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Letter from the Editor

Dear Reader,

It is with great pride and excitement that I welcome you to the inaugural volume of the *Undergraduate Law Review at Georgia (ULRAG)*. This journal represents not only the culmination of rigorous student scholarship, but also the beginning of a new tradition at the University of Georgia—one that amplifies the voices of undergraduates passionate about legal analysis, public policy, and social justice.

This first edition features timely and compelling pieces that span a range of pressing legal issues. From the evolving interpretation of federal environmental protections in *Sackett v. EPA*, to constitutional questions surrounding felon disenfranchisement, administrative deference, and online free speech, our contributors have examined the shifting landscape of American law with nuance, clarity, and courage. These essays reflect not only a deep engagement with current judicial decisions, but also a sincere commitment to advancing legal understanding in the public interest.

The creation of this publication has been a collective effort—one rooted in mentorship, collaboration, and an unwavering belief in the value of student-led scholarship. I am profoundly grateful to our past editorial board and each of our writers for their tireless work crafting important pieces of scholarship. Special thanks are due to those who laid the groundwork for ULRAG, ensuring that this project would not only launch, but thrive.

As you explore the following pages, I hope you'll find yourself challenged, informed, and inspired. Our legal system is complex and evolving. But through critical inquiry and engaged discussion, we as students can contribute meaningfully to its future.

On behalf of the editorial board, thank you for reading, and welcome to Volume I.

Warmly,

Benjamin Longren & Jason Eappen

University Of Georgia Undergraduate Law Review

Volume I

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“Waters of the U.S.” Running Dry

By: Jacob Funk-Sheppard

Rarely is a court presented with the opportunity to significantly redefine the scope of federal regulatory authority as was the case in *Sackett v. Environmental Protection Agency* 598 U.S. 651 (2023). *Sackett* is a landmark case that centers on the scope of federal authority under the Clean Water Act (CWA). The dispute began in 2007 when Michael and Chantell Sackett purchased a plot of land in Idaho with the intent to build a home. The Clean Water Act prohibits “the discharge of any pollutant by any person” without a permit into “navigable waters”. The Sacketts received a compliance order from the EPA, which stated that their residential lot contained navigable waters and that their construction project violated the Act.[1] The Sacketts contested the order, arguing it was issued without due process, and sought judicial review. A case so important as to be heard by the Supreme Court twice in 598 U.S. 651 (2023) and 566 U.S. 120 (2012)indicates not only the complexity of these cases, but their overarching impacts on federalism, property rights, and enforcement of the EPA’s most significant legislation: the Clean Water Act.[2]

Sackett v. EPA, hereafter referred to simply as *Sackett II*, restricted the amount of wetland under the purview of federal jurisdiction. The decision centered around the definition of “Waters of the United States” or WOTUS under the Clean Water Act (CWA) which the EPA designated as “all waters currently or potentially used in interstate or foreign commerce, interstate waters, intrastate waters with potential to affect commerce, wetlands, tributaries, impoundments, the territorial sea, and adjacent wetlands”.[3] To best protect America’s waterways and wetlands, lawmakers intentionally left the CWA’s jurisdiction vague, as the ecological complexity between the waters themselves and the wetlands and tributaries feeding them undoubtedly deserves protection from pollution or destruction.

However, in the same vein as *Wickard v. Filburn*, this case’s sweeping grants of federal authority were ripe for reduction by this iteration of the Supreme Court. In a 5-4 decision along mostly ideological lines, the Court held that the CWA only applies to wetland areas with a “continuous surface connection with waters of the United States” or a permanent body of water connected to

[1] 121-454 Sackett v. EPA (05/25/2023). Accessed February 21, 2025. https://www.supremecourt.gov/opinions/22pdf/21-454_4g15.pdf.
[2] “Sackett II and Its Ripple Effects: Uncertainty Remains for Developers and Communities,” Blog - Sackett II and its Ripple Effects: Uncertainty Remains for Developers and Communities, accessed March 30, 2025, https://nsglc.olemiss.edu/blog/2024/jun/27/index.html.
[3] “Pre-2015 Regulatory Regime ,” EPA, accessed March 30, 2025, https://www.epa.gov/wotus/pre-2015regulatory-regime.

traditional interstate navigable waters.[4] This test for evaluating the CWA as well as WOTUS in general reflects the Court's prevailing attitude towards federal power and environmental protection. In Justice Alito's majority opinion, joined by Justices Thomas, Barrett, Gorsuch, and Roberts, he asserted that a more restrained view of federal jurisdiction was necessary to prevent overreach, aligning the scope of the CWA with its original intent to regulate only those waters with a clear, significant nexus to interstate commerce. In contrast, Justice Kagan's concurrence in judgment cautioned against limiting the EPA's regulatory power, asserting that the majority's decision could weaken environmental protections and lead to more state-level environmental fragmentation. The decision reflects differing judicial philosophies, particularly regarding judicial deference to agencies. Under Chevron deference, courts traditionally defer to reasonable agency interpretations of ambiguous statutory language. Similarly, under Auer deference, courts have deferred to an agency's interpretation of its regulations. The Court's ruling in Sackett II suggests a retreat from both doctrines, limiting the scope of federal regulatory authority under the CWA and reinforcing the Court's focus on federalism and state sovereignty. This shift has significant implications for environmental governance across the U.S.

The implications of this new test and judicial philosophy are obvious. By limiting the scope of applicability of the CWA to only waters connected to interstate navigable waters as well as the extent of wetlands, the ability to control the pollution of these waters is dramatically limited. Wetlands are traditionally some of the most biodiverse habitats and deserve significant protection. What this case represents is a significant hit to the 5.5 percent of land wetlands cover in the 48 contiguous states.[5] Furthermore, the Court's use of the term "relatively permanent" may eliminate protections for ephemeral or intermittent streams without a regular, daily flow.[6] Ephemeral or intermittent streams make up 59% of all streams in the United States. This particularly impacts streams in the Southwestern region of the country, where ephemeral and intermittent streams make up 81% of all streams.[7] This development places a broad array of wetlands in environmental jeopardy and increases the risk of further environmental degradation and loss of biodiversity. Beyond the impact on wetlands, *Sackett II* creates long-term challenges

[4] "Sackett v. Environmental Protection Agency." Oyez. Accessed March 30, 2025. https://www.oyez.org/cases/2022/21-454.
[5] Lainie R Levick et al., "The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-Arid American Southwest," EPA, accessed March 30, 2025, https://www.epa.gov/report-environment/wetlands.
[6] Elyza Bruce, "The Ripple Effects of Sackett v. EPA," Common Home, May 1, 2024, https://commonhome.georgetown.edu/topics/health/the-ripple-effects-of-sackett-v-epa/.
[7] Lainie R Levick et al., "The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-Arid American Southwest," EPA, accessed March 30, 2025, https://www.epa.gov/report-environment/wetlands.

for regulatory oversight by reducing the EPA's ability to enforce the CWA by restricting its authority to do so.

Given the recency of this case, there remains much to be seen regarding the impacts of this case beyond the regulatory. However, while this case does limit federal statutory authority, it also opens an intriguing opportunity for states to self-regulate waterways. The subtle modification of the current federalism model has been the focus of several members of the Court in its conservative bloc and Alito's majority opinion in this case. The Court's ruling suggests a growing trend of judicial scrutiny and limits on agency discretion, highlighting a new era where courts may be less inclined to accept expansive interpretations of ambiguous statutes. This decision could shape how courts approach future cases involving administrative law, signaling a potential narrowing of agency power and a reinvigorated role for judicial interpretation in administrative decisions.

Beyond the administrative and ecological impacts of this decision, there is an increased cause for concern among advocacy groups and environmental activists. The divide on the Court has already taken significant strides in narrowing the purview of the government in *Dobbs v. Jackson Women's Health Organization* and *New York State Rifle & Pistol Association Inc. v. Bruen.* While in some ways undoing the work of previous Courts, these decisions, along with *Sackett II*, relegate some of the work formerly of the federal government to state and local authorities. This, however, will leave environmental protections and water law variable. This ruling, therefore, exacerbates the ever-growing partisan divide in America by antagonizing environmental authorities and reducing the protections of the government that have become taken for granted by the American populace. However, the outlook for environmental regulation need not be bleak. This decision opens the possibility of congressional legislation regarding water law and WOTUS and allows for a more nuanced approach to the environmental protection of waters by states.

The Court's decision to limit the scope of WOTUS marks a pivotal shift in the trajectory of Clean Water Act enforcement. While the immediate future of WOTUS and the CWA seems to be a more limited EPA, there is always the possibility of revision and clarification from future cases. The standard set by this case can lead to either further reductions of environmental protections and their associated powers, or increased litigation on behalf of property owners may lead to a more balanced standard of WOTUS protections. Regardless, this case sets an important precedent moving forward in the field of environmental law.

Sackett v. EPA represents a pivotal moment in the interpretation of the Clean Water Act and the scope of federal authority over environmental regulation. The Supreme Court's decision to narrow the definition of "Waters of the United States" significantly limits the EPA's ability to regulate

wetlands and intermittent streams, areas that are vital for biodiversity and ecological balance. While this ruling restricts federal jurisdiction, it also enhances the role of states in regulating their water resources, potentially fostering greater regional variation in environmental protection. The case underscores a broader trend of judicial scrutiny on agency interpretations, particularly under the frameworks of Chevron and Auer deference, signaling a shift toward limiting administrative discretion. As a result, the decision introduces uncertainty for future environmental policy, as it weakens the federal government's regulatory reach while encouraging state-based approaches that could create legal inconsistencies across the country. Advocacy groups and environmentalists are likely to face increased challenges, as the ruling suggests a more restrained federal role in environmental governance. Nevertheless, the ruling also opens the door for potential legislative action to clarify and strengthen water protections, ensuring that future legal battles will shape the future of environmental law in America.

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Permanent Felon Disenfranchisement: A Life Sentence for Mississippians

By: Kristen White

The right to vote has long been regarded as a foundational feature of American democracy. A vote holds immense power to amplify the voices of the governed and prevent arbitrary governance by the state. It is for these reasons that efforts to restrict or expand access to the ballot constantly find themselves at the center of contentious legislative debates, lawsuits, and even violent conflict. Amidst this discord, jurists of the nation's apex court have asserted in various rulings a belief that voting is a fundamental right, as expressed by Justice Hugo Black in *Wesberry v. Sanders* (1964): "Other rights, even the most basic, are illusory if the right to vote is undermined."[1] In a 2024 ruling on *Hopkins v. Watson*, the Fifth Circuit Court of Appeals stifled the nation's progress towards removing a nearly insurmountable abridgement of the right to vote permanent felon disenfranchisement – by holding that Mississippi's Jim Crow-era disenfranchisement law does not violate the Eighth Amendment's prohibition of cruel and unusual punishment.

Beyond being one of only eleven remaining states to practice permanent felon disenfranchisement, the origins of Mississippi's constitutional provision stripping perpetrators of specific crimes of their suffrage rights reflect a deeply racist history of discrimination in the South.[2] Section 241 of the Mississippi State Constitution, which revokes the right to vote from those convicted of "murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy," was passed in 1890 in response to Black men exercising their newly-protected suffrage.[3] The assortment of crimes listed above – excluding rape and murder, which were added in 1968 – were believed to be committed more often by African Americans and included with the intention of eliminating the Black vote.[4] To protect the suffrage of white Mississippians convicted of these crimes, the Mississippi

[1] Wesberry v. Sanders, 376 U.S. 1, 17 (1964).
[2] Rep., *Criminal Disenfranchisement Laws Across the United States* (Brennan Center for Justice), accessed April 12, 2025,https://www.brennancenter.org/sites/default/files/202109/Criminal%20Disenfranchisement%20Laws%20Map%2009.10.21.pdf.
[3] Miss. Const. Art. 12, **§**241.
[4] Vernon Lane Wharton, "The Elimination of the Negro as an Active Factor in Politics," chapter, in *The Negro in Mississippi: 1865-1890* (New York: Harper & Row, 1965), 214.[5] Miss. Const. Art. 12, **§**253.

Constitutional Convention passed Section 253, which allowed the disenfranchised to regain their voting rights by a two-thirds vote of the state's bicameral legislature.[567] Disenfranchisement laws, along with the Black Codes, emerged across the postwar South in an effort to foster conditions similar to those which existed before the end of the Civil War without violating the recently-passed Reconstruction Amendments. Despite efforts to erase the discriminatory ends that inspired the constitutional provision by passing amendments, plaintiffs argued that it continues to violate the Equal Protection Clause on a "non-racial basis" and constitutes cruel and unusual punishment against all disenfranchised felons.[67]

While the three-judge panel of the Fifth Circuit Court of Appeals ruled in August 2023 that Mississippi's felon disenfranchisement law violated the Cruel and Unusual Punishment Clause in the Eighth Amendment, it rejected the plaintiffs' claim that the provision violated the Equal Protection Clause of the Fourteenth Amendment,[8]referencing *Richardson v. Ramirez*, in which the Supreme Court held that Section Two of the Fourteenth Amendment, which enforces a penalty of reduced representation against states that deny the right to vote to all male citizens over the age of twenty-one, "except for participation in rebellion, or other crime,"[9] expressly permits disenfranchisement as punishment for a crime, thus precluding parties similarly situated from receiving a legal remedy under an Equal Protection challenge.[10]

After granting the appellant a rehearing en banc, the court overturned the panel's ruling. In an opinion written by Judge Edith Jones, the majority went beyond the panel's foreclosure of an Equal Protection challenge and argued that *Richardson* addresses Section One of the Fourteenth Amendment in its entirety, thus including the Due Process Clause, which applies the Bill of Rights to the states.[11] Since the Bill of Rights includes the Eighth Amendment, plaintiffs would not be able to contend that Section One of the Fourteenth Amendment voids the power of Section Two. The court also found that, even if *Richardson* did not foreclose this challenge, the plaintiffs failed to demonstrate that Section 241 violates the Eighth Amendment.[12] Notably, the majority argued that the Supreme Court defined felon disenfranchisement in *Trop v. Dulles* (1958) as nonpunitive: "... because the purpose of the latter [statute that revokes suffrage rights from someone who commits a bank robbery] is to designate a reasonable ground of eligibility for voting, this law is

[5] Miss. Const. Art. 12, §253.
[6] Hopkins v. Watson, 108 F.4th 371, 3 (5th Cir. 2024).
[7] Brief of Petitioner-Appellant at 33-40, Hopkins, et al v. Hosemann, No. 19-60678 (5th Cir. 2023)
[8] Hopkins v. Hosemann, 83 F.4th 312 (5th Cir. 2023).
[9] U.S. Constitution. amend XIV, sec 2.
[10] Richardson v. Ramirez, 418 U.S. 24 (1974).
[11] Hopkins v. Watson, 108 F.4th at 10-16.
[12] Ibid., at 16.

sustained as a nonpenal exercise of power to regulate the franchise."[13][14]If a statute does not impose a punishment, its constitutionality cannot be challenged under the Cruel and Unusual Punishment Clause. In citing Dulles, the Court erroneously treated the aforementioned statement as a declaration of felon disenfranchisement's nonpunitive nature rather than a hypothetical in which the disenfranchisement of a bank robber was determined not to be a punishment based on the intent of the enacting body. This meaning is evident in the text preceding the example, which states that whether or not a statute which "[decrees] some adversity as a consequence of certain conduct" has a penal effect depends on the "purpose of the legislature."[14] The dissent provided clarity regarding the intent of the Mississippi Constitutional Convention in passing Section 241 by referring to the Readmission Act (1870), which prohibited Mississippi legislators from amending the constitution to disenfranchise any citizens "except as a punishment for such crimes as are now felonies at common law…"[15] In order to comply with the federal statute, Mississippi's felon disenfranchisement law would have had to have been created with punitive intent. The majority's interpretation of Section 241 as nonpunitive would place the Readmission Act at odds with federal law, a reading the dissent noted should be avoided, per *Planned Parenthood of Houston & Southeast Texas v. Sanchez* (*2005*).[16]In response, the majority implied that the meaning of 'punishment' has changed such that it could not be interpreted to have the same meaning between 1870, 1890, 1958, and the present day, but did not expound upon this change.[17]

Although it erred in interpreting *Trop* to declare all felon disenfranchisement nonpenal, the majority acknowledged that a facially nonpenal statute may, in effect, impose a punishment. In employing the *Mendoza-Martinez* factors[18]to help determine the effect of Section 241, the court found evidence that felon disenfranchisement has not been historically regarded as serving a penal purpose, citing the 1898 Supreme Court's description of the practice as a "measure designed to protect the public, and not punish for [19]past offenses."[19] Additionally, the court determined that the crimes listed in Section 241 are "probative of dishonesty or lack of civic virtue," thus creating an interest for a nonpenal regulation to protect the integrity of elections.[20] The majority repeatedly referred to a standard of rationality in evaluating Section 241's nonpenal

[13] Trop v. Dulles, 356 U.S. 86, 78 S. Ct. 590, 96-97 (1958).
[14] Ibid., at 96.
[15] Hopkins v. Watson, 108 F.4th at 35 (Dennis, J., dissenting).
[16] Planned Parenthood of Houston v. Sanchez, 403 F.3d 324 (5th Cir. 2005).
[17] The Readmission Act was passed by Congress in 1870. The "evolving standards of decency" test was first established in Trop v. Dulles in 1958.
[18] Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)(The Supreme Court held that Section 401(j) of the Selective Training and Service Act of 1940, which deprived U.S. citizens found to be avoiding the wartime draft by residing in a foreign country of citizenship, was a penalty that violated the Fifth and Sixth Amendments).
[19] Hopkins v. Watson, 108 F.4th at 24 (citing Hawker v. New York, 170 U.S. 189 (1898) at 197).
[20] Ibid., at 26.

intention, but the content of the provision does not lend itself to the conclusion that there exists a "rational connection to a nonpunitive purpose."[21] In evaluating the character of the crimes listed, one cannot separate this statute from the invidious purposes with which it was drafted. As discussed above, the Mississippi felon disenfranchisement law was created by the Convention to circumvent the Fifteenth Amendment's prohibition of race-based voting discrimination.[22] By targeting the crimes believed to be committed mostly by African Americans,[23] delegates created an incohesive regulatory scheme that is unrelated to any legitimate interest in "[protecting] the public"[24] and effectively punished African Americans for committing a crime while Black. Perhaps the most striking evidence against the court's position is the absence of the offenses that arguably demonstrate the greatest "lack of civic virtue" with respect to voting:[25]the twenty-two election crimes listed in the Mississippi Code. The incoherent regulatory scheme of Section 241 prescribes the same punishment of lifetime disenfranchisement for a limited number of crimes of varying levels of severity while disregarding "society's measured response to… moral guilt"[26] and fails to show a reasonable connection to a nonpenal interest separate from the discriminatory aims by which the law was motivated.

While the court contended that felon disenfranchisement has not historically been regarded as a punishment, it acknowledged that *Trop* requires an evaluation of "evolving standards of decency"[27] in cases containing Eighth Amendment challenges.[27] The first of two steps in this inquiry is the determination of a national consensus against permanent felon disenfranchisement using "objective indicia of society's standards."[28] It is at this step that the court employed its most flawed rationale. The majority argued that because no two states share the exact same voting laws and it is not the job of the court to determine the "appropriate level of generality," a national consensus was impossible to determine.[29] In refusing to engage in an analysis using the ample similarities in voting laws across the country that would have revealed that thirty-nine states do not practice permanent felon disenfranchisement,[30]the court implicitly selected the lowest – and most stringent – level of generality, thus committing the same sin it claimed to eschew. The dissent recognized that this figure surpasses the threshold required by the Supreme Court when it held that thirty states outlawing executions of individuals with intellectual

[21] Ibid., at 26. (citing Smith v. Doe, 538 U.S. 84 (2003)).
[22] Hopkins v. Hosemann, 83 F.4th at 4.
[23] Ibid
[24] Hopkins v. Watson, 108 F.4th at 24.
[25] Ibid., at 26.
[26] Ibid., at 45. (Dennis, J., dissenting) [27]
Trop, 356 U.S. at 101.
[27] Hopkins v. Watson, 108 F.4th at 28.
[28] Hopkins v. Watson, 108 F.4th at 29 (citing Graham v. Florida, 560 U.S. 48, 61 (2010)).
[29] Ibid., at 30.
[30] Rep., Criminal Disenfranchisement Laws Across the United States. [32]
Hopkins v. Watson, 108 F.4th at 41.

disabilities demonstrated a national consensus against the practice.[32] Had the majority assessed regulatory schemes across the United States, it would have found that, of the eleven states that permanently disenfranchise felons, four have moved to reinstate voting rights for thousands of residents in recent years.[31]In 2018, Florida voters approved Amendment 4, which "automatically restores the right to vote to 1.4 million individuals with [past] felony convictions…"[32] Comparatively, the Mississippi legislature has restored voting rights to only eighteen individuals from 2013 to 2018.[33][34][35] Mississippi's ineffective use of Section 253 to re-enfranchise impacted individuals, along with the majority of states opting not to practice permanent felon disenfranchisement, bespeaks a rejection of the practice on a national level, a consensus that Mississippi does not seem interested in joining.

Mississippi's lifelong punishment for those convicted of crimes entirely unrelated to the electoral process continues to affect hundreds of thousands of residents. As of 2024, Mississippi has the second-highest incarceration rate in the country at 1,020 people per 100,000 inhabitants – a figure greater than that of most independent democracies.[36] According to The Center for Public Integrity, more than 10% of Mississippi's population was permanently disenfranchised as a result of this law in 2022.[37] The figure for Black residents of Mississippi is even higher at 16%.[36] On a national scale, felon disenfranchisement accounted for four million ineligible voters in the November 2024 election.[37] Felon disenfranchisement laws like that challenged in Mississippi result in millions of people whose lives are impacted by public officials and their policies being locked out of the democratic process. As more states shift away from stripping felons of a fundamental enjoyment of citizenship, permanent felon disenfranchisement must be evaluated for what it is: a life sentence. The failure of the Fifth Circuit Court of Appeals to do so places yet another obstacle in the way of greater political participation.

[31] Rep., Criminal Disenfranchisement Laws Across the United States.
[32] Ibid.
[33] Hopkins v. Hosemann, 83 F.4th at 7.
[34] Emily Widra, rep., States of Incarceration: The Global Context 2024 (Prison Policy Initiative, June 2024), https://www.prisonpolicy.org/global/2024.html.
[35] Gina Castro, rep., More than 15% of Black Mississippi Residents Permanently Barred from Voting (The Center for Public Integrity, October 6, 2022), https://publicintegrity.org/politics/elections/who-counts/more-than-15-of-black-mississippi-resid ents-permanently-barred-from-voting/.
[36] Ibid.
[37] Christopher Uggen et al., rep., Locked Out 2024: Four Million Denied Voting Rights Due to a Felony Conviction, October 10, 2024, https://www.sentencingproject.org/reports/locked-out-2024-four-million-denied-voting-rights-due-to-afelony-conviction/.

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Justice Neil Gorsuch Blows the Whistle: Evaluating the Court's Argument in Delligatti v. United States

By: Zoe Simmons

I. Introduction

On May 12, 2016, Salvatore Delligatti was charged with racketeering conspiracy, conspiracy to commit murder in aid of racketeering, attempted murder in aid of racketeering, conspiracy to commit murder for hire, operating an illegal gambling business, and using a firearm in furtherance of a crime of violence. Delligatti, predominantly known by his confidants as "Fat Sal," acted as an accomplice for the Genovese Crime Family by devising a scheme to murder Joseph Bonelli, a "local bully" residing in the borough of Queens, New York. Bonelli was suspected by the Genovese family of stealing from a local gas station and cooperating against bookies affiliated with the crime family. In response, Delligatti, an associate for the Genovese family, hired a man to orchestrate Bonelli's murder with the aid of local gang members from the Bronx, providing his new recruits with a loaded .38 revolver, a getaway vehicle, and several thousand dollars in pay.[1] However, the attempt to murder Bonelli was ultimately unsuccessful, for, unbeknownst to Delligatti, Nassau County's Police Department and District Attorney's Office used wiretap surveillance to apprehend Delligatti's coconspirators before they violently ambushed the intended victim.[2]

Following his conviction, Mr. Delligatti moved to dismiss before his trial; he argued that none of the charged predicates were categorically considered crimes of violence under Section 924(c), and therefore, his firearms conviction should be reversed. The district court denied his motion, and Delligatti was convicted on all charges and sentenced to 25 years in prison.[3]

[1] Brief for the United States, *Delligatti v. United States*, 604 U.S. ___ (2025) No. 23-825
[2] Ibid.
[3] Ibid.

Delligatti argued in front of the Second Circuit Court of Appeals that, under New York law, attempted second-degree murder is not a "crime of violence" because it can be committed by omission, or without the "use, attempted use, or threatened use of physical force against the person of another."[4] Per Section 924(c), and in light of the recent Supreme Court decision *United States v. Davis*, which struck down the residual clause as unconstitutionally vague, a "crime of violence" is properly defined as a felony offense that fulfills the elements clause.[5] The elements clause requires that the offense "has as an element the use, attempted use, or threatened use of physical force against the person or property of another."[6] Thus, the U.S. Court of Appeals for the Second Circuit upheld the lower court's decision, rejecting Delligatti's argument, and concluded that an attempted murder in aid of racketeering is enveloped within the definition of a "crime of violence." For, according to the opinion of the Second Circuit, attempted murder, by definition, involves the use of physical force. Because the Court of Appeals denied a punctual petition for rehearing, under 28 U.S.C § 1254(1), the jurisdiction of the Supreme Court was invoked. Justice Thomas delivered the 7-2 majority opinion on March 21, 2025; the Court decided that "the knowing or intentional causation of injury or death, whether by act or omission, necessarily involves the use of physical force against another person."[7] Thus, upon a careful evaluation majority and dissenting opinions, it becomes clear that the Court's reasoning in *Delligatti* departs from the plain meaning of 18 U.S.C. § 924(c)(3)(A), by defining a "crime of violence" to include omissions.

II. The Court's Argument

In his majority opinion, Justice Thomas argues that it is impossible to deliberately cause physical harm without the use of physical force under 942(c). Appealing to the Court's ruling in *United States v. Castleman*, Justice Thomas claims that "the knowing or intentional causation of bodily injury necessarily involves the use of physical force."[8] Thus, Justice Thomas asserts that if a person causes intentional harm to another, then the person inevitably employs physical force against another. Considering this claim, *omissions* that result in the bodily injury of a person necessarily involve the "use" of violent physical force against another. In response to the dissent's claim that the "use" of force to intentionally cause physical harm requires the *active* employment of violent physical force, thereby excluding omissions, Justice Thomas presents a counterexample: "a car owner can 'use' the rain to wash his vehicle simply by leaving it parked on the street."[9] For, while the car owner does not actively cause the force of the rain to act upon his vehicle, the car owner intentionally "makes use of" the rain as an instrument to attain

[4] 18 U.S.C. § 924 (c)(3)
[5] United States v. Davis, 588 U.S. 445 (2019).
[6] 18 U.S.C. § 924(c)(3)(A)
[7] Delligatti v. United States, 604 U.S. ___ (2025).
[8] Ibid.
[9] Ibid.

his desired end, thereby using the "force" of the rain to wash his vehicle. In this, Justice Thomas emphasizes the equivalency of the infinitive "to use" and the idiomatic expression "to make use of," and thus, a person who "makes use of" a preexisting force effectively and intentionally employs the force as an instrument to achieve one's ends. Considering the language used in 18 U.S.C. 924(c)(3), then, a person may use, or in Delligatti's case, attempt to use physical force against the person or property of another by omission, thereby fulfilling the element's clause. However, Justice Thomas notes that the mere use of physical force is not sufficient; the force employed by an individual against the person or property of another must be violent in nature. He concludes, "A mere touch is not a sufficient force for common-law robbery, but any force that actually causes death is."[10] Therefore, because Delligatti knowingly and intentionally attempted to cause the death of Bonelli, Delligatti attempted to use violent physical force against Bonelli's person in accordance with the definition presented in 18 U.S.C. 924(c)(3), thereby invoking a mandatory consecutive sentence for possessing a firearm in the furtherance of a crime of violence.

III. Neil Gorsuch's Dissent

In response to the Court's decision in *Delligatti*, Justice Gorsuch opens his dissent with the following hypothetical:

> Imagine a lifeguard perched on his chair at the beach who spots a swimmer struggling against the waves. Instead of leaping into action, the lifeguard chooses to settle back in his chair, twirl his whistle, and watch the swimmer slip away. The lifeguard may know that his inaction will cause death. Perhaps the swimmer is the lifeguard's enemy and the lifeguard even wishes to see him die. Either way, the lifeguard is a bad man. In many States, he may be guilty of a serious crime for failing to fulfill his legal duty to help the swimmer. But does the lifeguard's offense also qualify under 18 U. S. C. §924(c)(3)(A) as a "crime of violence" involving the "use . . . of physical force against the person . . . of another?"[11]

Justice Gorsuch's response is clearly—no. He rejects the Court's definition of a "crime of violence" as "the knowing or intentional causation of bodily injury...by omission."[12] Under this approach, Gorsuch notes, "even our lifeguard, whose offense stems from inaction, is guilty of a 'crime of violence.'"[13] Rather than accepting the absurd implications that result from embracing the Court's definition of a crime of violence, Gorsuch aims to preserve the plain meaning of the text in question, by defining a "crime of violence" as the plain text describes in 924(c): a felony offense that "has an element of the use, attempted use, or threatened use of physical force

[10] Ibid.
[11] Ibid.
[12] Ibid.
[13] Ibid.

against the person or property of another."[14] Contrary to the definition accepted by the Court, Gorsuch claims that the term "use" necessarily has an "active meaning," and thus "inaction" cannot constitute a "use" of physical force.[15] He notes further, referencing Bailey v. United States, "As this Court has long recognized, "[t]hese various definitions of 'use' imply action."[16] Moreover, referencing *Johnson v. United States*, Gorsuch argues that allowing a pre-existing force to run its course does not suffice, rather "an individual must '*employ* force consisting in a physical act.'"[17] Lastly, in congruence with the statute in question, the physical force must be violent in nature, and thus the "physical force" can neither be a "mere touching" or "a pre-existing natural force."[18] therefore, Gorsuch concludes, an individual who "causes bodily injury by omission" fails to meet the following criteria: "an individual must (1) actively (not just through inertia) employ (2) a violent or extreme physical act (not a mere touching or preexisting natural forces) (3) knowingly or intentionally to harm another person or his property."[19][20]

IV. Analysis

Considering the arguments presented by both the Court and the dissent, one must first consider which interpretation of 18 U. S. C. §924(c)(3)(A) best preserves the plain meaning of the constitutional text. To reiterate, the elements clause encompasses any felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another."[20] Consequently, to fulfill the elements clause, a person must commit a felony offense while *employing physical force* against the person of another, and thus, a sound interpretation of the text hinges on how one defines a "use" of "physical force." If one accepts the Court's definition of violent physical force as necessarily encompassing omissions, it follows that *every death* involves the use of violent physical force. In the Court's oral arguments, Justice Gorsuch notes further, "Every death involves physical force. And why wouldn't it all be violent? Because it's all extremely unpleasant."[21] Under the elements clause, then, the bad lifeguard's negligent behavior qualifies as a "crime of violence," although the lifeguard clearly fails to actively employ physical force against the person of another, and notably, the lifeguard fails to act altogether. Even if the bad lifeguard wishes for the swimmer's death and refuses to jump in after him and relieve him of the natural forces violently affecting the swimmer's person, the lifeguard does not effectively "wield" preexisting natural forces to attain his desired end, because the lifeguard does not possess the authority to do so. While the car owner possesses

[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Ibid. Emphasis added.
[18] Ibid.
[19] Ibid.
[20] 18 U. S. C. §924(c)(3)(A).
[21] *Delligatti v. United States*, No. 23-825, oral argument before the U.S. Supreme Court (Nov. 12, 2024), available at https://www.supremecourt.gov/oral_arguments/audio/2024/23-825.

the authority to park his vehicle where the rain *may* wash his vehicle, the car owner is incapable of *causing* the rain to wash his vehicle. As a result, the car owner does not employ the force of the rain to achieve his desired end because he is ultimately incapable of bringing the force of the rain into contact with his vehicle. Rather, the force of the rain happens to act on his vehicle, and the car owner neglects to intervene. Further, the plain text makes clear that "physical force" is a necessary antecedent to "violent force," and actively employing violent force to harm another requires taking an active step to bring the violent force in contact with the intended victim. The bad lifeguard neglects to take *any step* to bring the violent force into contact with the struggling swimmer, and thus, the lifeguard's inaction should not qualify as a use of violent physical force.

Therefore, upon evaluating the majority and dissenting opinions in *Delligatti*, it becomes clear that the Court's reasoning effectively reworks the definition of a "crime of violence," and thereby departs from the plain meaning of 18 U.S.C. § 924(c)(3)(A).

As a final consideration, Justice Gorsuch notes, "Yet the Court's reading of §924(c)(3)(A) renders the presence of a legal duty irrelevant—as the Court sees it, knowingly or intentionally causing bodily injury by failing to act is *always* a "crime of violence." *Ante*, at 4. (16)"

Free Speech Coalition V. Paxton

By: Daniel Bartello

"I know it when I see it,"[1] a phrase uttered by Justice Stewart in 1964 on the basis of his test of obscenity in the case *Jacobellis v. Ohio* (1964), in which the Warren Court was deciding on how to use the Roth Test on what is obscene or not.[2] The test establishes whether material is considered obscene based on whether "the average person, applying contemporary community standards, would find that the material appeals to a prurient interest in sex" and if the material is "utterly without redeeming social value." But the Roth Test was altered in 1968 in *Ginsberg v. New York*.[3] The Supreme Court's holding in *Ginsberg v. New York* becomes relevant by reason of its emphasis upon measuring materials in relation to the group toward whom the material is directed. As a result of *Ginsberg*, the state may now define or classify material as unfit for distribution to minors.[4] It is Important since It created the idea of variable obscenity, recognizing that minors don't have the same First Amendment protections and allowing the state to protect their welfare.[5]

This prompts the question what is deemed "unfit." In *Miller v. California* (1973), the Burger Court gave us an answer other than "I know it when I see it," The reason for this was the court shifted to a more conservative judical mindset with the four appointments by Richard Nixon.[6] The answer which was "whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; whether the work depicts or describes, in an offensive way, sexual conduct or excretory functions, as specifically defined by applicable state law; and whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[7] This test replaced vague subjectivity with a more structured approach, giving states clearer legal ground to restrict obscene material without violating the First Amendment. In other words, the Court attempted to draw a definable line between protected expression and punishable obscenity.

[1] Jacobellis v. Ohio 378 U.S. 184 (1964)
[2] Roth V. United States
[3] Ginsburg V. New York
[4] A Double Standard of Obscenity: The Ginsberg Decision
[5] Obscenity
[6] U.S Senate Supreme Court Nominations
[7] Miller v. California

Precedent of our case *Free Speech Coalition v. Paxton.*[8] In 2023, the Texas Legislature passed House Bill 1181, which required websites where more than one-third of content is deemed "harmful to minors" to implement strict age verification measures for users.[9] The law also mandated that such sites display health warnings about the alleged dangers of pornography. Texas Attorney General Ken Paxton, the named defendant in the case and responsible for enforcing the law, was sued by the *Free Speech Coalition* (FSC), which represents the adult entertainment industry. The FSC challenged the law on First Amendment grounds, arguing that it imposed unconstitutional burdens on free speech by restricting access to lawful adult content. Specifically, the coalition contended that the law chilled protected expression and relied on vague, overbroad classifications inconsistent with long-established Supreme Court obscenity precedent.

Texas's argument is that due to the digital age, there are no longer physical stores where you can consume pornographic material, so by passing this law, it is but the evolution of *Ginsberg* in the digital age. We see the petitioners argue in oral argument that, though we understand the similarities, there is a contrast difference from flashing your I.D. as opposed to putting your credit card or driver's license. Though there could be a greater risk for data breaches or misuse, therefore discouraging lawful uses, in turn infringing on privacy rights.

In defending HB 1181, Attorney General Ken Paxton has drawn on precedent from which is *Ashcroft v. American Civil Liberties Union* (2004).[10] A case involving the constitutionality of the Child Online Protection Act (COPA). Like HB 1181, COPA required websites that hosted content considered "harmful to minors" to implement age verification measures. However, in *Ashcroft*, the Supreme Court struck down the law, applying strict scrutiny. While the Court acknowledged the government's compelling interest in protecting children from harmful content, it held that COPA was not narrowly tailored and imposed an unconstitutional burden on protected adult speech. The Court emphasized that less restrictive alternatives—such as parental control tools and filtering software—were available and could achieve the same goal without infringing on First Amendment freedoms. Paxton's invocation of *Ashcroft* is intended to show that HB 1181 avoids the pitfalls of COPA, though opponents argue the law replicates the same constitutional flaws.

But as we have seen, Justice Alito and Barrett have stated how filtering does not work, and Alito jokingly said in orals, "Mr. Shaffer, do you know a lot of parents who are more techsavvy than their 15-year-old children?" When the decision was made in 2004, the iPhone was yet to be released in 2007. The context of the Court and technology at the time was social media was almost non-existent. At the time, there were far fewer adult websites. In '04, age verification

[8] No. 23-1122

[9] 88(R) HB 1181 - House Committee Report version - Bill Text

[10] Ashcroft v. American Civil Liberties Union

was far more clunky and unreliable, and lastly, most American families accessed the internet on a family computer, which is now practically extinct.

Back in 2004, the Court essentially argued that heavy-handed restrictions weren't necessary when parents already had tools like filters and controls available at home, a point that's even more relevant with today's technology. Now this is not the case. Since 2004, the online landscape has changed beyond recognition, with high-speed internet and smartphones now making it simple for kids to access explicit material anywhere and anytime; pornography has been made free, instant, and ubiquitous across the world; classic parental controls have become less effective as kids work around them easily with private browsing and unfiltered networks; and improvements in technology, such as AI powered age verification using government IDs and biometrics, have made enforcement more feasible, prompting other nations like France[11] and the UK[12] to pass similar laws, while continuing research on the harms of pornography—especially to children—has galvanized demands for more regulation.

Research has found that pornography consumption is associated with decreased relationship satisfaction, increased anxiety, depression, and lower self-esteem, higher rates of sexual dysfunction such as erectile dysfunction[13], the development of compulsive use patterns sometimes referred to as "porn addiction," distorted views of sexuality[14] and relationships among adolescents, greater acceptance of gender stereotypes and sexual objectification[15], and potential ethical concerns related to the normalization of exploitative content.

I believe that the Court will uphold some form of the Texas law, stating the age verification requirement is constitutional due to strict scrutiny, with it being a compelling government interest. It does not burden any other speech other than porn. There are no other effective alternatives with the evolution of the internet, which will in turn cause a precedent shift since porn is so available in the modern internet age.

The Court will strike down the health warning concern on the label due to the First Amendment protecting speech far more than product, so it cannot be applied the same as cigarettes or alcohol due to porn being a form of "speech." As well as a prior precedent in *NIFLA v. Becerra* (2018), the Court struck down a California law requiring pro-life pregnancy centers to advertise abortion services, holding that the government cannot compel individuals or entities to deliver messages that contradict their own views, and similarly, requiring pornographic websites to

[11] French regulator releases technical reference on age verification for porn | Biometric Update
[12] Implementing the Online Safety Act: Protecting children from online pornography - Ofcom
[13] Is Internet Pornography Causing Sexual Dysfunctions? A Review with Clinical Reports - PMC
[14] Teaching porn literacy
[15] Age of first exposure to pornography shapes men's attitudes toward women

display statements like "Pornography is harmful to your health" could constitute impermissible compelled ideological or moral speech, which the Court typically prohibits.[16]

Ultimately, *Free Speech Coalition v. Paxton* confronts the Court with a defining question of our digital era: How far can the state go in regulating access to constitutionally protected but controversial content in the name of protecting minors? With the rise of mobile technology, the collapse of traditional gatekeeping systems, and growing research into the harms of unrestricted pornography, the Court is likely to recalibrate its prior doctrine. While compelled speech in the form of health warnings will likely be struck down under *NIFLA v. Becerra*, the age verification requirement may survive strict scrutiny due to the compelling government interest, the availability of modern technological enforcement, and the absence of effective alternatives. If the Court rules this way, it won't just be affirming Texas's approach—it will be setting a new national precedent for how First Amendment protections apply in a digital age where content is always on, always accessible, and increasingly unfiltered.

[16] 16-1140 National Institute of Family and Life Advocates v. Becerra (06/26/2018)

Iran's Persecution of Women and Avenues for Confrontation

By: Emma Thomas

In September 2022, Jina Mahsa Amini was arrested in the Islamic Republic of Iran for allegedly violating mandatory hijab laws.[1] Days later, she died while in the custody of the State's morality police. Her death sparked nationwide "Woman, Life, Freedom" protests, resulting in a disproportionately aggressive response from Iran. Since Amini's death, Iran has intensified violence against women and increased enforcement of restrictive modesty laws. Additionally, in efforts to suppress protests, Iran has severely infringed on the rights of female students. These three major facets—the response to protests, the enforcement of morality laws, and intimidation in schools—constitute the crime against humanity of persecution of women, an international human rights violation that should be addressed through United Nations (UN) sanctions.

Defining persecution as a crime against humanity has historically been a point of controversy; international law has employed two major definitions. The first is listed in Article 7 of the Rome Statute of the International Criminal Court (ICC), which outlines crimes against humanity. According to Article 7, subsection 2, persecution is "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."[2] This means discrimination alone is not a crime against humanity; rather, persecution must involve violations of separate fundamental rights protected under international law. These rights, designed to establish principles of equality, liberty, and bodily integrity, are articulated in the UN's Universal Declaration of Human Rights (UDHR). Key provisions include the entitlement to equal rights and protection of the law; the right to life, liberty, security and peaceful assembly; and freedom of thought, religion, and expression. Furthermore, the UDHR prohibits torture, cruel punishment, and arbitrary arrest.[3] While Iran, as a UN member state, is required to uphold these principles, this paper will demonstrate its

[1] "Iran: Institutional discrimination against women and girls enabled human rights violations and crimes against humanity in the context of recent protests, UN Fact-Finding Mission says." United Nations. March 8, 2024. https://www.ohchr.org/en/press-releases/2024/03/iran-institutional-discrimination-against-wome n-and-girls-enabled-human.

[2] Rome Statute of the International Criminal Court (International Criminal Court, 2021), https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf, 4.

[3] Universal Declaration of Human Rights (United Nations, 1948), https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf.

violations. By systematically depriving women of these fundamental rights, Iran meets this first criterion for the crime against humanity of persecution.

The second definition of the crime against humanity of persecution derives from the International Criminal Tribunal for the former Yugoslavia (ICTY). The ICTY recognized that "persecution can consist of the deprivation of a wide variety of rights, including attacks on political, economic, and social rights, as well as acts of harassment, humiliation, and psychological abuse."[4] While this initial definition aligns with the ICC's by emphasizing rights infringements, the ICTY diverges by separating persecution from other violations of international law. Specifically, the ICTY determined that "the guiding principle in determining whether an act … may amount to persecution is not a function of its apparent cruelty, but of the discriminatory effect the act seeks to encourage within the general populace."[5]In comparison to the ICC's definition, this guideline broadens the scope for persecution as a crime against humanity: persecution *alone*, in the absence of other rights deprivations, is a violation of international law. However, this paper will demonstrate that both definitions are met: Iran exhibits the intent to discriminate against women, and its actions are connected to other transgressions of international law.

Iran's persecution of women involves three major facets. The first is the State's response to "Woman, Life, Freedom" (WLF) protests. As this paper previously detailed, WLF protests began after Jina Mahsa Amini died in custody of Iran's morality police, with Iran's forceful reaction causing the UN Human Rights Council to investigate. The fact-finding mission found that Iran's response involved "a pattern of extensive, permanent, and life-changing injuries to protestors" and "unlawful and extrajudicial killings".[6] Much of this violence was gender-based: security forces targeted women through threats, slurs, and shootings.[7] Furthermore, arrested women suffered physical and sexual assault "perpetrated by the State authorities in places of detention."[8] The lesser status of women in Iranian society enabled the State to justify these actions: assailants took advantage of "social and cultural stigma" to "spread fear and humiliate and punish women."[9] Because of this, the fact-finding mission concluded that there was a "pattern of cruelty directed at protestors on the basis of their gender."[10] The combination of unlawful killing and gender-based violence meets both definitions of the crime against humanity of persecution. While the Rome Statute's definition is satisfied by Iran's illegal use of

[4] Fausto Pocar, "Persecution as a Crime Under International Criminal Law," Journal of National Security Law & Policy, no. 2 (2008): 359, https://jnslp.com/wp-content/uploads/2010/08/04_pocar-finalpageproofs-12-17-08changesJCS01 2109.pdf.
[5] Pocar, "Persecution," 360.
[6] Report of the independent international fact-finding mission, 5-6.
[7] Report of the independent international fact-finding mission, 6.
[8] Report of the independent international fact-finding mission, 8.
[9] Report of the independent international fact-finding mission, 8.
[10] Report of the independent international fact-finding mission, 8.

force to target women, the ICTY's definition is fulfilled through Iranian authorities' goal of assaulting and humiliating specifically women—a clear exhibition of discriminatory intent.

The second component of Iran's persecution of women is the restrictive laws enforced by the State's morality police. These laws, such as the mandatory hijab statute, impose strict dress codes primarily upon women. However, such laws are discriminatory and "violate [women's] rights to freedom of expression, freedom of religion or belief and [their] autonomy."[11] Furthermore, following widespread opposition to hijab laws during WLF protests, the State increased the consequences of disobeying the regulations as part of "a broader campaign of harassment, intimidation, surveillance, and violence … against those women … who have publicly defied such norms."[12] As part of this, Iran proposed a chastity and hijab bill that increases punishments for rule-breaking, strengthens State enforcement powers, makes private persons responsible for compliance, and expands gender segregation in public spaces. Although the bill includes a dress code for men, its primary focus is restricting women's rights.[13] Moreover, women who do not comply with modesty laws endure government-imposed " 'social exclusion,' " including inaccessibility of public services and higher education.[14] Women who allegedly violate these statutes have also been subjected to inhuman punishment, including "lashing, being made to wash dead bodies, and referral to psychiatric treatment."[15] As with the first facet, these abominable conditions meet the requirements of the ICC and ICTY's definitions of persecution. Iran demonstrates clear discriminatory intent and effect through its laws and punishments imposed upon primarily women, meeting the ICTY's requirements for persecution. Furthermore, the violations of rights and cruel treatment constitute the separate violations of international law that are necessary for satisfying the Rome Statute's definition of persecution.

The third major aspect of persecution of women is Iran's suspected poisoning of female students. On November 30, 2022—mere months after the beginning of WLF protests—18 women from Nour Technical School reported symptoms consistent with poisoning. In the following days, similar symptoms appeared across multiple provinces, affecting thousands of students—particularly girls, many of whom participated in WLF protests. Official explanations for the symptoms differed; authorities seemed to overlook the poisonings.[16] According to the fact-finding mission, the timing and scale makes it "plausible that school poisonings may have taken place with a view to intimidating and/or punishing schoolgirls for their involvement in the 'Woman, Life, Freedom' movement or to dissuade them from defying the mandatory hijab laws."[17] Such infringement on the health and education of primarily female students constitutes

[11] Report of the independent international fact-finding mission, 3-4.
[12] Report of the independent international fact-finding mission, 11.
[13] Report of the independent international fact-finding mission, 11.
[14] Report of the independent international fact-finding mission, 11-12.
[15] Report of the independent international fact-finding mission, 12.
[16] Report of the independent international fact-finding mission, 14.
[17] Report of the independent international fact-finding mission, 15.

discriminatory intent and international human rights violations, satisfying both definitions of persecution.

Taken together, these three facets establish that, under both definitions, Iran's actions reflect the crime against humanity of persecution toward women. The fact-finding mission concurs, concluding that "gender persecution has taken place against the backdrop of an institutionalized system of discrimination and elements of segregation against women."[18] Due to the high stakes of the situation—women's health and security are at risk each day— countries should analyze their retaliatory options. The two major reactionary avenues are legal and economic. Due to shortcomings of international legal systems, an economic response is more appropriate for addressing this situation.

Although international authorities have previously prosecuted persecution as a crime against humanity, legal opportunities and duties for retaliation are limited. Though the UN Human Rights Council conducted a fact-finding mission, neither the mission nor the Council have enforcement power. The two instead call on UN Member States to "explore avenues for international and domestic accountability outside the country."[19] Given this, nations may pursue legal options beyond the UN's limits. In doing so, countries should examine the history of the crime against humanity of persecution and analyze the punishments imposed in previous violations. For example, the crime of persecution was assessed in the ICTY's first case, *The Prosecutor v. Duško Tadić*. This case addressed war crimes committed by Duško Tadić, the President of the Local Board of the Serb Democratic Party in Kozarac. Tadić perpetrated crimes against non-Serbs in Kozarac and was found guilty for the crime against humanity of persecution, among others. He was ultimately sentenced to 25 years imprisonment.[20] *Tadić* was the first step toward defining persecution under international law, setting a precedent for the legal confrontation of this crime. However, with the ICTY dissolved, the ICC remains as the only court which currently tries crimes against humanity. While the crime of persecution is included within the ICC's jurisdiction,[21]the Rome Statute provides that the ICC may only "exercise its functions and powers … on the territory of any State Party and, by special agreement, on the territory of any other State."[22]Iran is not a State Party of the ICC.[22][23] Additionally, there is no special agreement present, nor is Iran likely to concede to one due to the negative

[18] Report of the independent international fact-finding mission, 17.
[19] Report of the independent international fact-finding mission, 20.
[20] "The Prosecutor v. Duško Tadić," International Crimes Database, accessed February 22, 2025, https://www.internationalcrimesdatabase.org/Case/86.
[21] Rome Statute, 3. [22] Rome Statute, 2.
[22] "The States Parties to the Rome Statute," International Criminal Court, accessed February 22, 2025, https://asp.icc-cpi.int/states-parties.
[23] . International Convention on the Suppression and Punishment of the Crime of Apartheid (United Nations, 1973), 1.

consequences it would face if found guilty. Given this, there are few legal options available to confront Iran's persecution of women.

Therefore, it is necessary to turn toward economic avenues. First, the UN Security Council has a history of implementing sanctions against countries that conduct crimes against humanity on their own people. Case in point: in response to South African apartheid, State Parties to the Apartheid Convention labelled apartheid a crime against humanity, a measure adopted by the U.N. General Assembly on July 18, 1976.[24] Furthermore, in 1963, the UN imposed oil sanctions and an arms embargo on South Africa.[24] While sanctions were implemented prior to apartheid being considered a crime against humanity, it is reasonable to assume that similarly severe actions, such as the persecution committed by Iran, should face equivalent consequences. Given this, there is precedent for implementing UN Security Council sanctions against Iran. If vetoed, some form of sanctions remains a necessary step; states should consider imposing unilateral sanctions. Since Iran has shown no indication of curbing its actions, an economic response is essential for pressuring the State to address the suffering of women and commit to preventing such tragedies in the future.

Ultimately, the urgency of ending Iran's persecution of women grows with each passing day. As the State perpetuates discrimination and oppression, and security forces assault individuals' basic rights through gender-based violence, Iranian women live in constant fear for their safety. However, it is critical to acknowledge that Iran's inhuman treatment of women extends beyond the three outlined facets. While these components are sufficient to establish a crime against humanity in the form of persecution of women, all violations of human rights and international law warrant adequate attention. Due to the current state in Iran, it is plausible that meaningful action will only be prompted through economic pressure. Thus, it is fundamental that the UN Security Council takes all necessary measures to impose sanctions designed to mitigate future harm.

[24] United Nations General Assembly Resolution 1899 (XVIII) (United Nations, 1963), 2.

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United Nations General Assembly Resolution 1899 (XVIII). United Nations, 1963.

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https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf.

EMD Sales

By: Bethany McRae

The Fair Labor Standards Act (FLSA) of 1938 was enacted to protect workers and serve as a cornerstone in U.S. labor laws.[1] Among the many provisions of the Act, one significant provision was that of the overtime law, which established that all employees working over 40 hours a week should be paid overtime pay amounting to 150%. However, there are exceptions to this rule included in the act, most notably "outside salesmen," whose roles primarily involve sales activities conducted away from the employer's place of business. The FLSA and the applicability of wage, hours, and its exemptions, has become one of the most highly litigated laws in employment law.[2] Many of these legal disputes have led to differing understandings of the appropriate burden of proof required for employers to adequately justify these exemptions. Due to these differing understandings the Supreme Court granted a writ of cert to the case E.M.D. Sales, Inc v. Carrera. The Supreme Court's decision in E.M.D. Sales, Inc. v. Carrera standardized the burden of proof in FLSA cases, becoming a monumental turning point for employers and employees alike.

E.M.D. Sales, Inc sales representatives are responsible for managing inventory and taking orders from various grocery stores. In 2017, several sales representatives filed a lawsuit against EMD, alleging that they had been incorrectly classified as "outside salesmen" and therefore were being denied their rightful overtime compensation. The district court ruled in favor of the employees, finding E.M.D. Sales liable for overtime pay under the "clear and convincing evidence" standard of proof.[3] On appeal, the question became what standard of proof should be applied to Fair Labor Standards Act cases. The Fourth Circuit Court of Appeals upheld the district courts' ruling and the use of the "clear and convincing evidence" standard. This ruling, while remaining with precedent inside the Fourth Circuit, was at odds with several other circuit courts, which had consistently applied the "preponderance of the evidence" standard. This inconsistency prompted the Supreme Court to grant certiorari and standardize a single standard of proof.

The Supreme Court unanimously ruled to overturn the Fourth Circuits' ruling, standardizing the standard of proof to the "preponderance of the evidence" standard. In the Court Opinion,

[1] U.S. Department of Labor, Fair Labor Standards Act, accessed March 30, 2025, https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FairLaborStandAct.pdf.

[2] Fishman, Robert G. 2022. "Fishman, Larsen & Callister." Fishman, Larsen & Callister | Attorneys at Law. April 15, 2022. https://www.flclaw.net/what-most-commonly-litigated-wage-hour-violation/.

[3] U.S. Supreme Court, E.M.D. Sales, Inc. v. Carrera, accessed March 30, 2025, https://www.supremecourt.gov/opinions/24pdf/23-217_9o6b.pdf.

Justice Brett Kavanaugh noted that the heightened standard could be warranted if the statute explicitly called for it, there was a special class at play that was protected under the Constitution, or other unusual government actions.[4] The Court ultimately found that the none of these scenarios applied to the FLSA exemption case, thus the traditional "preponderance of the evidence" standard should be used when ruling on these cases.

This ruling aligns with the American tradition of remaining loyal to employers, marking another big legal win for employers who will have less of a challenge with defending exemption classifications in court. This introduces significant challenges for employees seeking to assert their rights under the Fair Labor Standards Act. Establishing the "preponderance of the evidence" standard for employers potentially tilts the balance in favor of employers, making it more difficult for employees to contest exemption classifications.

This is especially true when we analyze the disadvantages employees often face in legal disputes with employers. First, we are likely to see an increased issue with resource disparity. Employers typically have far more resources, allowing them to hire experienced legal assistance and can more easily cover the cost of prolonged litigation. In contrast, employees often have very little resources and time to spend understanding legal processes and hiring adequate legal counsel. This could lead to employees making mistakes in filing, presenting evidence, and overall understanding of the legal standards.

Ultimately, there is significant evidence to support the theory that the legal system tends to favor repeat litigants over one-time litigants. Repeat litigants develop a deep understand of the court system, procedural rules, and effective litigation tactics. This institutional knowledge enables them to navigate the legal landscape more adeptly and understand how to gain procedural advantages. In contrast, one-time litigants may find the complexity of the legal system daunting and may be less equipped to assert their rights effectively.[5]

The Supreme Court's decision in E.M.D. Sales v Carrera represents a significant shift in the legal landscape of FLSA exemption cases. This change could potentially exacerbate the already existing disparity between employees and employers, potentially undermining the intended protections of the FLSA. By lowering the burden of proof for the employers, the Court made it easier for businesses to classify workers as exempt without the heightened scrutiny that the 'clear and convincing' standard would have provided. Employees may continue to face an uphill battle in proving misclassification going forward. Employees often lack the financial means to successfully challenge these exemption cases and often must work with an asymmetry of information between them and employers. Without a stronger evidentiary requirement,

[4] Ibid.

[5] Galanter, Marc. 1974. "Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change." Law & Society Review 9 (1): 95–160. https://doi.org/10.2307/3053023.

workers will find it increasingly challenging to obtain the overtime pay they are entitled to under the FLSA, potentially discouraging valid claims and diminishing the Act's effectiveness in protecting workers' rights.

DISTORTION BY DESIGN: THE LEGAL ARCHITECTURE OF PHARMACEUTICAL BENEFIT MANAGERS AND THEIR ANTI COMPETITIVE IMPLICATIONS

By: Kailyn Scott

There is not one country as distinctly at the forefront of pharmaceutical innovation as the United States. Since inception, R&D pioneered by the U.S. has brought forth immense utility to global healthcare. Unsurprisingly, this recognized value comes with cost. To many, this tradeoff is considered a necessary condition of innovation. Proponents will credit privatization of U.S. healthcare for the advantageous position in international markets, while adversaries scrutinize the marginal price passed onto American consumers. When prices of prescription drugs increase, blame is often directed at well-established pharmaceutical corporations. However, these increases cannot always be blamed on avaricious executives or uncontrollable economic events. Often, these increases are artificial. When examining the industries' organizational structure more carefully, it is apparent that accountability should not lie solely with drug manufacturers, but a much less obvious presence. Various components of the pharmaceutical industry permit anti-competitive practices that negatively affect the consumer, despite being technically legal. One of the most significant aspects to this antitrust collusion is Pharmaceutical Benefit Managers, colloquially referred to as PBMs. PBMs serve as privately owned entities operating as liaisons between drug manufacturers and pharmacies. They are responsible for determining insurance formularies. Despite their critical role, they often fail to maintain impartial work practices.

This note argues that the anti-competition legislature in its present state fails to recognize the prejudice of privately owned intermediaries and should be amended to reflect the extent to which they compromise the integrity of the pharmaceutical industry.

I. INTRODUCTION

Anti-competition law, as it relates to the pharmaceutical industry, is incredibly nuanced. Although deterrents against monopolistic practices exist, a common narrative is that the industry is exploited by the drug manufacturers and large corporations who circumvent laws. However, the true issue lies with middlemen who control drug distributions.[1] Anti-competitive practices are not difficult to identify, but they can be difficult for administrative and judicial entities to act against. In 2019 the Bureau of Competition and Federal Trade Commission, hereafter referred to as the "FTC", jointly produced an "Overview of FTC Actions in Pharmaceutical Products and Distribution". The most pressing matters included, pharmaceutical distribution and mergers, both of which contributed to the overall monopolization of the industry.[2] Under large encompassing scope of "pharmaceutical distribution", non-compete and price-fixing agreements were singled out. At this intersection between distributors and producers lies pharmaceutical benefit managers (PBMs). PBMs act as liaisons between drug manufacturers and insurance companies.[3] They are a significant actor in the pharmaceutical industry, but their role has, historically, gone unnoticed. Typically, PBMs decide which proprietary drugs are on formularies, essentially choosing which prescriptions go on which insurance plans. Often, they promote the proprietary drugs of large corporations like Pfizer, Johnson & Johnson, Merck & Co, etc. In return for pushing these corporations onto specific formularies instead of smaller boutique-pharma companies, they receive rebates. Rebates are a large part of a PBMs benefits. A rebate is a discount offered by a manufacturer to the PBM after a prescription drug has been acquired and allotted to specific formularies. In theory, a rebate should be a valuable tool to pass savings onto the consumer. However, issues arise due to the inherent biases of privately owned PBMs, which account for over 80% of the total market share. The "Big 3" PBM corporations are all under the conglomerate of major insurance companies. Caremark (CVS), Express Scripts (Cigna), and Optum Rx (UnitedHealth Group). It is impossible as a privately owned PBM under the management of a major insurance company to be completely impartial. This is supported by findings from the FTC report on PBM involvement which state, "The Big 3 PBMs also reimbursed their affiliated pharmacies at a higher rate than they paid unaffiliated pharmacies on nearly every specialty generic drug

[1] National Community Pharmacists Association, *The Truth About Pharmacy Benefit Managers: They Increase Costs and Restrict Patient Choice and Access*, September 2020, https://ncpa.org/sites/default/files/202009/ncpa-response-to-pcma-ads.pdf.

[2] Federal Trade Commission, *Overview of FTC Actions in Pharmaceutical Products and Distribution*, June 2019, accessed March 28, 2025, https://www.ftc.gov/system/files/attachments/competition-policyguidance/overview_pharma_june_2019.pdf.

[3] U.S. Federal Trade Commission, *Pharmacy Benefit Managers: The Powerful Middlemen Inflating Drug Costs and Squeezing Main Street Pharmacies*, Interim Staff Report, July 2024, https://www.ftc.gov/system/files/ftc_gov/pdf/pharmacy-benefit managers-staff-report.pdf.

examined".[4] This blatant bias is ultimately responsible for corporations artificially increasing drug prices.

II. RELEVANCE OF 15 U.S.C. § PROVISION AND RESPONSIBILITIES OF THE FTC

In terms of its structure, the FTC is both an administrative and judicial body, enforcing antitrust laws since its enactment in 1914. It is relevant to note that the FTC's Bureau of Competition is the extension by which anti-competitive action is investigated and prosecuted. Additionally, the FTC and the Department of Justice both share responsibility for prosecuting violations of antitrust law.[5] The two most applicable aspects of section 5 of the FTC Act, include consumer protection and competition laws. Section 5(a) broadly describes its protections from, "**unfair or deceptive acts or practices** in or affecting commerce." 5 U.S.C. Sec. 45(a)(1). In this context, an unfair or deceptive act includes any conduct that would violate the Sherman Antitrust Act and the Clayton Act.[6] The Clayton Act specifies regulations regarding anti-competitive mergers. This provision is very general, allowing the FTC a legal "umbrella" to prosecute and act against any acts they deem in violation of either act.

III. FTC ACTION FILED AGAINST PHARMACEUTICAL BENEFIT MANAGERS

On September 20th, 2024, the Federal Trade Commission filed action against major market pharmaceutical benefit managers, Caremark, ESI, and Optum. These names would not necessarily jump off the page, as PBMs have historically evaded public criticism. In contrast, large pharmaceutical companies receive criticism for increased drug prices and formulary costs when the true cause is not as obvious. The complaint reads, " Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by the FTC Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondents Caremark, ESI, and Optum (collectively "PBM Respondents"); and Zinc, Ascent, and Emisar (collectively "GPO Respondents") have engaged in conduct that violates Section 5 of the FTC Act, 15 U.S.C. § 45."[7] Section 5 of the FTC Act, as stated previously, is a general provision that covers any acts deemed "unfair" or "deceptive" at the discretion of the FTC. The simplicity of the provision allows the FTC to broadly bring action against the respondents. Although the case

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[4] U.S. Federal Trade Commission. "FTC Releases Second Interim Staff Report on Prescription Drug Middlemen." Press release, January 2025. https://www.ftc.gov/news-events/news/pressreleases/2025/01/ftc-releases-second-interim-staff-report prescription-drug-middlemen.

[5] U.S. Federal Trade Commission, *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, revised May 2021, https://www.ftc.gov/aboutftc/mission/enforcement-authority.

[6] Federal Trade Commission, *Federal Trade Commission Act*, accessed March 28, 2025, https://www.ftc.gov/legal library/browse/statutes/federal-trade-commission-act.

[7] Federal Trade Commission, *Part 3 Administrative Complaint (Revised Public Redacted Version)*, November 26, 2024, accessed March 24, 2025, https://www.ftc.gov/system/files/ftc_gov/pdf/612314.2024.11.26_part_3_administrative_complaint_-_revised_public_redacted_version.pdf.

is ongoing, it is likely that the respondents will be held liable for the artificial increase in insulin prices.[8] The reason that this legal endeavor is significant is a result of the central role that PBMs play in determining the cost of drugs. Admittedly, the pharmaceutical industry remains a complicated, and often misunderstood, web of anticompetitive practices that are funneled into the receiving end of customers pockets. The most difficult concept to grasp regarding pharmaceutical benefit managers today is that they are completely legal. Obviously, it cannot be overlooked that some restrictions currently exist, hopefully with more to be introduced soon. But at their simplest, an intermediary is not inherently illegal, especially when classified as an essential manager of control and market organization. However, lines are crossed when PBM's receive rebates for pushing industry leaders' proprietary drugs onto insurance formularies. This blurs the line from a truly unbiased system, to one where the very makeup of the industry itself is at the discretion of individuals who often act in the interest of the manufactures and insurance companies who own them.

IV. INCREASED SCRUTINY ON PHARMACEUTICAL BENEFIT MANUFACTURERS

There has been a noticeable uptick in the FTCs' inquiries against PBMs in recent years. This amplified scrutiny aims to further protect the consumer from being on the receiving end of anti-competitive practices. Beyond the initial case the FTC has also brought action against CVS. CVS is widely considered to be one of the largest and most influential pharmaceutical companies in the United States. As recently as February 2025, CVS Caremark was, "ordered...to comply with a Federal Trade Commission civil investigative demand filed in December 2023."[9] This means that the company is required to provide various documents and explain actions related to anticompetitive behavior in overseeing pharmacies. These are steps in the right direction. Increased scrutiny will result in more detailed dialogue surrounding the role that PBMs play in contributing to the current unfairness in the industry. Furthermore, there is an inexcusable variation in policy by state regarding the restrictions and regulations for PBMs that need to be addressed. Between the years 2017-2024, there were a total of 186 provisions throughout all 50 states regarding the conduct of PBMs.[10] These provisions varied greatly in content and regulation. This demonstrates the lack of attention that is paid to this aspect of the industry has received over the past decades. It is important, if any truly beneficial steps are to be taken, that legislation be federalized to provide the most unbiased protection for consumers. The most

[8] U.S. Federal Trade Commission. "FTC Sues Prescription Drug Middlemen for Artificially Inflating Insulin Drug Prices." Press release, September 20, 2024. https://www.ftc.gov/news-events/news/pressreleases/2024/09/ftc-sues-prescription-drug middlemen-artificially-inflating-insulin-drug-prices.

[9] National Community Pharmacists Association, "Federal Court Orders CVS Caremark to Comply with Antitrust Investigation," *NCPA Newsroom*, February 27, 2025, accessed March 17, 2025, https://ncpa.org/newsroom/qam/2025/02/27/federal-court-orders-cvs-caremark-comply-antitrustinvestigation.

[10] National Academy for State Health Policy, *State Pharmacy Benefit Manager Legislation Tracker*, accessed March 28, 2025, https://nashp.org/state-tracker/state-pharmacy-benefit-manager-legislation/#overview.

significant takeaway is that there needs to be alterations to the current laws surrounding PBMs. Currently, there is not one all-encompassing federal act aimed at regulating pharmacy benefit managers. Legislation as it stands now does not do enough to protect the consumer from the negative effects of having privately-owned PBM acting as an intermediary between insurance and manufacturing companies. FTC action has repeatedly revealed that PBMs are not acting solely in the interest of the consumer. The existence of these "Big 3" PBM corporations violates section 5(a) of the FTC Act, as they are inherently unfair entities affecting commerce. Although, it is not reasonable nor legal to ban them outright, increased scrutiny is necessary to appropriately amend their role in the pharmaceutical industry.

V. CONCLUSION

Current anti-competition legislature neglects to consider the unavoidable prejudice of commerce decisions made by privately owned pharmaceutical benefit managers. As a result, this legislation should be modified to acknowledge the extent to which they have negatively affected competition in the pharmaceutical industry. As they are privately owned, often by insurance companies, PBMs cannot ever truly be "impartial". Ultimately, their decisions are driven by profit-factors and influenced by the corporations which own them. The federal government should implement action, not necessarily to remove their presence, but to amend the nature of their roles in the pharmaceutical industry. Perhaps the only way to truly have fair-minded PBMs is to evolve their roles to be an extension of the government, introducing the first comprehensive, federally enacted legislation regarding their role as intermediaries.