinct political choices into a single initiative."[286] The Montana Supreme Court disagreed, concluding that the amendment proposed "a single change to the Montana Constitution on a single subject: the right to make decisions about one's own pregnancy, including the right to abortion."[287] The court rejected Knudsen's other arguments and directed him to "prepare a ballot statement consistent with the applicable statutory requirements and forward the statement to the Montana Secretary of State within five days."[288]

Second, Knudsen then rejected MSRR's proposed ballot statement and drafted his own, which stated that the amendment: (1) would "allow post-viability abortions up to birth"; (2) left "to the subjective judgment of an abortion provider" the meaning of "fetal viability" and "extraordinary medical measures"; (3) "prohibit[ed] any State requirement for parental notice"; (4) obviated most "health and safety regulations"; (5) prevented enforcement of "medical malpractice standards against providers for harms caused in providing pregnancy/abortion care"; and (6) could "increase the number of taxpayer-funded abortions."[289] MSRR challenged this statement in court, too.[290] The Montana Supreme Court, again, agreed with MSRR that the ballot language failed to "fairly state to the voters what is proposed within the Initiative"; instead the language "would prevent a voter from casting an intelligent and informed ballot" because the language "focuse[d] on topics, such as parental notice and medical malpractice, that [CI-128] d[id] not discuss."[291] Instead of returning the task of drafting to Knudsen, the court prepared its own ballot statement, which it directly certified to the secretary of state to move the initiative process along[292]—this dispute had delayed "signature gathering by several weeks."[293]

Third, days after MSRR launched its efforts in April 2024 to collect the approximately 60,000 signatures (from 10% of voters in forty different state House districts) by June 21, 2024, Republican Senators on the Law and Justice Interim Committee opposed the constitutional amendment.[294] Yet, the legislative hearing was unnecessary: the Montana Supreme Court explained that "[t]he interim committee review process ha[d] thus not been triggered as the condition precedent—a finding of legal sufficiency by the

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[286] Brent Mead, *Memorandum Re: Legal Sufficiency Review of Proposed Ballot Measure No. 14,* DAILY MONTANAN (Jan. 16, 2024), https://dailymontanan.com/wp-content/uploads/2024/01/2024.01.15-Ballot-Measure-14-Legal-Sufficiency-Final.pdf.
[287] Montanans Securing Reproductive Rights v. Knudsen, 545 P.3d 45, 51 (Mont. 2024).
[288] *See id.* at 52-53.
[289] *See* Montanans Securing Reproductive Rights v. Knudsen, 546 P.3d 183, 186 (Mont. 2024).
[290] *Id.*
[291] *Id.* at 188.
[292] *Id.* at 190.
[293] Mara Silvers, *Montana's Abortion Rights Campaign Seeking Signatures while Dodging Opposition*, KPAX (June 3, 2024, 10:33 AM), https://www.kpax.com/news/montana-news/montanas-abortion-rights-campaign-seeking-signatures-while-dodging-opposition.
[294] *See* Blair Miller, *Group Kicks off Signature Gathering Efforts for Montana Abortion Access Ballot Petition*, IDAHO CAPITAL SUN (Apr. 18, 2024, 10:33 ET), https://idahocapitalsun.com/2024/04/18/group-kicks-off-signature-gathering-efforts-for-montana-abortion-access-ballot-petition/; Mara Silvers, *Republicans Vote to Oppose Constitutional Abortion Rights Measure*, MONT. FREE PRESS (Apr. 18, 2024), https://montanafreepress.org/2024/04/18/montana-republicans-vote-to-oppose-constitutional-abortion-rights-measure/.

Attorney General—was not met."[295] The secretary-of-state-supplied petition forms drew attention to this procedural quirk, discouraging people from signing:

> Voters are advised that unlike the other 2024 ballot issues, the Montana Supreme Court ordered that the ordinary process which authorizes the Legislature to have either an interim committee or an administrative committee of the legislature review the content of this initiative prior to circulation does not apply to this petition.[296]

Fourth, the Montana Life Defense Fund ("MLDF") spread misinformation about CI-128, "claiming it would usher in an era of limitless abortion and lead to a series of negative consequences," while also "training its own volunteers to deter petitioners and, when sheets of signatures [we]re submitted, to weed out ineligible names."[297] Opponents cast CI-128 as unreasonably overbroad, including by claiming that it "would allow any medical provider, such as dental hygienists, to provide abortions without government regulation"—even though the proposal permitted government regulation to address "medically acknowledged, bona fide health risk[s] to a pregnant patient."[298]

Fifth, MLDF volunteers videotaped CI-128 supporters trying to collect signatures in public places, thereby discouraging people from signing petitions.[299] These and other opponents filed complaints with the Commissioner of Political Practices, alleging signature-gathering violations.[300] Due to concerns about violence and harassment from the antiabortion movement, MSRR did not hold large public events.[301]

Despite the antiabortion movement's opposition, MSRR turned in over 117,000 signatures—nearly double the amount required to get on the

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[295] Montanans Securing Reproductive Rights, 546 P.3d 183, 186 n.2 (Mont. 2024).
[296] Jonathan Ambarian, *Montana Abortion Measure a Step Closer to Signature Gathering after Legal Back-and-Forth*, KTVH (Apr. 5, 2024, 20:42 ET), https://www.ktvh.com/news/montana-abortion-measure-a-step-closer-to-signature-gathering-after-legal-back-and-forth.
[297] Silvers, *supra* note 293.
[298] *Id.* This misinformation continued in the lead-up to the general election. *See* Darrell Ehrlick, *Gianforte Revives Debunked Abortion Claim for Ballot Initiative*, DAILY MONTANAN (Aug. 2, 2024, 17:39 ET), https://dailymontanan.com/2024/08/02/gianforte-revives-debunked-abortion-claim-for-ballot-initiative/.
[299] Silvers, *supra* note 293; *see also* Denali Sagner, *Abortion Rights Advocates Report Intimidation During Signature Collection Effort*, FLATHEAD BEACON (June 12, 2024), https://flatheadbeacon.com/2024/06/12/montana-abortion-constitutional-amendment-signature-128/ ("As opposition to CI 128 has mounted, signature gatherers have been filmed and followed across the state, including in Helena, Butte, Billings, Bozeman and Stevensville[.]").
[300] Silvers, *supra* note 293.
[301] *Id.*

ballot—on the June 21, 2024 deadline.[302] According to the ACLU, this set a record.[303]

Yet, despite the record number of signatures, Secretary of State Christi Jacobsen used her office in another attempt to keep CI-128 off the ballot. According to MSRR, historically "the Secretary has correctly and lawfully directed county election administrators to 'accept the signatures of' electors who appear on the 'inactive' voter list," but on June 28, 2024, "the Secretary abruptly reversed course [to] effectively forc[e] election administrators to reject signatures from [these] qualified electors" by "unilaterally reprogram[ing] the State's software program used by county election administrators to process petitions to reject signatures from these voters automatically."[304] MSRR sought a temporary restraining order and preliminary injunction requiring "the counting of signatures of qualified electors . . . and the restoration of any unlawfully rejected signatures."[305] The Secretary of State claimed that "[i]t was imperative that the incorrect guidance provided by previous administrations be corrected."[306] A state court required counting the signatures of inactive-but-registered voters and the state supreme court denied Jacobsen and Knudsen's request to revise that ruling.[307]

On the July 19, 2024, deadline, "[c]ounty election officials . . . verified 74,186 voter signatures, more than the 60,359 needed for the constitutional initiative to go before voters" and "also met the threshold of 10% of voters in 51 House Districts—more than the required 40 districts."[308] The secretary of state's office certified the measure for the November ballot.[309]

In the lead-up to the election, "pastors, priests, faith-based anti-abortion advocates and conservative Christian policy groups" actively opposed CI-128.[310] The Montana Catholic Conference encouraged bishops to voice their

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[302] *See* Julia Mueller, *Montana Organizers Submit Signatures to Add Abortion-Rights Measure to the Ballot*, THE HILL (June 21, 2024, 18:09 ET), https://thehill.com/homenews/campaign/4734258-montana-organizers-submit-signatures-add-abortion-rights-measure-ballot/.

[303] Adam Edelman & Lindsey Pipia, *Montana Organizers Collect Enough Signatures to Advance Abortion Rights Ballot Measure*, NBC NEWS (June 21, 2024, 16:06 ET), https://www.nbcnews.com/politics/2024-election/montana-abortion-ballot-measure-signatures-rcna158016.

[304] Complaint for Declaratory and Injunctive Relief at 2, Montanans Securing Reproductive Rights v. State, No. C DV-25-2024-0000463-DK, (Mont. 1st Judicial Dist. Ct. Lewis & Clark Cnty. July 10, 2024).

[305] Plaintiffs' Brief In Support of Motion for Temporary Restraining Order & Preliminary Injunction at 17, Montanans Securing Reproductive Rights v. State, No. C DV-25-2024-0000463-DK (Mont. 1st Judicial Dist. Ct. Lewis & Clark Cnty. July 10, 2024).

[306] Blair Miller, *Montana Abortion Petition Group Alleges Secretary of State Wrongfully Tossing Signatures*, DAILY MONTANAN (July 9, 2024, 15:46 ET), https://dailymontanan.com/2024/07/09/montana-abortion-petition-group-alleges-secretary-of-state-wrongfully-tossing-signatures/.

[307] *See* Order, State v. Montana First Judicial Dist. Ct., Lewis & Clark Cnty., No. OP. 24-0431 (Mont. July 23, 2024); Bowen West, *Montana Supreme Court Denies Petition to Take Case on Ballot Measure Signatures*, NBC MONT. (July 24, 2024, 10:16 ET), https://nbcmontana.com/news/local/montana-supreme-court-denies-petition-to-take-case-on-ballot-measure-signatures.

[308] Amy Beth Hanson, *Abortion Rights Supporters Report Having Enough Signatures to Qualify for Montana Ballot*, ASSOCIATED PRESS (July 19, 2024, 19:20 ET), https://apnews.com/article/montana-abortion-ballot-measure-0fc3226216500b4f385db7313ed1947f.

[309] *Id.*; Amy Beth Hanson, *Montana Becomes Eighth State with Ballot Measure Seeking to Protect Abortion Rights*, ASSOCIATED PRESS (Aug. 20, 2024, 23:21 EDT), https://apnews.com/article/montana-abortion-rights-constitutional-amendment-177266d09ce91e073407276e588868df.

[310] Mara Silvers, *From the Pulpit, Abortion Initiative Opponents Urge Congregations to Vote Against CI-128*, MONT. FREE PRESS (Oct. 25, 2024), https://montanafreepress.org/2024/10/25/montana-abortion-

opposition publicly, while the Montana Family Foundation circulated a letter seeking pledges from pastors to "prepare [their] congregations to vote against this ballot initiative."[311] Other opponents "suggest[ed] a [signature-gathering] campaign motivated by the clipboard wielders' hourly wages" and "derid[ing] the out-of-state funders and political action committees financially fueling" CI-128's sponsor.[312]

Despite these efforts, a majority of voters approved CI-128 on Election Day, with an effective date of July 1, 2025.[313] In the interim, the Montana legislature considered a proposed constitutional amendment to confer "personhood" rights on embryos and a statute creating the crime of "abortion trafficking," to penalize leaving the state for an abortion unavailable in Montana.[314] Montana also made changes to the petitioning process for ballot measures.[315] However, CI-128 took effect on July 1st as anticipated, after the Montana Supreme Court rejected a last-minute legal challenge.[316]

H. Nebraska

At the end of the 2023 legislative session, Nebraska's unicameral legislature shortened the window for abortion from twenty to twelve weeks, except in cases of rape, incest, or medical emergency.[317] A week after Ohio enshrined the right to make reproductive healthcare decisions in its state constitution, Protect Our Rights—a coalition including the ACLU of Nebraska, I Be Black Girl, Planned Parenthood North Central States, and the Women's Fund of Omaha—launched its campaign to protect abortion until fetal viability (and thereafter where the pregnant person's health or life is in danger) in Nebraska.[318] The proposal provided that:

> All persons shall have a fundamental right to abortion until fetal viability, or when

initiative-opponents-urge-christian-congregants-to-vote-against-ci-128/. However, this activity was not unanimous: "Many churches in Montana [did] not [participate] in organizing for or against CI-128" and "[o]ther congregation leaders have endorsed the initiative's stated intent and criticized recent laws seeking to curb or regulate abortion access." *Id.*

[311] *Id.*

[312] *Id.*

[313] Daniel Arkin, *Montana Voters Approve Constitutional Right to Abortion*, NBC NEWS (Nov. 6, 2024, 04:35 ET), https://www.nbcnews.com/politics/2024-election/montana-abortion-rights-amendment-ballot-measure-pass-rcna177397; MONT. CODE ANN. § 13-27-105(2) (2023).

[314] *See* H.B. 316, 69th Leg., Reg. Sess. (Mont. 2025); H.B. 609, 69th Leg., Reg. Sess. (Mont. 2025).

[315] Tom Lutey, *Changes Coming to Montana Elections*, MONT. FREE PRESS (May 16, 2025), https://montanafreepress.org/2025/05/16/how-lawmakers-are-changing-montana-election-laws/.

[316] Darrell Ehrlick, *Groups File Suit to Declare Montana's Right to Abortion Is Unconstitutional*, DAILY MONTANAN (Aug. 6, 2025, 12:53 ET), https://dailymontanan.com/2025/08/06/groups-file-suit-to-declare-montanas-right-to-abortion-is-unconstitutional/. After the state supreme court unanimously rejected the effort to prevent CI-128 from being added to the constitution, the Montana Family Foundation and Montana Life Defense Fund filed another lawsuit seeking to invalidate it. *Id.*

[317] *Cf.* NEB. REV. STAT. § 28-3106 (2023); *with* S. 574, 2023 Leg., 82nd Sess. (Neb 2023), https://nebraskalegislature.gov/FloorDocs/108/PDF/Slip/LB574.pdf. In July 2024, the Nebraska Supreme Court rejected a challenge to this restriction under the state constitution's single-subject provision since it had been combined with a ban on gender affirming care for minors. *See* Planned Parenthood of the Heartland, Inc. v. Hilgers, 317 Neb. 217 (2024).

[318] Nathaniel Weixel, *Advocates Launch Ballot Measure to Protect Abortion in Nebraska*, THE HILL (Nov. 15, 2023, 15:15 ET), https://thehill.com/policy/healthcare/4311517-ballot-abortion-nebraska-2024/.

> needed to protect the life or health of the pregnant patient, without interference from the state or its political subdivisions. Fetal viability means the point in pregnancy when, in the professional judgment of the patient's treating health care practitioner, there is a significant likelihood of the fetus' sustained survival outside the uterus without the application of extraordinary medical measures.[319]

Protect Our Rights chose this language through efforts of activists, attorneys, community members, and doctors, following multiple rounds of polling.[320] Even so, the antiabortion movement painted the proposal as "extreme" and "very vague."[321] Opponents claimed "that the measure would allow abortions literally until the end of pregnancy," "eliminate health and safety standards, and allow minors to obtain abortions without parental notification."[322]

After initially rejecting the idea of a competing ballot initiative,[323] the antiabortion movement reversed course, circulating three competing abortion-related initiative petitions. First, Protect Women and Children proposed: "Except when a woman seeks an abortion necessitated by a medical emergency or when the pregnancy results from sexual assault or incest, unborn children shall be protected from abortion in the second and third trimesters."[324] Second, Now Choose Life proposed: "A preborn child at every stage of development is a person. Wherever under Nebraska law the term 'person' is used or implied, it shall include such a child."[325] Finally, the Human Life Protection Initiative would ban abortion, but carve out an

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[319] PROTECT THE RIGHT TO ABORTION—CONSTITUTIONAL INITIATIVE, 5 (2023), https://sos.nebraska.gov/sites/default/files/doc/elections/Petitions/2024/Protect%20the%20Right%20to%20Abortion%20Constitutional%20Amendment.pdf.

[320] Elizabeth Rembert, *Group Looks to Enshrine Abortion Access until Fetal Viability in Nebraska*, NEB. PUB. RADIO (Nov. 15, 2023, 07:00 AM), https://nebraskapublicmedia.org/en/news/news-articles/group-looks-to-enshrine-abortion-access-until-fetal-viability-in-nebraska/.

[321] Andrew Wegley, *Petition Seeks to Enshrine Abortion Rights in Nebraska Constitution*, OMAHA WORLD-HERALD (Nov. 16, 2023), https://omaha.com/news/state-regional/nebraska-abortion-rights-petition-language/article_e203168b-c7b3-559e-8a8c-73f969255fe5.html.

[322] Weixel, *supra* note 318; *Nebraska Abortion Rights Advocates Release Petition Language to Get Issue on November 2024 Ballot*, 10/11 NOW (Nov. 15, 2023), https://www.1011now.com/2023/11/15/abortion-rights-advocates-release-petition-language-get-issue-nov-ballot/.

[323] Margery A. Beck, *Emboldened by Success in Other Red States, Effort Launched to Protect Abortion Rights in Nebraska*, ASSOCIATED PRESS (Nov. 15, 2023), https://apnews.com/article/abortion-ballot-measure-nebraska-0ccae759148162706ab1e2006ecb936e.

[324] Petition: Protect Women and Children—Constitutional Amendment, 5 (Neb. 2024), https://sos.nebraska.gov/sites/default/files/doc/Protect%20Women%20and%20Children%20Constitutional%20Amendment.pdf.

[325]Petition: NOW CHOOSE LIFE, 5 (Neb. 2024), https://sos.nebraska.gov/sites/default/files/doc/elections/Petitions/2024/Now%20Choose%20Life%20Constitutional%20Amendment.pdf.

"affirmative defense" for "licensed physician[s]," when the pregnant person's life was at risk.[326]

To get on the ballot in Nebraska, a proposed constitutional amendment needed approximately 123,000 signatures (10% of registered voters, including 5% of registered voters in 38/93 counties) by July 3, 2024.[327] Protect Our Rights and Protect Women and Children were the only abortion-related initiative campaigns to succeed, each turning in over 200,000 signatures.[328] By early July, the secretary of state's office received 304 affidavits from voters asking to have their names removed from the Protect Women and Children petition, likely due to misleading statements by canvassers.[329] On August 23, 2024, Bob Evnen, the Secretary of State, announced that both proposals had qualified for the November ballot with over 136,000 verified signatures.[330] The proposals were then named Initiative 439 (Protect Our Rights) and Initiative 434 (Prohibit Abortions After the First Trimester Amendment).

The antiabortion movement then filed two lawsuits seeking to prevent Initiative 439 from appearing on the ballot, contending that it was confusing and violated the state constitution's single-subject requirement.[331] Twenty-nine doctors supporting abortion rights filed their own suit—arguing that Initiative 434 was confusing and violated the single-subject requirement—asking the Nebraska Supreme Court to treat the competing ballot initiatives alike: either pull them both or let them both go before voters.[332] The court unanimously decided to keep both initiatives on the ballot.[333]

In the lead up to the election, the antiabortion movement sought to defeat Initiative 439 through confusion and misinformation. An antiabortion doctor who had sought to prevent the initiative from appearing on ballots starred in a television ad, portraying herself as a reproductive rights advocate: "As a doctor, I want compassionate, clear, scientific standards of care" and "Initiative 439 pretends to protect our rights but it does the opposite. It lets government officials interfere in medical decisions and takes care out of the hands of licensed physicians, when women in crisis

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[326] Petition: NEBRASKA HUMAN LIFE PROTECTION, 6 (Neb. 2023), https://sos.nebraska.gov/sites/default/files/doc/elections/Petitions/2024/Nebraska%20Human%20Life%20Protection%20Initiative.pdf; Philip Catalfamo, *Four Ballot Initiatives in Nebraska Tackle Abortion in Their Own Way*, NEB. NOW (June 14, 2024, 12:08 AM), https://www.klkntv.com/four-ballot-initiatives-in-nebraska-tackle-abortion-in-their-own-way/.

[327] Weixel, *supra* note 318.

[328] *See* Aaron Sanderford, *Nebraska Abortion Fight Fuels Record Filings to Remove Signatures from Petitions*, NEB. EXAM'R (July 8, 2024, 04:00 ET), https://nebraskaexaminer.com/2024/07/08/nebraska-abortion-fight-fuels-record-filings-to-remove-signatures-from-petitions/.

[329] *Id.* In contrast, only twelve affidavits requested signature removal from the Protect Our Rights petition. The proponents of the Protect Our Rights measure encouraged voters to remove their signatures if they were worried about signing the wrong petition. *Id.*

[330] *See* Press Release, Secretary of State Certifies Two Abortion-Related Petitions for General Election Ballot, State of Neb. Sec'y of State (Aug. 23, 2024),https://sos.nebraska.gov/sites/default/files/doc/news-releases/Secretary%20of%20State%20certifies%20two%20abortion-related%20petitions.pdf .

[331] *See* Aaron Sanderford, *Three's a Crowd in Nebraska Abortion Amendment Lawsuits*, NEWS FROM THE STATES (Aug. 30, 2024, 20:17 ET), https://www.newsfromthestates.com/article/threes-crowd-nebraska-abortion-amendment-lawsuits; *see also* State *ex rel.* Brooks v. Evnen, 317 Neb. 581, 585–88 (2024).

[332] State *ex rel.* Constance v. Evnen, 317 Neb. 600, 601–03 (2024).

[333] *See Brooks*, 317 Neb. at 583, 597–98; *Constance*, 317 Neb. at 600, 607.

need them most."[334] The week before the election, state officials warned about misinformation in television advertisements involving the competing abortion ballot measures.[335]

On Election Day, Nebraska became the first state to enshrine pre-viability abortion restrictions in its state constitution since *Dobbs*, with citizens opting to pass Initiative 434 and reject Initiative 439.[336] The antiabortion movement's strategy of "using the language of reproductive freedom to advance seemingly moderate measures that obscure long-term goals of deeper bans" will likely be "export[ed]" elsewhere given the success in Nebraska.[337] If abortion-rights supporters want to try again in Nebraska—either to amend Initiative 434 or repeal it via a new proposal—they will have to wait at least two years under state law.[338] Abortion opponents are seeking to put their own proposal—an outright abortion ban without exceptions—on the ballot in 2026.[339]

I. Nevada

Following a 1990 referendum (approved by nearly two-thirds of voters), Nevada law codifies *Roe*, permitting abortion until twenty-four weeks gestation, and also prevents the legislature from restricting abortion without having the people directly approve the change.[340] Even so, in August 2023, Planned Parenthood created Nevadans for Reproductive Freedom PAC ("NRF"), which in September 2023 filed a petition for a November 2024 ballot initiative that would add reproductive freedom protections to the state constitution.[341]

The Coalition for Parents and Children, an organization opposing NRF's efforts, sued seeking to enjoin the secretary of state from placing the initiative on the ballot, contending that the proposal "violated the single-subject requirement because it considered multiple medical procedures, instead of being limited to only pregnancy or abortion" since it covered

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[334] Rachel Cohen Booth, *Nebraska Is the Only State with Two Abortion Measures on the Ballot. Confusion Is the Point*., VOX (Oct. 15, 2024, 07:00 EDT), https://www.vox.com/2024-elections/377639/nebraska-abortion-ballot-measure-trimester-ban-election-reproductive-freedom.

[335] *See* Jake Anderson, *Nebraska DHHS Issues Health Alert for Ads with 'Incorrect and Misleading Information' about Abortion Law*, KETV (Oct. 28, 2024, 11:36 ET), https://www.ketv.com/article/nebraska-dhhs-health-alert-abortion-law-ads/62737065.

[336] *See* Elizabeth Rembert, *Nebraska Voters Opt to Keep 12-Week Abortion Ban in Place*, NAT'L PUB. RADIO (Nov. 6, 2024, 04:09 ET), https://www.npr.org/2024/11/06/g-s1-32935/abortion-ban-nebraska-vote.

[337] Booth, *supra* note 334; *but see* Shefali Luthra, *How Abortion Rights Groups Are Preparing for the Next Trump Administration* (Nov. 21, 2024, 13:57 ET), https://19thnews.org/2024/11/abortion-rights-second-trump-administration/ (reporting that the citizen-initiated ballot measure strategy "is hitting its endpoint" because "[t]here are only four states left that allow the direct democracy approach—Arkansas, Idaho, North Dakota, and Oklahoma—where voters have not yet weighed in on state abortion rights").

[338] NEB. REV. STAT. § 18-259.

[339] Juan Salinas II, *Nebraska Group Seeks to Turn State's 12-Week Abortion Ban into Total One*, NEWS FROM THE STATES (June 11, 2025, 06:00 ET), https://www.newsfromthestates.com/article/nebraska-group-seeks-turn-states-12-week-abortion-ban-total-one.

[340] *See Nevada Question 7, Abortion Legal to 24 Weeks Statute Referendum (1990)*, BALLOTPEDIA, https://ballotpedia.org/Nevada_Question_7,_Abortion_Legal_to_24_Weeks_Statute_Referendum_(1990).

[341] Megan Barth, *Planned Parenthood Officers File Petition to Add Abortion to Nevada Constitution*, NEV. GLOBE (Sept. 15, 2023, 07:00 ET), https://thenevadaglobe.com/articles/planned-parenthood-officers-file-petition-to-add-abortion-to-nevada-constitution/.

abortion, birth control, infertility, and post-partum care.[342] The trial court agreed, granting the injunction "for three reasons: (1) [the initiative petition] does not contain [only] a single subject, (2) its description of effect is misleading, and (3) it requires an expenditure of money without raising the necessary revenue."[343] On NRF's appeal, the state supreme court "conclude[d that] the district court erred": (1) "all medical procedures considered in the initiative petition concern[ed] reproduction," making them "germane to each other," such that "the initiative's single subject [was] establishing a right to reproductive freedom"; (2) "the description of effect was legally sufficient" because it "addresse[d] the initiative's goals: to recognize and protect a fundamental right to reproductive freedom" and "how the initiative intend[ed] to reach those goals: by defining what is included in the right to reproductive freedom and limiting the State's regulation and prosecution of reproductive decisions"; and (3) "the initiative petition d[id] not require an expenditure of funds" since it did not, contrary to the trial court's reasoning, "contemplate a new State entity to determine the standard of care or to evaluate whether a provider performed within the standard of care."[344]

In December 2023, while that appeal was pending, NRF proposed a revised petition, focused only on the "fundamental right" to abortion before fetal viability or when necessary to protect the health or life of the pregnant person. This right could be infringed only by a compelling state interest, which would be limited to "the state's interest in protecting, maintaining, or improving the health of an individual who is seeking abortion care that is consistent with accepted clinical standards of practice." The same trial court that rejected the reproductive freedom proposal approved this one.[345]

In February 2024, NRF launched its signature-collection efforts on its abortion-only proposal, choosing to concentrate on this proposal due to time constraints.[346] As in other states, the antiabortion movement catastrophized what would happen if the amendment was added to the state constitution,[347] but NRF ultimately turned in 200,000 signatures—nearly double the 102,362 required (with at least 25,591 from each congressional district)—of which, nearly 128,000 were deemed valid, securing a spot on the November 2024 ballot.[348]

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[342] Nevadans for Reproductive Freedom v. Washington, 546 P.3d 801, 804 (Nev. 2024).
[343] *Id.*
[344] *Id.* at 804, 807–09.
[345] News 4 & Fox 11 Digital Staff, *Nevada Judge Greenlights Abortion Rights Petition, Could Be Headed for 2024 Ballot*, NEWS 4 (Jan. 24, 2024, 15:26), https://mynews4.com/newsletter-daily/carson-city-judge-greenlights-abortion-reproductive-rights-petition-for-2024-nevada-ballot.
[346] Jannelle Calderón, *More than 200,000 Nevadans Support Effort to Put Abortion Rights on November Ballot*, THE NEVADAN (May 21, 2024), https://thenevadannews.com/2024/05/21/nevadans-support-abortion-ballot/; Adam Edelman, *Nevada Abortion-Rights Group Officially Kicks off 2024 Ballot Measure Effort—With a Focus on IVF Concerns*, NBC NEWS (Feb. 24, 2024, 06:00 ET), https://www.nbcnews.com/politics/2024-election/nevada-abortion-ballot-measure-ivf-rcna139061.
[347] Barth, *supra* note 341 ("the proposed constitutional amendment . . . wants to give constitutional immunity to amateur abortionists to operate up until the moment of birth on any woman or girl, no matter how young.").
[348] Gabe Stern, *Nevada Verifies Enough Signatures to Put Constitutional Amendment for Abortion Rights on Ballot*, ASSOCIATED PRESS (June 28, 2024, 19:32 EDT), https://apnews.com/article/abortion-nevada-constitutional-amendment-c85970d01e74a79cc34d8e094075c9f7; Calderón, *supra* note 346.

While a majority of Nevadans supported the proposal on Election Day 2024,[349] the proposal must be approved by a simple majority vote in two separate elections—meaning that the initiative will go before voters again in 2026.[350]

J. South Dakota

After *Dobbs*, South Dakota's trigger law became effective, banning abortion except if "appropriate and reasonable medical judgment [finds] that performance of an abortion is necessary to preserve the life of the pregnant female."[351] To liberalize the abortion regime, Dakotans for Health sponsored a ballot initiative that would amend the state constitution to: (1) prevent the state from restricting first-trimester abortions; (2) permit the state to regulate second-trimester abortions only if "reasonably related to the physical health of the pregnant woman"; and (3) permit the state to regulate or ban third-trimester abortions "except when abortion is necessary, in the medical judgment of the woman's physician, to preserve the life or health of the pregnant woman."[352] The organization modeled its proposal off *Roe*'s trimester framework and rushed to submit the proposed amendment to the Secretary of State's office before Monae Johnson took office.[353] Planned Parenthood, the ACLU, and other abortion-rights groups "declined to support the effort" because they considered the proposal to protect "abortion in name only."[354]

At each stage of the initiative process, the antiabortion movement tried to derail Dakotans for Health's efforts, seeking to prevent South Dakotans from voting on the proposal—even though 65% of registered voters "support[ed] having a statewide referendum to determine South Dakota's laws regarding reproductive rights."[355] Ultimately, the antiabortion movement got its way, defeating the proposal on Election Day.[356]

First, opponents made signature collection more difficult. County governments in Minnehaha and Lawrence Counties adopted new restrictions on petitioning on public property, making it harder for canvassers to obtain

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[349] Eric Neugeboren, *Nevadans Vote to Enshrine Abortion Rights in Constitution, but it Needs Approval in 2026*, NEV. INDEP. (Nov. 5, 2024, 22:02 ET), https://thenevadaindependent.com/article/nevadans-vote-to-enshrine-abortion-rights-in-constitution-but-it-needs-approval-in-2026.

[350] *See Filing a Constitutional Initiative*, NEV. SEC'Y OF STATE, https://www.nvsos.gov/sos/elections/initiatives-referenda/filing-a-constitutional-initiative.

[351] S.D. CODIFIED LAWS § 22-17-5.1 (2025).

[352] Jack Dura, *GOP Lawmakers Try to Thwart Abortion Rights Ballot Initiative in South Dakota*, ASSOCIATED PRESS (Feb. 22, 2024, 16:08 ET), https://apnews.com/article/south-dakota-abortion-ballot-initiative-dd0da89de4fd6d1ef133a57d697e3faf.

[353] *See* Joshua Haiar, *Some South Dakota Abortion Rights Groups Don't Back Ballot Measure to Restore Access*, STATELINE (Dec. 11, 2023, 10:05 ET), https://stateline.org/2023/12/11/some-south-dakota-abortion-rights-groups-dont-back-ballot-measure-to-restore-access/ (noting that Johnson was endorsed by South Dakota Right to Life).

[354] Zernike, *supra* note 5.

[355] Stu Whitney, *New Poll: Majority of South Dakotans Oppose Total Ban on Abortion and Want Voters, Not Lawmakers, to Make the Rules*, S.D. NEWS WATCH (Aug. 16, 2022), https://www.sdnewswatch.org/new-poll-majority-of-south-dakotans-oppose-total-ban-on-abortion-and-want-voters-not-lawmakers-to-make-the-rules/.

[356] Seth Tupper, Joshua Haiar, Makenzie Huber & John Hult, *Abortion-Rights Measure Loses in South Dakota*, S.D. SEARCHLIGHT (Nov. 6, 2024, 02:03 ET), https://southdakotasearchlight.com/2024/11/06/abortion-rights-measure-loses-in-south-dakota/.

signatures.[357] The counties then revised their policies after a federal district court enjoined the challenged restrictions.[358] The leaders of the opposition campaign "vow[ed] to wage war against petition circulators," including by putting "blockers on the street to stop circulators from collecting signatures."[359] As part of these efforts, the Life Defense Fund sought to discourage people from signing by arguing that the proposal was "radical."[360] The most prominent initiative opponent, Representative Jon Hansen (R-Dell Rapids), falsely claimed the proposal was "far more extreme than Roe v. Wade itself."[361]

Second, as the petitioning process unfolded, the Republican-controlled legislature adopted a resolution opposing the initiative.[362] The resolution concluded that the proposed amendment "would fail to protect human life, would fail to protect a pregnant woman, and would fail to protect the child she bears" because it "would severely restrict any future enactments of protections for a pregnant woman, her child, and her healthcare providers."[363] The Republican House Majority Leader justified the resolution as highlighting "some of the unintended or intended, maybe, consequences of the measure so that the public could see what it does in practical effect."[364] Yet, the proposed amendment expressly left the legislature leeway to regulate—or ban—abortion later in pregnancy.

Third, Representative Hansen, a fervent abortion opponent and the leader of a group dedicated to defeating the abortion ballot initiative, sponsored House Bill 1244, which created a process by which "[a]n individual who has signed a petition to initiate a constitutional amendment . . . may submit a written notification to the secretary of state stating that the individual's name be withdrawn from the petition."[365] Curiously, the law took effect upon the governor's signature as "necessary for the immediate preservation of the public peace, health, or safety" due to the "emergency" then "declared to exist."[366]

Thereafter, South Dakota Right to Life undertook "a deliberate and organized campaign . . . to coerce signers into withdrawing their support

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[357] *See* Cory Allen Heidelberger, *Minnehaha County Petition Restrictions: Restraining Order Expires, Judge Hears Evidence, Auditor Anderson Gave Money to Anti-Abortion Petition Blockers*, DAKOTA FREE PRESS (May 27, 2023), https://dakotafreepress.com/2023/05/27/minnehaha-county-petition-restrictions-restraining-order-expires-judge-hears-evidence-auditor-anderson-gave-money-to-anti-abortion-petition-blockers/; John Hult, *State, Minnehaha County Agree to Pay Legal Fees After Separate First Amendment Lawsuit Losses*, DAKOTA NEWS NOW (Dec. 27, 2023, 13:52 ET), https://www.dakotanewsnow.com/2023/12/27/state-minnehaha-county-agree-pay-legal-fees-after-separate-first-amendment-lawsuit-losses/.

[358] *See* Heidelberger, *supra* note 357; Hult, *supra* note 357; *see* Dakotans for Health v. Anderson, 677 F. Supp. 3d 977 (D. S.D. 2023); Dakotans for Health v. Anderson, 675 F. Supp. 3d 919 (D. S.D. 2023); Dakotans for Health v. Ewing, No. 5:23-CV-05042-RAL, 2023 WL 4118599 (D. S.D. June 22, 2023).

[359] Cory Allen Heidelberger, *Hansen Vows to Shout Down Women and Voters Seeking Vote on Roe v. Wade Amendment*, DAKOTA FREE PRESS (Sept. 14, 2022), https://dakotafreepress.com/2022/09/14/hansen-vows-to-shout-down-women-and-voters-seeking-vote-on-roe-v-wade-amendment/.

[360] *See id.*

[361] Stu Whitney, *Is Proposed Abortion Amendment 'Far More Extreme' than Roe v. Wade?*, S.D. NEWS WATCH (June 8, 2023), https://www.sdnewswatch.org/south-dakota-abortion-measure-roe-wade/.

[362] Dura, *supra* note 352.

[363] H.R. Con. Res. 6008, 2024 Gen. Assemb., 99th Leg. Sess. (S.D. 2024).

[364] Dura, *supra* note 352.

[365] H.B. 1244, 2024 Gen. Assemb., 99th Leg. Sess. (S.D. 2024).

[366] *Id.*

from the petition [to put abortion on the ballot]."[367] This campaign distributed "misleading materials, including a 'Liar Flyer,' and formal legal forms urging the removal of [signers'] names from the petition"—both online and in person.[368] In mid-May 2024, hundreds of petition signers received calls "from someone claiming to be a volunteer with the Secretary of State's Office," inquiring in a "judgmental tone" about their decision to sign the petition and encouraging them to withdraw their support—but the calls were not from the Secretary's office; instead, they were made on behalf of the South Dakota Petition Integrity Committee.[369] The Petition Integrity Committee, founded by Hansen, contended that signers were asked "whether petition circulators followed applicable laws and whether signers were misled into signing the petition."[370] While these efforts "smell[] of voter intimidation and harassment,"[371] the state attorney general's office found "no indication of criminal activity."[372] Even so, the secretary of state issued a public warning about the phone calls.[373]

Despite these efforts, Dakotans for Health submitted over 55,000 signatures—approximately 20,000 more than required—by the May 2024 deadline.[374] Thereafter, Secretary of State Johnson certified "Amendment G" for the November 2024 ballot, after "conduct[ing] a random sample of the petition signatures and f[i]nd[ing that] 84.92 percent [were] valid," such that "46,098 signatures were deemed valid."[375]

However, as expected, before the June 17, 2024, deadline, an opposition group filed a lawsuit seeking to invalidate 148 additional signatures to prevent the initiative from appearing on ballots.[376] In addition

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[367] John Tsitrian & Tom Lawrence, *Dakotans for Health Warns Freedom Amendment Petition Signers of Effort by Right to Life Organization*, S.D. STANDARD (May 13, 2024), https://www.sdstandard-now.com/home/dakotans-for-health-warns-55000-freedom-amendment-petition-signers-of-coordi-nated-effort-by-right-to-life-organization.

[368] *Id.*

[369] Jacob Newton, *Law Enforcement Investigates Abortion Petition Callers*, KELOLAND (May 14, 2024, 10:30 ET), https://www.keloland.com/keloland-com-original/law-enforcement-investigates-abortion-petition-callers/; Makenzie Huber, *Anti-Abortion Group Is behind Calls Labeled a 'Scam' by State Election Official*, S.D. SEARCHLIGHT (May 14, 2024, 16:17 ET), https://southdakotasearch-light.com/2024/05/14/anti-abortion-group-behind-calls-labeled-scam-sd-secretary-state-abortion/.

[370] Huber, *supra* note 369.

[371] *Id.* (quoting Rick Weiland, leader of Dakotans for Health).

[372] Josh Chilson, *AG Finds No Evidence of Wrongdoing by Callers Opposing Abortion Petition*, S.D. PUB. BROAD. (May 14, 2024, 17:54 ET), https://listen.sdpb.org/healthcare/2024-05-14/ag-finds-no-evi-dence-of-wrongdoing-by-callers-opposing-abortion-petition.

[373] *See* Press Release, S.D. Sec'y of State, Telephone Scam—Secretary Johnson Warns Citizens of Fake Groups Claiming to Be Making Calls on Behalf of SOS Office (May 13, 2024), https://sdsos.gov/about-the-office/assets/Press%20Releases/SOSWarnsCitizensToRemainVigilantOnElectionCalls.pdf.

[374] *See* Jack Dura, *Abortion Rights Initiatives Make the Ballot in South Dakota and Colorado*, ASSOCI-ATED PRESS (May 17, 2024, 17:43 ET), https://apnews.com/article/abortion-south-dakota-voter-ballot-amendment-ed7f558d0cfeabd944cef6ba4aa33cdc; Zernike, *supra* note 5.

[375] Press Release, S.D. Sec'y of State, Second Ballot Question Validated for 2024 General Election (May 16, 2024), https://sdsos.gov/about-the-office/assets/Press%20Releases/AbortionValidationPressRe-lease.pdf.

[376] Lee Strubinger, *Anti-Abortion Group Files Lawsuit Against Abortion Rights Ballot Question*, S.D. PUB. BROAD. (June 17, 2024, 14:40 ET), https://listen.sdpb.org/politics/2024-06-17/anti-abortion-group-files-lawsuit-against-abortion-rights-ballot-question; Jack Dura, *An Anti-Abortion Group in South Dakota Sues to Take an Abortion Rights Initiative off the Ballot*, ASSOCIATED PRESS (June 17, 2024), https://apnews.com/article/south-dakota-abortion-rights-ballot-initiative-

to challenging the validity of signatures, the Life Defense Fund alleged petition process failures by Dakotans for Health and asked the court to prevent involvement from "Dakotans for Health and those who worked with or for it" in ballot measure campaigns for four years.[377] A state trial court dismissed the suit, but the state supreme court reversed.[378] The Life Defense Fund then added Secretary Johnson as a defendant and argued that "unlawful actions during the petition-gathering process should nullify a vote to pass the amendment."[379] A seven-day trial was scheduled to begin on September 23, 2024—three days *after* the start of early voting, which created the specter of election interference—but the trial was cancelled due to judicial reassignments and the case's dismissal after Election Day.[380]

All of these efforts paid dividends. While summer polling suggested Amendment G would pass,[381] by the end of the campaign, opposition groups outraised Dakotans for Health by almost a 2-1 margin and outspent Dakotans for Health more than ten times over.[382] Unlike in 2006 and 2008 when South Dakotans rejected strict abortion restrictions, in 2024 voters rejected Amendment G.[383] Thereafter, Dakotan's for Health's co-founder urged the legislature to add exemptions to the state's restrictive abortion law for

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94ceb056ed97b40ea76730a9c3e662a6; Stu Whitney, *Poll: Amendment to Expand South Dakota Abortion Rights Has Nearly 20-Point Lead*, S.D. NEWS WATCH (June 3, 2024), https://www.sdnewswatch.org/poll-amendment-to-expand-south-dakota-abortion-rights-has-nearly-20-point-lead/.

[377] Dura, *supra* note 376; Stu Whitney, *Lawsuit over Abortion Amendment Challenged in Federal Court*, MITCHELL REP. (June 18, 2024, 14:13 ET), https://www.mitchellrepublic.com/news/south-dakota/lawsuit-over-abortion-amendment-challenged-in-federal-court.; The allegations mirror South Dakota Right to Life's complaint to the state attorney general during the petitioning process. *See* Letter from Marty J. Jackley, Att'y Gen. of S.D, to Richard P. Weiland, Dakotans for Health (Oct. 31, 2023); Letter from Richard P. Weiland, Dakotans for Health, to Marty J. Jackley, Attorney General, South Dakota (Nov. 2, 2023).

[378] Jack Dura, *South Dakota Court Decision Threatens Abortion Rights Measure on November Ballot*, ABC NEWS (Aug. 5, 2024, 10:48 ET), https://abcnews.go.com/US/wireStory/south-dakota-supreme-court-reverses-judges-dismissal-lawsuit-112579152; *South Dakota Anti-Abortion Group Appeals Ruling that Dismissed its Lawsuit over Ballot Initiative*, ASSOCIATED PRESS (July 19, 2024, 13:36 ET), https://apnews.com/article/south-dakota-abortion-ballot-initiative-66a6895262c4dda90eedf0e05ff85dee.

[379] Jackson Dircks, *Amendment G Court Case Being Expedited*, S.D. PUB. BROAD. (Aug. 12, 2024, 13:54 ET), https://www.sdpb.org/politics/2024-08-12/amendment-g-court-case-being-expedited; Makenzie Huber, *Abortion Rights Measure Likely to Appear on Ballot, but Lawsuit Could Affect Election Results*, MITCHELL REP. (Aug. 7, 2024, 14:12 ET), https://www.mitchellrepublic.com/news/south-dakota/abortion-rights-measure-likely-to-appear-on-ballot-but-lawsuit-could-affect-election-results.

[380] John Hult, *Abortion Measure Lawsuit Dismissed in Minnehaha County*, NEWS FROM THE STATES (Nov. 18, 2024, 14:57 EDT), https://www.newsfromthestates.com/article/abortion-measure-lawsuit-dismissed-minnehaha-county; Joshua Haiar, *Court Explains Abortion Ballot Measure Trial Mix-Up but Doesn't Schedule New Date*, S.D. SEARCHLIGHT (Sept. 19, 2024, 17:49 ET), https://southdakotasearchlight.com/2024/09/19/court-explains-abortion-ballot-measure-trial-mix-up-but-doesnt-schedule-new-date; John Hult, *Abortion Ballot Measure Challenge on Course for Late September Trial*, S.D. SEARCHLIGHT (Sept. 3, 2024, 15:28 ET), https://southdakotasearchlight.com/2024/09/03/abortion-ballot-measure-challenge-on-course-for-late-september-trial/.

[381] Whitney, *supra* note 355 (reporting on a May 2024 poll which found a majority (53%) of South Dakotans supported Amendment G and a July 2022 "poll of 500 registered voters [in South Dakota, which] showed that a majority (57%) of respondents support allowing legal access to abortion medications in the state, including 42% who "strongly support" such access").

[382] *See* Makenzie Huber, *$500K Contribution Helps Abortion-Rights Group Narrow Fundraising Gap*, S.D. SEARCHLIGHT (Oct. 24, 2024, 18:34 ET), https://southdakotasearchlight.com/2024/10/24/anti-abortion-groups-campaign-finance-fundraise-spending-amendment-g-ahead-of-election/.

[383] Tupper, *supra* note 356; Whitney, *supra* note 376 (discussing 2006 and 2008 referenda in which South Dakotans rejected abortion bans with limited exceptions (to preserve the life of the mother and life of the mother, rape, and incest, respectively)).

pregnancies resulting from rape and incest and for nonviable pregnancies consistent with the opposition's promises during the campaign.[384] Should Dakotans for Health or anyone else seek to bring another ballot measure forward, the process will be more onerous.[385]

CONCLUSION: THE ANTIABORTION MOVEMENT THREATENS AMERICAN DEMOCRACY.

By removing the constitutional floor mandated by *Roe* and *Casey*, the Supreme Court painted *Dobbs* as a win for democracy because the American people would gain control over abortion policy in their states. Since *Dobbs*, support for abortion has increased.[386] As of 2023, in forty-five states, at least 50% of residents believed that abortion should be legal in all or most cases, while only "[r]oughly one in ten residents in most states sa[id that] abortion should be illegal in all cases."[387] Majorities of Americans oppose: "heartbeat bills" (63%); bans only permitting abortion to save the life of the mother (72%); laws making it illegal to cross state lines to obtain a legal abortion (77%); and bans at fifteen weeks' gestation (52%).[388] Polling suggests that 80% of Americans do not want the government involved in abortion at all.[389] Yet, the antiabortion movement—aided by likeminded politicians—repeatedly sought to deny voters the ability to enact their pro-choice policy preferences at the ballot box. Despite these actions, across all abortion-related ballot measures—both citizen-initiated and legislatively-referred—"the pro-choice side has garnered 60.4% of the 56.6M votes cast."[390]

These efforts, which seek to impose the will of an antiabortion minority on the pro-choice majority, represent a significant threat to a fundamental tenet of our democracy: that government power stems from the will of the

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[384] *Amendment G Sponsor Calls on Legislature to Pass Abortion Exemptions Bill*, DAKOTA NEWS NOW (Dec. 8, 2024, 12:14 ET), https://www.dakotanewsnow.com/2024/12/08/amendment-g-sponsor-calls-legislature-pass-abortion-exemptions-bill/.

[385] *See* Joshua Haiar, *Legislature Approves Several New Restrictions on Citizen Ballot Measures*, S.D. SEARCHLIGHT (Mar. 17, 2025, 18:11 ET), https://southdakotasearchlight.com/2025/03/17/legislature-approves-several-new-restrictions-on-citizen-ballot-measures/ (reporting on legislative approval of shortened signature collection period, geographic requirements for signatures, and increased voter threshold for approval. This restriction on citizen-initiated ballot measures is an about-face from South Dakota's history as the first state to allow initiatives).

[386] *See* Fernando & Thomson-Deveaux, *supra* note 3; PEW RSCH. CTR , *supra* note 3.

[387] PRRI 2023, *supra* note 213, at 12–13 (identifying only Arkansas, Idaho, North Dakota, South Dakota, and Utah as states in which "a minority of residents support abortion"). A year before, forty-three states had at least 50% of residents supporting legal abortion in all or most circumstances. *See* ABORTION ATTITUDES IN A POST-ROE WORLD: FINDINGS FROM THE 50-STATE 2022 AMERICAN VALUES ATLAS 10 (Feb. 2023), https://www.prri.org/wp-content/uploads/2023/02/PRRI-Feb-2023-Abortion-D-1.pdf [hereinafter "PRRI 2022"] (identifying Arkansas, Idaho, Mississippi, Oklahoma, South Dakota, Tennessee, and Utah as states with less than 50% of residents who say abortion should be legal in all or most cases).

[388] PRRI 2022, *supra* note 387, at 22–23.

[389] Adriel Bettelheim, *Exclusive Poll: Americans Strongly Back Abortion Pill Access, FDA Drug Powers*, AXIOS (Mar. 29, 2024), https://www.axios.com/2024/03/29/abortion-pill-supreme-court-case-poll.

[390] David S. Cohen (@dsc250.bsky.social), Bluesky (Nov. 22, 2024, 11:02 ET), https://bsky.app/profile/did:plc:depcs5sr3mflnnhtxcpnxbzd/post/3lbke2iviks2f.

people.[391] As Kelly Hall, executive director of the Fairness Project, said antiabortion politicians

> are saying: "We know that voters disagree with us on this issue, and rather than us changing how we govern to be more in line with the people who we are elected to represent, we are going to change the rules of governance itself to make sure that we don't have to listen to our constituents." That is new, that is wild, [and] that should freak everyone out—regardless of how you feel about abortion—because it means that we have let our elected representatives get completely untethered from the fundamental role that they are elected to fulfill, which is to represent our views. They are saying in black and white in print, in no uncertain terms: "We are not going to listen to you."[392]

Put simply: Antiabortion attacks on direct democracy are attacks on the democratic ideals—popular sovereignty, majority rule—on which our nation was built.

This is not surprising: "women's civil rights and democracy go hand in hand."[393] In fact, "the absence of democracy—or even a decline in the quality of democracy—leads to fewer protections for women and more impunity for those who violate women's human rights."[394] This connection between women's rights and democracy makes sense: democracy is "based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives."[395] A person cannot fully participate politically or

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[391] *See* Erica Chenoweth & Zoe Marks, *Revenge of the Patriarchs: Why Autocrats Fear Women*, 101 FOREIGN AFFAIRS 103, 103 (2022) ("[I]n recent years, authoritarian leaders have launched a simultaneous assault on women's rights and democracy that threatens to roll back decades of progress on both fronts."); *see also* SMITH & TOLBERT, *supra* note 4, at 141 (the initiative process "is one of the most pristine forms of governance that exists in the states, as power surges directly from the only legitimate fountain of authority—*the people*").

[392] Stuart, *supra* note12; *Cf.* RUTH BEN-GHIAT, STRONGMEN: MUSSOLINI TO THE PRESENT 49 (2020) ("Elections had long been a mark of an open society and their absence a criterion of autocracy, but new authoritarians use elections to keep themselves in office, deploying antidemocratic tactics like fraud or voter suppression to get the results they need.").

[393] Chenoweth & Marks, *supra* note 391, at 105.

[394] Marisa von Bülow, *Women's Activism: Resistance and Democracy in Brazil*, *in* ON THE FRONT LINES: WOMEN'S MOBILIZATION FOR DEMOCRACY IN AN ERA OF BACKSLIDING, *supra* note 51, at 5.

[395] SAMIRA DAMAVANDI, COERCION AND CONTROL: SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS, DECLINE OF DEMOCRACY AND RISE IN AUTHORITARIANISM 2 (2023), https://www.icrw.org/wp-content/uploads/2023/06/SRHR-and-the-Decline-of-Democracy.pdf; *see also id.* at 3 ("Reproductive rights have been inextricably linked to democratic institutions."); *see also* Zillah Eisenstein, *Privatizing the State: Reproductive Rights, Affirmative Action, and the Problem of Democracy*, 12 FRONTIERS: A J. OF WOMEN STUDIES 98, 117 (1991) ("If democracy is, in part, based on human rights and the individual

socially if she lacks control over her body.[396] Accordingly, autocrats begin by targeting sexual and reproductive health and rights in order to "pav[e] the way for repealing other rights, such as voting rights."[397] These strongmen often explicitly oppose the progress of women's rights "under the guise of a return to 'traditional values,' while the women's movement itself is subverted, ignored, or smeared as an alien 'gender ideology.'"[398]

But, why? "Aspiring autocrats and patriarchal authoritarians have good reason to fear women's political participation: when women participate in mass movements, those movements are both more likely to succeed and more likely to lead to more egalitarian democracy."[399] Autocrats often come to power following "periods of economic and political gain for women," so they "seek[] to reverse shifts in social norms that threaten patriarchy and the satisfaction of 'natural' male desires."[400] Unfortunately and importantly, this connection goes both ways: "anti-democratic efforts lead to further erosion of reproductive rights, and regression on abortion rights results in further democratic backsliding,"[401] as seen by the correlation between states—both domestic and international—that restrict both voting and abortion.[402]

These dynamics have played out elsewhere. For example, in Fascist Italy, the state "banned abortion and contraception," restricted "anything publicizing the means of preventing or interrupting pregnancy," and considered registering all pregnancies in the 1920s and 1930s.[403] More recently, "[a]utocrats in Russia, Poland, and Nicaragua have attacked women's reproductive rights."[404] Putin's Russia restricted abortion in

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freedom of choice to determine the decisions that affect one's life, then abortion and the broader concern of reproductive rights are crucial to the practice of democracy.").

[396] Martha F. Davis & Risa E. Kaufman, *A Global View of U.S. Backsliding on Democracy and Reproductive Rights*, AM. CONST. SOC'Y (Nov. 13, 2023), https://www.acslaw.org/expertforum/a-global-view-of-u-s-backsliding-on-democracy-and-reproductive-rights/.

[397] DAMAVANDI, *supra* note 395, at 3; *see also* Anna Gustafson, *Why Experts Say the Fall of Abortion Rights Is a Key Sign of a Troubled Democracy*, MICH. ADVANCE (Sept. 25, 2022, 04:10 ET), https://michiganadvance.com/2022/09/25/why-experts-say-the-fall-of-abortion-rights-is-a-key-sign-of-a-troubled-democracy/ ("[P]olitical scientists noted, authoritarian, or authoritarian-friendly, leaders often set their sights on annihilating reproductive rights, including access to abortion.").

[398] Colleen Scribner, *Why Strongmen Attack Women's Rights*, FREEDOM HOUSE (June 18, 2019), https://freedomhouse.org/article/why-strongmen-attack-womens-rights. In response, some "women have refused to become the tools of state demographic agendas. They have declined to procreate for the state, instead risking prison to obtain birth control and have abortions." BEN-GHIAT, *supra* note 392, at 196.

[399] Chenoweth & Marks, *supra* note 391, at 105.

[400] BEN-GHIAT, *supra* note 392, at 121.

[401] Davis & Kaufman, *supra* note 396.

[402] *See* Hanna Kozlowska, *Where Democracy Falters, So Do Reproductive Rights*, FOREIGN POLICY (Mar. 16, 2022, 08:34 ET), https://foreignpolicy.com/2022/03/16/where-democracy-falters-so-do-reproductive-rights; Dylan C. Naughton, *What Influences Reproductive Rights Policy? State Abortion Restrictions and the Level of State Democracy* 11 (Univ. of Minn. Morris Undergraduate J., Manuscript 1133, https://digitalcommons.morris.umn.edu/cgi/viewcontent.cgi?article=1133&context=horizons ("states with lower levels of democracy will appear to enact more restrictive reproductive policies"); *see also* Jessica Glenza & Same Levine, *US Anti-Abortion Groups Shift Focus to Voting Restrictions*, GUARDIAN (Apr. 9, 2021, 06:00 ET), https://www.theguardian.com/us-news/2021/apr/09/us-voting-restrictions-conservative-groups-lobbying-against-abortion.

[403] BEN-GHIAT, *supra* note 392, at 71, 84; VICTORIA DE GRAZIA, HOW FASCISM RULED WOMEN: ITALY, 1922–1945, 55, 58 (1993).

[404] Sarah Sunn Bush & Pär Zetterberg, *Gender Equality and Authoritarian Regimes: New Directions for Research*, 2023 POL. & GENDER 1, 1 (2023).

2003.[405] In Poland and Hungary, twenty-first century abortion restrictions took effect because the countries' strongmen leaders had eroded the rule of law.[406] "A lack of guarantees for the rule of law has created a context in which the executives can use their discretionary power to limit reproductive rights and academic freedom without having to justify their actions to independent courts."[407]

"The evidence is clear: When abortion is legal, democracy thrives. And when reproductive rights are restricted, democracy withers."[408] While the antiabortion movement in the United States met universal defeat in 2022 and 2023, it succeeded in defeating four citizen-initiated constitutional amendments in 2024. The antiabortion movement will seek to replicate its efforts in future battles over abortion ballot measures and continue to threaten direct democracy and our constitutional order.[409] Americans must prioritize democracy—regardless of their opinions on abortion.[410]

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[405] BEN-GHIAT, *supra* note 392, at 84.

[406] Paweł Marczewski, *Mobilizing for Reproductive Rights: Women's Activism and the Crisis of Democracy in Poland and Hungary*, *in* ON THE FRONT LINES: WOMEN'S MOBILIZATION FOR DEMOCRACY IN AN ERA OF BACKSLIDING, *supra* note 51, at 21.

[407] *Id.* at 22.

[408] Alison Brysk, *Expanding Abortion Access Strengthens Democracy, While Abortion Bans Signal Broader Repression—Worldwide Study*, THE CONVERSATION (Oct. 24, 2024, 14:26 ET), https://theconversation.com/expanding-abortion-access-strengthens-democracy-while-abortion-bans-signal-broader-repression-worldwide-study-240278.

[409] These antidemocratic efforts extend beyond abortion: according to the Ballot Initiative Strategy Center, there are approximately one-hundred bills in eighteen states to "make it more difficult for citizen-led initiatives to succeed." *See Voter Pushback*, *supra* note 280; *see also* Anna Kaminski, *Kansas Abortion Rights Advocacy Group Sues State Officials over Law Banning Foreign Contributions*, KAN. REFLECTOR (May 19, 2025, 4:00 PM), https://kansasreflector.com/2025/05/19/kansas-abortion-advocacy-group-sues-state-officials-over-law-banning-foreign-contributions/.

[410] *See* Martin Skladany, *How the Anti-Abortion Movement Undermines Democracy*, NEW REP. (Sept. 24, 2024), https://newrepublic.com/article/186246/abortion-rights-democracy-dobbs-authoritarianism. Democratic backsliding has a wide range of negative consequences, which are outside the scope of this Article.; *See e.g.*, Layna Mosley, *The Financial and Economic Dangers of Democratic Backsliding*, HARV. L. SCH. FORUM ON CORPORATE GOVERNANCE (July 31, 2023), https://corpgov.law.harvard.edu/2023/07/31/the-financial-and-economic-dangers-of-democratic-backsliding/.