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Imagine sitting on the sands of the beautiful Buck Island in St. Croix, Virgin Islands, your feet in the warm sea, when suddenly you feel a stunning blow to your foot—you look down to see blood spewing from your severed toes and a flash of barracuda tail swimming away from you.1 How were you supposed to know that you were at risk for a shoreline barracuda attack? In S.R.P. v. United States,2 twelve-year-old Sergio Perez (Perez) must have wondered the same thing when a barracuda attacked him while visiting Buck Island, a National Monument operated by the National Park Service (NPS).3 After undergoing surgery to reattach his nearly severed toes, Perez unsuccessfully tried to recover damages from the United States under the Federal Tort Claims Act (FTCA).4 Through his mother, Perez sued the NPS for failing to warn him of the possibility that a barracuda

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2. 676 F.3d 329 (3d Cir. 2012).
3. See id. at 330 (detailing how barracuda attack occurred on Buck Island, “a unit of the National Park System under the control and management of the National Park Service”).
4. See id. (discussing facts and procedural history, including district court’s dismissal for lack of subject-matter jurisdiction due to application of discretionary function exception); see also Pat Murphy, Is Park Service Liable for Barracuda Attack?, BENCHMARKS (Apr. 11, 2012), http://lawyersusaonline.com/benchmarks/2012/04/11/is-park-service-liable-for-barracuda-attack/ (discussing Third Circuit opin-
could attack him while he was on the shore.\(^5\) The Third Circuit Court of Appeals affirmed the United States District Court for the Virgin Islands’ dismissal of the case, finding that the NPS’s failure to warn of a shoreline barracuda attack fell within the ambit of the discretionary function exception to the FTCA.\(^6\)

Though the government generally waives its sovereign immunity for tort claims under the FTCA, certain discretionary decisions made by state actors remain immune pursuant to the discretionary function exception of the FTCA.\(^7\) The Third Circuit in \textit{S.R.P.} broadly construed the discretionary function exception but recognized two additional criteria in analyzing whether a government action involved a discretionary decision.\(^8\) These two criteria are: whether the government knew about the specific risk of injury, and whether the remedial steps necessary to warn about that risk are “\textit{garden-variety}.”\(^9\) Concurring in the decision, Judge Roth wrote separately to express the fear that evaluating FTCA claims under these two additional criteria will “\textit{eviscerate}” the discretionary function exception altogether.\(^10\) This casebrief, however, argues that the majority appropriately

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5. See \textit{S.R.P.}, 676 F.3d at 330–31 (discussing facts of case including how accident occurred, and lack of warning specifically addressing shoreline barracuda attacks on signage and in brochure given to visitors).

6. See id. at 330 (affirming district court’s dismissal for lack of subject-matter jurisdiction because of discretionary function exception to FTCA).

7. See 28 U.S.C. § 1346 (2006) (granting federal courts original jurisdiction over civil suits against United States for negligence of state actors); \textit{Id.} § 2680(a) (providing exception to Section 1346 waiver of immunity for claims based upon state actor’s “exercise or performance or the failure to exercise or perform a discretionary function or duty”).

8. See \textit{S.R.P.}, 676 F.3d at 338 (recognizing risk of “\textit{overly broad construction}” in that “it could easily swallow the FTCA’s general waiver of sovereign immunity and frustrate the purpose of the statute”). In further discussion, the court reasoned that “where the Government is aware of a specific risk and responding to that risk would only require the Government to take garden-variety remedial steps, the discretionary function exception does not apply.” \textit{Id.; see also Murphy, supra} note 4 (discussing how Third Circuit Judge D. Michael Fisher “\textit{thr[e]w the plaintiff’s bar a bone, recognizing that}” government’s knowledge of specific risk of injury and garden-variety type of remedy for that risk will render discretionary function exception inapplicable). For a further discussion of the court’s analysis, see \textit{infra} notes 109–37 and accompanying text.

9. \textit{S.R.P.}, 676 F.3d at 338 (acknowledging that knowledge of risk and garden-variety type of remedy bar application of discretionary function exception according to Third Circuit jurisprudence).

10. \textit{Id.} at 345 (Roth, J., concurring) (“[M]y concern [is] that the majority’s opinion will eviscerate the discretionary function exception by inserting an improper element into the analysis of whether sovereign immunity has been waived under the FTCA.”). Judge Roth opines that these two elements “are both irrelevant . . . [and] should not remove the shield of sovereign immunity.” \textit{Id.} Although Judge Roth rejects the use of both the knowledge and garden-variety criteria, she mainly took issue with the latter. See \textit{id.} at 348 (“I would apply the discretionary function exception here to bar waiver of sovereign immunity—without the ‘garden-variety’ condition imposed by the majority.”).
puts “teeth” into an otherwise “toothless standard” of the discretionary function analysis that would threaten to deprive meritorious tort claims from succeeding against the government.  

Part II discusses the statutory language of the FTCA and its discretionary function exception, examining how the Supreme Court and appellate courts, including the Third Circuit, have developed the analysis surrounding the exception. Part III analyzes the Third Circuit’s holding in S.R.P. that the NPS’s failure to warn of shoreline barracuda attacks was sufficiently discretionary. It further analyzes the court’s discussion of the government’s lack of specific knowledge of the risk of a shoreline barracuda attack and its inability to remedy the risk through garden-variety measures. Part IV discusses the implication of the court’s decision for practitioners, highlighting how some plaintiffs may still prevail in FTCA claims involving discretion by incorporating these two criteria in their arguments.

11. See id. at 336 (recognizing that discerning whether discretionary decision is subject to policy analysis is “not a toothless standard that the [G]overnment can satisfy merely by associating a decision with a regulatory concern”) (alteration in original) (internal citation omitted). For a critique of the discretionary function exception as being overly broad, see James R. Levine, The Federal Tort Claims Act: A Proposal for Institutional Reform, 100 COLUM. L. REV. 1538, 1538 (2000) (“[T]he discretionary function exception has swallowed much of the liability the FTCA creates, leaving many deserving claimants without a remedy.”); Jonathan R. Bruno, Note, Immunity for “Discretionary” Functions: A Proposal to Amend the Federal Tort Claims Act, 49 HARV. J. ON LEGIS. 411, 449–50 (2012) (arguing one reason to repeal discretionary function exception is because it screens out too many “potentially meritorious claims against the government, including claims in which a federal official’s carelessness can be proved”); Andrew Hyer, Comment, The Discretionary Function Exception to the Federal Tort Claims Act: A Proposal for a Workable Analysis, 2007 BYU L. REV. 1091, 1149 (2007) (characterizing application of discretionary function exception per Supreme Court’s most recent test as too broad and proposing “incentive recognition” approach). But see Paul F. Figley, Understanding the Federal Tort Claims Act: A Different Metaphor, 44 TORT TRIAL & INS. PRAC. L.J. 1105, 1138 (2009) (“The FTCA succeeds at the task Congress set for it. . . . [Serving] as a drawbridge across the moat of sovereign immunity, providing a remedy for those claims that fit within the bounds of the drawbridge, comply with the procedures of the bridge keeper, and avoid the exceptions Congress built into the bridge.”); Harold J. Krent, Reconceptualizing Sovereign Immunity, 45 VAND. L. REV. 1529, 1545 (arguing despite variances in interpreting discretionary function exception, “Congress’s articulation of the exception unquestionably helps preserve majoritarian policy”).

12. For a brief statutory analysis of the FTCA and its discretionary function exception, see infra notes 21–29 and accompanying text. For a discussion of courts’ interpretation of the scope of the discretionary function exception to the FTCA, see infra notes 30–97 and accompanying text.

13. For a discussion of how the court in S.R.P. reached its holding, see infra notes 115–28 and accompanying text.

14. For a discussion of additional criteria for analyzing claims under the discretionary function exception as applied in S.R.P., see infra notes 129–37 and accompanying text.

15. For a discussion of how practitioners representing FTCA plaintiffs, as well as the government, might craft arguments before the Third Circuit as to whether
II. THE CHANGING TIDES OF SOVEREIGN IMMUNITY: THE EVOLUTION OF THE DISCRETIONARY FUNCTION EXCEPTION TO THE FTCA

Before Congress enacted the FTCA in 1946, the United States enjoyed sovereign immunity from tort claims brought against it. The FTCA creates a general waiver of sovereign immunity for torts committed by governmental actors. Nevertheless, the FTCA contains numerous exceptions, including the discretionary function exception. The Supreme Court has interpreted the scope of the discretionary function exception with increasing breadth, causing some to fear that it is screening out meritorious tort claims against the government. Due to these concerns, the Third Circuit recently followed its own precedent and the lead of other courts by narrowing the discretionary function exception.

A. The Tidemark Set by Statutory Language of the FTCA

The FTCA grants district courts jurisdiction to hear tort claims brought against the United States as long as they allege money damages for personal injury incurred by the negligent acts or omissions of a United States employee in the scope of employment. Additionally, Congress set forth an interesting analogy: the United States would be liable "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or the discretionary function exception applies, see infra notes 151–54 and accompanying text.

16. See Figley, supra note 11, at 1107 (discussing extent of American sovereign immunity before passage of FTCA). Figley further notes that although "Americans injured by torts of the federal government could not sue it for damages," these claimants could still "petition the government for redress of grievances." Id. He explains that resorting to the "legislative process" was insufficient and eventually gave way to the passage of the FTCA in 1946, waiving sovereign immunity for tort claims. See id. at 1107–09.


18. For a discussion of the discretionary function exception of the FTCA and a brief statutory analysis, see infra notes 21–29 and accompanying text.

19. For a discussion of the Supreme Court’s recent interpretation of the scope and policy surrounding the discretionary function exception, including the development and alteration of a two-part test, see infra notes 30–58 and accompanying text.

20. For a discussion of United States Courts of Appeals’ decisions in interpreting the discretionary function exception, including the Third Circuit, see infra notes 59–97 and accompanying text.

21. See 28 U.S.C. § 1346(b)(1) ("[D]istrict courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment").
omission occurred.”22 Thus, under this analogy, a negligent government actor is subjected to state tort law.23

Of the many exceptions to the FTCA, the most litigated and broadest is the discretionary function exception.24 This exception provides that the main provision of the FTCA shall not apply to claims stemming from any “discretionary function or duty” that the United States’ agent or employee performs.25 This is true regardless of whether the discretionary function or duty is abused.26 Procedurally, the discretionary function exception determines whether a court has subject-matter jurisdiction to hear the claim.27 If the discretionary function exception applies, the United States is immune from suit, thus stripping the court of subject-matter jurisdiction over the claim.28 Congress left the interpretation of what actions are “discretionary” to the courts to develop.29

22. Id.

23. See Figley, supra note 11, at 1114 (explaining that “the United States’ liability is like that of a private person, not of a state or municipality,” emphasizing requirement for “analogous private person liability” as defined by state tort law).

24. See Levine, supra note 11, at 1541 (noting discretionary function exception is “most gaping and frequently litigated of the FTCA’s exceptions”).

25. 28 U.S.C. § 2680(a). Thus, the main provisions of Section 1346 do not apply to:

Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. Id.

26. See id. (providing operational language that if government employee’s action is based upon discretionary function, it is protected “whether or not the discretion involved be abused”).

27. See id. § 1346(b) (“[T]he district courts, together with the . . . District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . .”); see also S.R.P. v. United States, 676 F.3d 329, 333 n.2 (3d Cir. 2012) (recognizing discretionary function exception was “jurisdictional on its face,” but also deeming it “analogous to an affirmative defense”). In S.R.P., the plaintiff invoked jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), 1367(a), and the FTCA, 28 U.S.C. §§ 2674 and 1346(b). See id. at 331–32; see also Figley, supra note 11, at 1109–10 (discussing jurisdictional grant of FTCA, which defines scope of waiver of sovereign immunity).

28. See, e.g., Figley, supra note 11, at 1118 (“[U]nless a claim falls within the specific language of § 1346(b), it is excluded from the FTCA’s general waiver of sovereign immunity.”). Figley describes the jurisdictional grant in terms of the following metaphor: “Absent any of these elements, the claim cannot use the FTCA as a bridge across the moat of sovereign immunity.” Id.

29. See Hyer, supra note 11, at 1096 (discussing how Congress “provided little concrete guidance” as to interpreting scope of discretionary function, as other commentators have suggested as well).
B. From Low Tide to High Tide: Supreme Court Expands the Scope of the Discretionary Function Exception

Early Supreme Court cases discussing the scope of the discretionary function exception used the status of the governmental actor to determine whether the action involved sufficient discretion to confer immunity.\(^\text{30}\) This interpretation gave way to a two-part test, focusing on the nature of the governmental actor’s decision and on the actor’s subjective decision-making process when determining if an action is susceptible to policy analysis.\(^\text{31}\)

1. First Interpretations: Focus on the Actor’s Role and Separation of Powers Justifications

The Supreme Court initially framed its analysis of the scope of the discretionary function exception in terms of the United States actor’s status, differentiating between “operational” level and higher-level actors.\(^\text{32}\) In *Dalehite v. United States*,\(^\text{33}\) one of the Court’s first opportunities to interpret the scope of the discretionary function exception, the Court found that employees who were simply carrying out operations set in place by “cabinet-level” decision-makers used sufficient discretion to fit under the exception.\(^\text{34}\) The Court, after examining the legislative history of the

\(^{30}\) For a discussion of the first discretionary function exception Supreme Court cases, see *infra* notes 32–43 and accompanying text.

\(^{31}\) For a discussion of how the Supreme Court developed and modified a two-part test to determine susceptibility to policy analysis, see *infra* notes 44–58 and accompanying text.

\(^{32}\) See *Indian Towing Co. v. United States*, 350 U.S. 61, 64 (1955) (discussing “operational level” distinction and imposing liability on government to same extent as for “a private individual under like circumstances”); *Dalehite v. United States*, 346 U.S. 15, 35–37 (1953) (holding that government actors at operational or administrative level exercise discretion in carrying out directives from higher-level government employees).

\(^{33}\) 346 U.S. 15 (1953).

\(^{34}\) See *id.* at 35–37 (finding that discretionary function or duty “includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations”). The Court further found that the activities of “subordinates” in accordance with “cabinet-level” directions were immune from suit because this kind of operational level decision-making had “room for policy judgment and decision,” giving rise to discretion. *Id.* To illustrate the full significance of the *Dalehite* case, briefly setting forth its facts may be helpful. After World War II, the United States converted the manufacture of ammonium nitrate from a war-inspired need for explosives to a commercially-driven need for fertilizer both in the United States and in Europe. See *id.* at 18–19. One particular shipment of this ammonium nitrate fertilizer “produced and distributed . . . according to the specifications and under the control of the United States” made its way to Texas City for storage. See *id.* at 19–22. Over 2,000 tons of the fertilizer was loaded onto French ships, which then exploded in the harbor, leveling the city and killing “many” people. See *id.* at 22–23. The ensuing lawsuit was the Supreme Court’s first chance to interpret the scope of the discretionary function exception. See *id.* at 17 (granting certiorari “because the case presented an important problem of federal statutory interpretation [of the Federal Tort Claims Act]”).
FTCA, found that “it was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function.” The Court, however, declined to define with precision where this discretionary function ends. Instead, it held that the protection afforded to higher government actors making decisions also shielded subordinates merely following orders.

Separation of powers has been touted as one reason for subsequently developing the Court’s discretionary function exception jurisprudence cautiously. This view is clearly expressed in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, where the Court refocused the scope of the discretionary function exception to “the challenged acts of a Government employee—whatever his or her rank.” The Court interpreted Congress’s intent as wishing to “prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.”

Thus, the discretionary function exception was the “boundary” between allowing tort claims against the federal government to succeed and pro-

35. Id. at 27–28.

36. See id. at 35 (finding it “unnecessary to define, apart from this case, precisely where discretion ends”). The Court’s next case affirmed the status-based distinction in the scope of the discretionary function exception and took up the issue of the private person analogy expressed in the main provision of the FTCA. See *Indian Towing Co.*, 350 U.S. at 68–69 (“The broad and just purpose which the [FTCA] was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable.”).

37. See *Dalehite*, 346 U.S. at 36 (“Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.”).

38. See, e.g., Krent, supra note 11, at 1530–31 (“Judicial review could impede majoritarian policymaking if judges were empowered to review certain discretionary executive branch actions for their reasonableness or to force the executive branch to uphold contractual obligations that it believes are no longer in the nation’s best interests.”). But see Bruno, supra note 11, at 435–38 (criticizing scholars’ arguments that discretionary function immunity preserves balance of powers that would otherwise “be compromised were such [policy] judgment subject to judicial review through the adjudication of tort claims”). Bruno proposes that this fear of legislative and agency policy-making being subjected to judicial review in areas where the judiciary has no experience is “exaggerated.” See id. at 438. Bruno argues that the negligence framework allows judges to review tort claims without “overstep[ping] their legal authority or competence” in deciding tort claims against the government. See id. at 440. He states:

The question presented by a tort claim that arises from some federal employee’s policy-based decision is not whether, in the abstract, the decision taken was sound or wise . . . . [But rather] whether, in light of existing case law, the allegedly tortious acts or omissions at issue constituted breach of some valid duty of care owed to the plaintiffs.


40. Id. at 813.

41. Id. at 814.
tecting the government’s role in exercising discretion while creating and implementing important policy goals. But this did little to clarify what Dalehite declined to define: where the discretionary function exception does not apply.

2. The Supreme Court’s Two-Part Test

Four years later in Berkovitz v. United States, the Supreme Court identified two particular instances where the discretionary function exception does not bar a plaintiff’s tort claim: where policy “leaves no room for an official to exercise policy judgment in performing a given act,” and where an act simply does not involve the exercise of judgment. The Court also set forth a two-part test meant to analyze tort claims in light of the discretionary function exception. The first part asks whether any regulations, policies, or statutes specifically mandate a course of action that ultimately gives rise to the tort claim. If so, the government employee or actor has no business exercising discretion in the first place, and the discretionary function exception necessarily does not apply. However, if there is no such regulation mandating a specific course of action, or if the regulation is sufficiently broad enough to allow discretion within its bounds, courts should advance to the second part of the test: whether the discretion exercised is the kind of discretion that the exception is designed to protect.

Almost three years after Berkovitz, in United States v. Gaubert, the Supreme Court transformed this two-part test and expanded the scope of the

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42. See id. at 808 (“The discretionary function exception . . . marks the boundary between Congress’ willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.”).

43. For a discussion of where the Dalehite court declined to extend the scope of the discretionary function exception, see supra note 36 and accompanying text.

44. 486 U.S. 531 (1988).

45. See id. at 546–47 (“[I]f the [governmental actor’s] policy leaves no room for an official to exercise policy judgment in performing a given act, or if the act simply does not involve the exercise of such judgment, the discretionary function exception does not bar a claim that the act was negligent or wrongful.”).

46. See id. at 536 (setting forth two-part test).

47. See id. (discussing how existence of “a federal statute, regulation, or policy” that “specifically prescribes a course of action for an employee to follow” leaves that employee with “no rightful option but to adhere to the directive”). The Court reasoned that if the employee is forced to follow these directives, then this is not a meaningful exercise of discretion that would allow the discretionary function exception to apply. See id.

48. See id. (“[C]onduct cannot be discretionary unless it involves an element of judgment or choice.”).

49. See id. (reasoning that if employee has no specific mandatory directive to follow and “the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield”).

discretionary function exception.\textsuperscript{51} It found that “each of the regulatory actions in question involved the kind of policy judgment that the discretionary function exception was designed to shield.”\textsuperscript{52} Moreover, the Court emphasized that governmental action need not have actually resulted from an exercise of policy judgment.\textsuperscript{53} Rather, the focus of discretionary function analysis is “on the nature of the actions taken and on whether they are susceptible to policy analysis.”\textsuperscript{54} This line of the decision essentially altered the second part of the \textit{Berkovitz} test to whether actions are “susceptible to policy analysis.”\textsuperscript{55} As a result, some commentators have pointed to the second part of the test as the source of much inconsistency within the circuits after \textit{Gaubert}.\textsuperscript{56} For instance, the lack of a clear standard in the second part of the test has led to partisan-based results.\textsuperscript{57}

\textsuperscript{51} See Bruce A. Peterson & Mark E. Van Der Weide, \textit{Susceptible to Faulty Analysis: United States v. Gaubert and the Resurrection of Federal Sovereign Immunity}, 72 Notre Dame L. Rev. 447, 456 (1997) (discussing Justice White’s “single sentence that changed the entire focus of the exception”). Peterson and Van Der Weide argue that Justice White “provided neither explanation nor authority for his transformation of the second prong of the \textit{Berkovitz} test.” \textit{Id.} They note the “inquiry moved from the realm of the factual to the realm of the hypothetical” when the nature of the actions, not the actor’s subjective intent, became the focus of discretionary function exception analysis. \textit{Id.; see also} Bruno, supra note 11, at 429 (discussing how Supreme Court sought partly to “correct the Fifth Circuit’s proposition that ‘operational’ or low-level management decisions necessarily fall outside the scope of the government’s discretionary function immunity”). The \textit{Gaubert} Court sought to resolve the agency issue framed in \textit{Dalehite}, and in doing so, it expanded the scope of the discretionary function exception. \textit{See id.}

\textsuperscript{52} \textit{Gaubert}, 499 U.S. at 332. Here, the governmental actions at issue were the alleged negligence of the Federal Home Loan Bank Board and the Federal Home Loan Bank-Dallas in “carrying out their supervisory activities.” \textit{Id.} at 318. The plaintiff, chairman of the board and the largest shareholder of a federally insured savings and loan, lost millions of dollars in a poorly supervised merger. \textit{See id.} at 319–20. The Court found that the federal banking regulations on point “established governmental policy which is presumed to have been furthered when the regulators exercised their discretion to choose from various courses of action in supervising [one of the merged entities].” \textit{Id.} at 332.

\textsuperscript{53} See Bruno, supra note 11, at 429 (discussing how \textit{Gaubert} Court addressed longstanding “ambiguity in the case law as to whether a government agent’s action, in order to fall within the discretionary function exception, must have actually been the product of policy judgment”).

\textsuperscript{54} \textit{Gaubert}, 499 U.S. at 325.

\textsuperscript{55} See Peterson & Van Der Weide, supra note 51, at 456 (discussing effect of Justice White’s alteration of second part of \textit{Berkovitz} test).

\textsuperscript{56} See, e.g., 1 \textsc{George Cameron Coggins \\& Robert L. Glicksman, Public Natural Resources Law} § 1066 (2d ed. 2013) (stating that “courts are not entirely in agreement over the scope of the discretionary function exception,” particularly for recreation cases).

\textsuperscript{57} See Robert C. Longstreth, \textit{Does the Two-Prong Test for Determining Applicability of the Discretionary Function Exception Provide Guidance to Lower Courts Sufficient to Avoid Judicial Partisanship?}, 8 U. St. Thomas L.J. 398, 399 (2011) (“[F]ederal Republican-nominated judges are more likely than Democratic-nominated judges to find that the discretionary function exception bars tort actions against the federal government.”). Judge Longstreth determined the partisanship of the judges according to the party of the President who nominated them. \textit{See id.} at 398–99. He
Others argue that *Gaubert* made it easier for the government to prevail under the discretionary function exception.\(^{58}\)

C. *There Are Plenty of Fish in the Sea: Interpretive Differences Among Courts*

Tracing the spectrum of decisions hinging on the applicability of the discretionary function exception shows that courts’ analyses are subjective and fact-driven.\(^{59}\) Distinguishing design from implementation, balancing safety considerations, knowledge of prior similar risks, ability to perform routine maintenance and repair work, and budgetary issues all surface as themes throughout the sea of cases.\(^{60}\) Although some courts have found the discretionary function exception inapplicable under these themes, the lack of a bright-line rule has led to more favorable decisions for the government since *Gaubert*.\(^{61}\)

then proposed that, if the second prong of the discretionary function exception were sufficiently clear in terms of offering guidance to courts, there should be no variance among Republican and Democrat judges. See id. at 399. His findings indicated that there was little variance among decisions that turned on the first prong of the test (whether there was a federal statute on point to eliminate discretion), while Democratic-nominated judges were three times more likely than Republican-nominated judges to find that “the conduct at issue was not susceptible to policy analysis” in the second prong. See id. at 406. He concluded his article by arguing that “reducing the open-ended nature of the inquiry under the second prong” will help rein in some of the seemingly partisan biased opinions. See id. at 407.

58. See Peterson & Van Der Weide, supra note 51, at 465 (noting that “cases bear . . . out” the prediction that after *Gaubert* “the proportion of government defendants able to satisfy the second prong of the *Berkovitz* test and obtain discretionary function immunity” would increase).

59. See, e.g., Terbush v. United States, 516 F.3d 1125, 1136 (9th Cir. 2008) (“[O]ur case law may not be in complete harmony on this issue, which is perhaps the inevitable result of such a policy-specific and fact-driven inquiry.”). The court in *Terbush* further noted that the struggle courts engage in is marked by their reluctance to create bright-line rules, in keeping with Supreme Court precedent, which likewise refuses to “create formulaic categories.” See id. at 1129–30 (discussing Supreme Court and lower court precedent refusing to create hard rules for classifications of conduct). Courts have instead chosen to define discretionary activity along a spectrum. See O’Toole v. United States, 295 F.3d 1029, 1035 (9th Cir. 2002) (describing analysis under second prong of test as falling along spectrum). As the court in *O’Toole* explained, at one end of the spectrum, “agency decisions [are] totally divorced from the sphere of policy analysis,” as in car accidents caused by government actors. Id. At this end, the discretionary function exception does not apply because “[t]he discretion exercised by the negligent government driver is just not the kind of decisionmaking” meant to be shielded. Id. At the other end of the spectrum, “agency actions [are] fully grounded in regulatory policy, where the government employee’s exercise of judgment is directly related to effectuating agency policy goals.” Id. These types of decisions are meant to be shielded, such as regulating airline safety. See id. (citations omitted).

60. For a discussion of the themes that courts draw on in discretionary function exception analysis, see infra notes 62–97 and accompanying text.

61. For a discussion of successful plaintiffs facing the discretionary function exception, as well as those cases where immunity is conferred, see infra notes 70–97 and accompanying text.
1. The Design-Implementation Distinction and Safety

Some discretionary decisions that involved design work, such as road design, were protected by the discretionary function exception.\(^62\) On the other hand, when a decision involved merely implementing a design, any discretion involved was generally not the kind protected by the discretionary function exception.\(^63\) This is particularly true in cases where the implementation of a design mostly involves safety concerns, such as maintaining a road’s design so that it was safe for higher speeds.\(^64\) Balancing competing safety concerns in implementing a design, however, may be susceptible to policy analysis.\(^65\)

62. See, e.g., ARA Leisure Servs. v. United States, 831 F.2d 193, 195 (9th Cir. 1987) (“Park Service’s decision to design and construct [park road] without guardrails was grounded in social and political policy. . . . [And thus] is protected by the discretionary function exception.”). But see Soldano v. United States, 453 F.3d 1140, 1150 (9th Cir. 2006) (finding Park Service’s decision to design sign placement along park road was protected by discretionary function exception, but decision to design part of road with “an unsafe speed limit” did not insulate government from liability).

63. See, e.g., Whisnant v. United States, 400 F.3d 1177, 1181, 1185 (9th Cir. 2005) (noting trend in case law distinguishing design from implementation and holding FTCA did not bar plaintiff’s claim for negligence in implementing safety regulations); Faber v. United States, 56 F.3d 1122, 1126–27 (9th Cir. 1995) (rejecting government’s argument that implementing safety mandate to post signs warning of diving hazards involved discretion); cf. Cope v. Scott, 45 F.3d 445, 449 (D.C. Cir. 1995) (finding fault with plaintiff’s argument that governmental actions of policy implementation are not protected by discretionary function exception because this argument “is merely an effort to establish yet another in a long series of ‘analytical frameworks’ that the Supreme Court has rejected as an inappropriate means of addressing the discretionary function exemption”) (citation omitted).

64. See, e.g., Soldano, 453 F.3d at 1150–51 (reasoning that Park Service’s decision to design road without guard rail near vista point may have involved discretion but setting speed limit near vista point inconsistent with design choice was unsafe for park visitors and not protected by discretionary function exception); Whisnant, 400 F.3d at 1181 (“Matters of scientific and professional judgment—particularly judgments concerning safety—are rarely considered to be susceptible to social, economic, or political policy.”); ARA Leisure Servs., 831 F.2d at 195–96 (holding that, in contrast to designing park road without guardrail, neglecting to maintain road in safe condition subjected United States to liability when tour bus drove off road).

65. See Bailey v. United States, 623 F.3d 855, 863 (9th Cir. 2010) (holding United States Army Corps of Engineers immune under discretionary function exception because it had to balance competing safety considerations, rendering decision policy-oriented). The plaintiff-decedent in Bailey drowned when his boat went over a submerged dam, where warning signs had been washed away and not replaced. See id. at 858–59 (discussing facts). The Corps had to balance the risk that its employees might encounter dangerous water when trying to replace the signs with the risk that boaters would not be warned of the upcoming submerged dam. See id. at 862 (noting balancing). The court determined this was a balancing act of “competing policy interests” and was thus susceptible to policy analysis under the discretionary function exception. See id. The dissent argued this was inconsistent with case law establishing that “safety considerations are not policy considerations.” Id. at 866 (Fletcher, J., dissenting) (citations omitted).
2. **Budgetary Considerations**

Governmental actors are frequently faced with a choice of how to allocate scarce funds when making a decision that could fall under the discretionary function exception.66 But, budgetary considerations themselves have generally not been accepted as legitimate policy concerns.67 Courts have recognized that budgetary concerns underlie virtually any decision a governmental actor must make, undoubtedly leading to the discretionary function exception swallowing the whole of the FTCA.68 An exception has been made, however, when concerns with how to budget limited funds were balanced against virtually unlimited natural hazards for which warnings could be given.69

3. **Failure to Warn Cases: Policies Granting Discretion**

Courts are “not entirely in agreement” over the scope of the discretionary function exception in recreation cases involving “low-level governmental actions,” as in the decision of whether to warn of certain dangers.70 Often, when a regulation or statute grants a governmental actor broad discretion, any decisions regarding warning about hazards has

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66. See Peterson & Van Der Weide, supra note 51, at 498–500 (discussing cost considerations of governmental agencies).

67. See, e.g., Cope, 45 F.3d at 449 (rejecting government’s argument that “underlying fiscal constraints should therefore exempt ‘virtually all government activity’”); ARA Leisure Servs., 831 F.2d at 196 (holding decisions of how to allocate funds for maintaining park system were not intended to confer immunity).

68. See, e.g., Cope, 45 F.3d at 449 (discussing how government’s budgetary argument leads to idea that governmental decisions that “involve choice and the faintest hint of policy concerns are discretionary and subject to the exception”). The Cope court remarked that this argument would “allow the exception to swallow the FTCA’s sweeping waiver of sovereign immunity.” Id. (citation omitted); see also ARA Leisure Servs., 831 F.2d at 196 (“Budgetary constraints underlie virtually all governmental activity.”); Peterson & Van Der Weide, supra note 51, at 498–500 (explaining interaction between budget considerations and adoption of safety precautions, but recognizing that “courts’ acceptance of budgetary constraints as a ‘policy’ factor is understandable”). Peterson and Van Der Weide argue, however, that the Supreme Court has never officially recognized budget constraints as a policy factor and that courts should not permit private or public organizations to avoid liability on budgetary considerations. See id. at 501. Instead, “discretionary function immunity should only be available for decisions of a uniquely governmental—i.e., policy—nature” without considering monetary resources. Id.

69. See Valdez v. United States, 56 F.3d 1177, 1180 (9th Cir. 1995) (holding that National Park Service, “[f]aced with limited resources and unlimited natural hazards,” was protected in making policy decisions balancing “goal of public safety against competing fiscal concerns as well as the danger of an overproliferation of warnings”); see also Elder v. United States, 312 F.3d 1172, 1181 (10th Cir. 2002) (“[P]ark officials must weigh the cost of safety measures against the additional safety that will be achieved. Even inexpensive signs may not be worth their cost.”).

70. See COGGINS & GLICKSMAN, supra note 56 (surveying decisions in recreation cases that interpret scope of discretionary function exception and comparing results by circuit).
also been protected under the discretionary function exception.\footnote{1} Yet, there are exceptions to this general rule, such as decisions to zone a particular property, as articulated by the Tenth Circuit Court of Appeals in \textit{Boyd v. United States}.\footnote{2} The decision of whether to zone water was considered discretionary because it exhibited a balance between expenditures on safety and recreational use; however, the court held the decision to neglect to warn of dangerous conditions in an unzoned water area simply did not involve discretion.\footnote{3}

Similarly, in \textit{Smith v. United States},\footnote{4} the Tenth Circuit considered the decision to leave an area undeveloped as sufficiently discretionary, but determined that the choice not to warn or safeguard this area from danger was not an exercise of discretion.\footnote{5} Conversely, in \textit{Elder v. United States},\footnote{6} the Tenth Circuit found that the decision not to post additional warning signs was continuing a course of action undertaken to provide warning and thus was discretionary because the decision was sufficiently grounded in social and economic policy.\footnote{7}

\section{Knowledge of Risk of Harm and “Garden-Variety” Remedy}

The Third Circuit’s additional two elements of knowledge and garden-variety remedies are not entirely novel within Third Circuit precedent.\footnote{8} Other courts have also considered these elements in analyzing

\footnote{1. \textit{See}, e.g., \textit{Childers v. United States}, 40 F.3d 973, 976 (9th Cir. 1995) (holding NPS’s \textit{“decisions as to the precise manner”} of warning public about open but unmaintained trails in winter \textit{“clearly [fell] within the discretionary function exception”}); \textit{Valdez}, 56 F.3d at 1179 (finding NPS was not liable in following guidelines that vested it with discretion in carrying out \textit{“general policy goals regarding visitor safety”}). \textit{But see} \textit{Oberson v. U.S. Dep’t of Agric., Forest Serv.}, 514 F.3d 989, 998 (9th Cir. 2008) (holding Forest Service liable for failing to warn of known hazard on snowmobile trail despite discretion granted as to how to warn visitors).

\footnote{2. 881 F.2d 895 (10th Cir. 1989).

\footnote{3. \textit{See id. at 897} (upholding jurisdiction for plaintiff’s claim for husband’s wrongful death when he was struck by boat and killed in unzoned waters because decision not to warn at all was not discretionary, even though decision whether to zone waters or not was susceptible to policy analysis).

\footnote{4. 546 F.2d 872 (10th Cir. 1976).

\footnote{5. \textit{See id. at 877} (holding that decision to leave area undeveloped was discretionary under discretionary function exception, but failing to post warning signs or provide safeguards around super-heated thermal pool was not discretionary).

\footnote{6. 312 F.3d 1172 (10th Cir. 2002).

\footnote{7. \textit{See id. at 1180} (finding that discretionary function exception applied to decision not to post more warning signs or erect more barriers in area where young boy slipped on algae and died while crossing stream in national park).

\footnote{8. \textit{See}, e.g., \textit{Cestonaro v. United States}, 211 F.3d 749, 752, 757 (3d Cir. 2000) (holding \textit{“subsequent decisions concerning the [parking] lot were not necessarily protected”} due to NPS’s failure to address known dangerous condition); \textit{Gotha v. United States}, 115 F.3d 176, 181 (3d Cir. 1997) (characterizing case of failing to install handrails along dark pathway \textit{“mundane, administrative, garden-variety, housekeeping problem”}).}
whether the discretionary function exception applies.\footnote{79}{For a discussion of other courts the Third Circuit relied on in \textit{S.R.P.} when discussing these two elements, see \textit{infra} note 132 and accompanying text.}

It is not clear, however, whether these courts intended the additional elements to be incorporated into an analysis of the susceptibility to policy analysis.\footnote{80}{For a discussion of how the Third Circuit utilized these two criteria in \textit{S.R.P.}, see \textit{infra} notes 129–50 and accompanying text.}

\section{Knowledge}

Courts have found that when a governmental actor has reason to know about a specific risk of injury or harm but does nothing about it, future injuries of the same kind have rendered the discretionary function exception inapplicable.\footnote{81}{See, e.g., Oberson v. U.S. Dep’t of Agric., Forest Serv., 514 F.3d 989, 998 (9th Cir. 2008) (finding Forest Service liable due to its knowledge of hazard on snowmobile trail through its own investigation sixteen days before plaintiff was injured, and its failure to warn about hazard); Cope v. United States, 45 F.3d 445, 452 (D.C. Cir. 1995) (holding that government’s decisions on how and where to post warning signs for dangerous road condition was not shielded by discretionary function exception).}

Some courts have discussed the knowledge element as an important factor, while others have refused to review it as a matter of refraining from impermissible judicial review of policy decisions.\footnote{82}{See, e.g., Terbush v. United States, 516 F.3d 1125, 1139 (9th Cir. 2008) (holding that NPS’s determination not to warn public about rockfall that occurred three weeks prior to plaintiff’s injury in subsequent rockslide was "precisely the kind of determination that is protected from [the court’s] review").}

Specifically within the Third Circuit, in \textit{Cestonaro v. United States},\footnote{83}{211 F.3d 749 (3d Cir. 2000).} the court found the discretionary function exception did not bar the plaintiff’s claim of negligent maintenance of a parking lot.\footnote{84}{See id. at 757 (discussing court’s holding).}

In that case, the plaintiff filed a claim on behalf of her husband, who was killed by an armed gunman in an unofficial parking lot in Christiansted National Historic Site—a lot maintained by the NPS.\footnote{85}{See id. at 751 (discussing facts of case).}

The court noted that the NPS, though aware of crimes committed in the area and regular safety complaints around the lot, did not take any further actions in deterring nighttime parking at the lot.\footnote{86}{See id. at 752 (indicating court’s reasoning).}

The court emphasized that susceptibility analysis "is not a toothless standard that the government can satisfy merely by associating a decision with a regulatory concern."\footnote{87}{Id. at 755 (citation omitted).}

The court ultimately held the discretionary function exception did not apply because the court was unable to find a "rational nexus" between the NPS’s inaction in maintaining the lot and its stated discretionary function of balancing concerns for historic preservation with safety.\footnote{88}{See id. at 759 (noting failure to find decision related to policy).}
b. Ordinary and Routine Maintenance

Some courts discuss repairs in terms of how ordinary or garden-variety they are.89 *Gotha v. United States*90 is one example of a Third Circuit case upholding a claim over the discretionary function exception, offering a textbook example of the kind of negligence situation where the Third Circuit is comfortable holding the government liable.91 In *Gotha*, the plaintiff fell and injured her ankle while descending a dark, unpaved pathway on the Navy facility where she was contracted to work.92 She sued under the FTCA for negligent maintenance of the area, specifically for failure to light the area adequately and failure to provide a stairway with handrails.93 The United States argued that constructing such handrails and lighting could interfere with cables linked to monitoring on-site weapons, which therefore required a discretionary decision grounded in policy concerns.94 The court found this argument too speculative, noting “[t]his case is not about a national security concern, but rather a mundane, administrative, garden-variety, housekeeping problem that is about as far removed from the policies applicable to the Navy’s mission as it is possible to get.”95 The court then squared its decision with *Gaubert*, finding that the conduct of maintaining the pathway was not sufficiently “grounded in the policy of the regulatory regime.”96 In its analysis in *S.R.P.*, the Third Circuit explicitly incorporated the garden-variety remedy and the government’s knowledge of a specific risk of harm.97

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89. See, e.g., O’Toole v. United States, 295 F.3d 1029, 1035 (9th Cir. 2002) (describing policy analysis for second prong of test as falling along spectrum); Mitchell v. United States, 225 F.3d 361, 366 (3d Cir. 2000) (concluding that Park Service’s failure to repair concrete culvert on side of road that plaintiff smashed car into implicated policy concerns in “[the] decision not to undertake a reconstruction of all drainage ditches along [the road]” and therefore was “not [a] ‘mundane, administrative, garden-variety, housekeeping problem’”); ARA Leisure Servs. v. United States, 831 F.2d 193, 196 (9th Cir. 1987) (finding Park Service’s failure to maintain road safety “falls in the category of ‘ordinary garden-variety negligence’”).
90. 115 F.3d 176 (3d Cir. 1997).
91. See id. at 182 (“[I]t is difficult to conceive of a case more likely to have been within the contemplation of Congress when it abrogated sovereign immunity than the one before us.”).
92. See id. at 178 (examining facts of case).
93. See id. (stating plaintiff’s claims).
94. See id. at 181 (discussing government’s argument).
95. Id. (emphasis added).
96. Id. at 182 (citing Gaubert v. United States, 499 U.S. 315, 325 (1991)).
97. For a discussion of the Third Circuit’s analysis under *S.R.P.*, see infra notes 129–50 and accompanying text.
III. **Third Circuit Prevents the Discretionary Function Exception from Swallowing the FTCA**

Perez brought suit against the government for failing to warn him about a shoreline barracuda attack. In reviewing the case, the Third Circuit first found that the government’s decision not to warn involved the right kind of discretion under the discretionary function exception; however, it then analyzed the case in terms of whether the government had knowledge of the specific risk of a shoreline barracuda attack, and whether eliminating this risk would involve garden-variety type measures. Though Perez did not succeed under either analysis, the court opened the door to future plaintiffs who meet the two additional criteria. Though the concurrence criticized these criteria as potentially eviscerating the discretionary function exception, the majority prevents the exception from swallowing the whole of the FTCA by aligning it more closely to the purpose of the FTCA.

A. **Paradise Lost**

On May 9, 2004, twelve-year-old Perez was playing on the beach of Buck Island in the Virgin Islands. While sitting on the beach with his feet in the shallow water, a barracuda attacked him, nearly severing three of his toes, two of which required surgery to reattach. Barracudas do not typically attack humans, and the NPS was only aware of one other barracuda attack on a human in Buck Island’s recent history. In addition to warning about other dangerous wildlife, the NPS warned visitors in a brochure and on signs posted around the island to treat barracudas with

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98. For a discussion of the facts and disposition of *S.R.P.*, see *infra* notes 102–08 and accompanying text.

99. For a discussion of the court’s analysis of *S.R.P.*, see *infra* notes 109–28 and accompanying text.

100. For a discussion of how the Third Circuit’s approach confines the discretionary function exception to a reasonable scope by adding two additional elements, see *infra* notes 129–37 and accompanying text.

101. For a discussion of the concurrence in *S.R.P.* and its criticism of the majority’s approach, see *infra* notes 147–48 and accompanying text.


103. *Id.* (discussing plaintiff’s injury).

104. *Id.* at 331 (discussing how barracudas “are not generally aggressive toward humans” unless they mistake human limbs for prey, and relating event to prior attack at Buck Island). The NPS was aware of one other barracuda attack on a human at Buck Island that occurred about twenty-two years before Perez’s attack. *Id.* (discussing previous barracuda attack on fisherman). That attack was distinguishable from the present one because the fisherman who was attacked allegedly attracted the barracuda by “pouring fish oil in the water around his feet.” *Id.* Additionally, several other snorkelers nearby were not attacked in that incident. *Id.* (distinguishing fisherman’s attack from present case).
case.105 Because Perez was injured on a unit of the National Park System controlled and managed by the NPS, Perez, through his mother, filed suit against the United States under the FTCA for failure to adequately warn visitors of the dangers posed by barracudas “to shallow water bathers.”106 The District Court for the Virgin Islands dismissed the case for lack of subject-matter jurisdiction, finding the discretionary function exception applied.107 Perez then appealed to the Third Circuit.108

B. The Teeth in the Third Circuit’s Analysis

The court laid out a thorough analysis of the case under the two parts of the Berkovitz/Gaubert test, finding the NPS’s decision not to post warnings about shoreline barracuda attacks was susceptible to policy analysis.109 After doing so, however, the court considered the implications of an overly broad interpretation of the discretionary function exception and how this would frustrate the purpose of the FTCA.110 In response to the concern that the exception might swallow the FTCA, the court articulated two new criteria for applying the discretionary function exception that has roots in Third Circuit precedent: knowledge of the specific risk, and whether the type of remedy required to address this risk was a routine,

105. See id. (discussing NPS’s efforts to warn of natural hazards on Buck Island). Visitors can only reach Buck Island by boat, and all private boaters who reach the island must obtain an anchoring permit. See id. at 330–31 (discussing accessibility of Buck Island by either private concessionaries or private boat and detailing process of receiving “Buck Island Reef Brochure”). The anchor permit contains “Safety Tips for Sea and Shore,” among other pertinent information, which states:
Shallows and reefs near shore contain sharp corals, stingrays, spiny sea urchins, fire coral, fire worms, and barbed snails. Cuts from marine organisms infect quickly, so clean and medicate them. Portuguese man-o-war and sea wasps, both stinging jellyfish, are rarely found here. Barracuda and sharks, if encountered, should be treated with caution but are not usually aggressive toward snorkelers.

Id. at 331 (emphasis added). This information was also posted in English and in Spanish on signs in the picnic areas of Buck Island. See id. (detailing posted safety information).

106. See id. at 330 (stating procedural posture and relationship of Buck Island Monument to National Park Service).

107. See id. at 347 (discussing district court’s findings).

108. See id. (discussing procedural history).

109. For a discussion of the court’s application of the Berkovitz/Gaubert test, see infra notes 113–28 and accompanying text.

110. See S.R.P., 676 F.3d at 338 (“We acknowledge that if the discretionary function exception is given an overly broad construction, it could easily swallow the FTCA’s general waiver of sovereign immunity and frustrate the purpose of the statute.”).
garden-variety type. \footnote{111 For a discussion of the court’s consideration of these two additional criteria, see infra notes 129–37 and accompanying text.} Ultimately, Perez’s claim still failed under this analysis. \footnote{112 See S.R.P., 676 F.3d at 342 (relying on Gotha and Cestonaro to find that “neither condition for finding the challenged conduct outside the scope of the discretionary function exception [was] present in this case”).}

1. Susceptibility to Policy Analysis

The court began its analysis with the “threshold matter” of “identifying the conduct at issue.” \footnote{113 Id. at 332 (internal citation omitted).} Perez alleged the United States was negligent specifically for not providing enough warning to shallow water bathers on the shoreline of barracuda attacks. \footnote{114 See id. at 334 (discussing allegations of plaintiff’s complaint). The NPS had already provided some warning about the presence of barracudas on Buck Island, but Perez defined the NPS’s negligent conduct narrowly, alleging that the existing warnings “appl[ied] only to snorkelers.” Id.}

On the other hand, the United States argued that the NPS was only aware in the “most general sense” that barracudas were dangerous to humans, not that they “posed a risk to shoreline swimmers specifically.” \footnote{115 Id.} Thus, the “key dispute” in this case was how specific or general the government’s knowledge was of the danger posed by barracudas. \footnote{116 See id. (“[K]ey dispute in this case is the extent of the NPS’s knowledge regarding the dangers posed by barracudas.”).}

The court next determined whether any specific regulation mandated a course of action or, alternatively, whether there was room for discretion. \footnote{117 See id. (noting that court must “first determine whether a statute, regulation, or other policy required the NPS to warn of hazardous conditions in a specific manner, or whether the NPS’s actions were discretionary because they involved ‘an element of judgment or choice’” (internal citation omitted)). For a discussion of the two-part test first set forth in Berkowitz and modified by Gaubert, see supra notes 44–58 and accompanying text.} The court reviewed the NPS Organic Act, which directs the NPS to conserve “natural and historic objects” in national parks, as well as some of the NPS’s internal policies, which provide the NPS’s duty to “remove known hazards and apply other appropriate measures, including . . . signing . . . [T]hat have the least impact on park resources and values.” \footnote{118 S.R.P., 676 F.3d at 334–35 (internal citation omitted).} The court determined that these policies “clearly vest[ed] local NPS officials with broad discretion” in crafting warnings against natural hazards. \footnote{119 Id. at 335. The court agreed with the United States, who argued that “the question of whether and to what extent to warn involved significant policy considerations.” Id. at 331–35.} Thus, no statute or regulation “mandated any particular method for warning about marine hazards on Buck Island.” \footnote{120 Id.}
Because the court found that the NPS used discretion in determining whether to warn of shoreline barracuda attacks, the court next analyzed whether this discretion was "susceptible to policy analysis." The court further noted, "susceptibility analysis is not a toothless standard" that the government can easily satisfy by pointing to some "regulatory concern." Rather, the court indicated that it would be looking for a "rational nexus" between the government's decision and legitimate regime-oriented policy concerns.

The NPS's determination not to post additional warnings regarding barracudas was susceptible to policy analysis because it involved balancing safety with overloading visitors with warnings. In deciding whether to warn about a shoreline barracuda attack and by how much, "the NPS had to weigh the potential benefits of additional warnings against the costs of such warnings, including the risk of numbing Buck Island visitors to all warnings." The court considered the "virtually unlimited natural hazards" present on Buck Island and reasoned that the NPS had to make "a policy determination" about which hazards to address and how to best advise visitors of their dangers. Making this determination was "directly 516 F.3d 1125 (9th Cir. 2008); Elder v. United States, 312 F.3d 1172 (10th Cir. 2002); Shansky v. United States, 164 F.3d 688 (1st Cir. 1999); Blackburn v. United States, 100 F.3d 1426 (9th Cir. 1996); Valdez v. United States, 56 F.3d 1177 (9th Cir. 1995)) (discussing First, Ninth, and Tenth Circuit cases dealing with NPS's decisions to warn or not to warn of dangers). 121. Id. at 336 (quoting Gaubert v. United States, 499 U.S. 315, 325 (1991)). The court prefaced its analysis by first discussing the rebuttable presumption that actions by a governmental actor vested with discretion by legislation are "grounded in policy." See id. (discussing rebuttable presumption arising when government agent may exercise discretion according to statute). The government agent's acts are actually presumed to be "grounded in policy when exercising that discretion" when it is afforded by a statute. Id. The court cites Third Circuit precedent for the idea that the presumption is rebuttable. See id. (citing Cestonaro v. United States, 211 F.3d 749, 755 n.4 (3d Cir. 2000)). 122. Id. (citing Cestonaro, 211 F.3d at 755). 123. Id. (citing Cestonaro, 211 F.3d at 759). 124. See id. (proceeding to second part of Berkovitz/Gaubert text). 125. Id. (holding that NPS's decision was right kind of discretion and was thus susceptible to policy analysis). 126. Id. at 336–37 (concluding that nature of NPS's decision regarding posting signs involved policy determinations). Bombarding visitors with signs about every possible type of danger that could be encountered on the island—in addition to the warning signs and the brochures already provided by the park service—would actually run the risk of numbing visitors to dangers. See id. at 337 (discussing how policy involves determining whether warning involves "overloading visitors with unnecessary warnings"). Additionally, it would detract from the natural setting of the island. See id. at 335 (discussing NPS's internal policies, which direct NPS officials to take park aesthetics into consideration when contemplating whether to install signs and other warnings); cf. Elder v. United States, 312 F.3d 1172, 1183–84 (10th Cir. 2002) (discussing impact of too many warning signs on important aesthetic value of Zion National Park's Emerald Pool, where plaintiff slipped on algae). There, the plaintiff challenged the adequacy of the existing warning signs because no sign specifically addressed the "danger of algae in the streams" around the waterfall where the plaintiff slipped and died. See id. at
related to the NPS’s mission of preserving national parks” and therefore grounded in regulatory policy.\(^\text{127}\) In the court’s view, this was “precisely the type of policy choice” that judges are prohibited from second-guessing under the discretionary function exception.\(^\text{128}\)

2. **Knowledge and “Garden-Variety” Remedy**

After articulating its holding using the *Berkovitz*/ *Gaubert* test, the court acknowledged that a broad interpretation of the discretionary function exception could “swallow” the waiver of sovereign immunity under the FTCA.\(^\text{129}\) This would not only frustrate the purpose of the FTCA, but would also run contrary to congressional intent to impose liability on the United States for “ordinary common-law torts.”\(^\text{130}\) In order to reign in an overly broad construction, the court recognized that it “[h]as held that where the Government is aware of a specific risk and responding to that risk would only require the Government to take garden-variety remedial steps, the discretionary function does not apply.”\(^\text{131}\) Other courts supported the Third Circuit’s view, incorporating the government’s knowledge of a “specific risk of harm” and “eliminating the danger” not by “implicat[ing] policy but . . . involv[ing] only garden-variety remedial measures.”\(^\text{132}\)

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\(^{1174}\)–75. The court considered the impact more signage would have on the aesthetic value of the site and decided “it would be impossible to resolve Plaintiffs’ negligence claims without evaluating decisions protected by the discretionary function exception.” *Id.* at 1183–84.

127. *S.R.P.*, 676 F.3d at 336–37 (discussing how NPS’s mission was related to determination of how to warn, thus part of “policy of regulatory regime” (citing *Gaubert* v. United States, 499 U.S. 315, 325 (1991)).

128. *Id.* at 337 (discussing judicial concern of not second-guessing policy decision made by governmental actor).

129. *Id.* at 338 (“[I]f the discretionary function exception is given an overly broad construction, it could easily swallow the FTCA’s general waiver of sovereign immunity”).

130. *Id.* (discussing how discretionary function exception has potential to “frustrate the purpose” of FTCA and that Supreme Court precedent explains congressional intent to waive immunity for ordinary torts involving basic safety concerns (citing Dalehite v. United States, 346 U.S. 15, 28 (1953))).

131. See *id.* (discussing two additional elements of knowledge and garden-variety remedial steps in preventing discretionary function exception from having overly broad construction). The court further noted this interpretation was “consistent with the primary purpose of the FTCA.” *Id.*

132. See *id.* at 340 (discussing other circuit court cases’ support before turning to case at issue); see also *Oberson* v. U.S. Dep’t of Agric., Forest Serv., 514 F.3d 989, 998 (9th Cir. 2008) (holding failure to warn about or remedy known hazard to snowmobilers not discretionary due to knowledge of that specific hazard); *Fabend* v. Rosewood Hotels & Resorts, 174 F. Supp. 2d 356, 360 n.10 (D.V.I. 2001) (finding knowledge of specific risk of harm where danger was “well-defined and specific, not . . . nebulous or hidden”); *George* v. United States, 735 F. Supp. 1524, 1528, 1533 (M.D. Ala. 1990) (holding Forest Service liable because it was on notice of danger of alligator attack from prior incidents of “aggressive alligator behavior” and yet it failed to remedy that danger); *Boyd* v. United States, 881 F.2d 895, 896, 898 (10th Cir. 1989) (holding decision not to warn swimmers of dangers in un-
The court next launched into an analysis of the government’s “aware[ness] of a specific risk” and whether “responding to that risk would only require the Government to take garden-variety remedial steps.”133 In this case, the NPS was not aware of the specific risk of shoreline barracuda attacks.134 Referring to the Gothia decision, the court determined that even if the NPS was on notice of a possible barracuda attack somewhere off shore, responding to the known hazard would not require “garden-variety action, such as putting up a rail or installing additional lighting, which does not implicate any overarching policy concerns.”135 Rather, the NPS’s “determination regarding the content of warning signs on Buck Island involved significant policy considerations.”136 Therefore, neither the knowledge nor garden-variety type remedy criteria would place this discretionary decision outside of the discretionary function analysis.137

C. S.R.P. May Have Lost the Battle, but Future FTCA Plaintiffs May Win the War

The Third Circuit effectively wrote two decisions in S.R.P.: one using the susceptibility to policy analysis test under Berkovitz/Gaubert, and another, applying the knowledge and garden-variety remedy elements developed in its own precedent.138 Interestingly, neither approach saved zoned area “did not implicate any social, economic, or political policy judgments”).

133. S.R.P., 676 F.3d at 338.

134. See id. at 340 (“[T]he NPS was not aware of a specific risk.”). In a footnote, the court conceded that it was “possible that the NPS could be aware of a safety hazard so blatant that its failure to warn the public could not reasonably be said to involve policy considerations.” Id. at 340 n.6. Yet, the court supported the district court’s finding that although the warning signs indicated that NPS “was aware in a general sense that barracudas were potentially dangerous, there was no evidence that NPS officials were or should have been specifically aware of the risk of a shallow-water attack.” Id. at 340. The court reviewed the district court’s finding for clear error, which it did not find. See id. (discussing lack of clear error). An interesting argument that did not garner the court’s support was that NPS “knew that barracudas posed a serious risk to shallow-water swimmers” because of the recent policies of the Secretary of the Interior prohibiting fishing in the area so as to “increase the barracuda population.” Id. at 341. The court did not find the district court to have clearly erred in finding little merit in this argument. See id. (dismissing argument).

135. Id. (assuming “arguendo, that the NPS was aware of the risk” and determining whether the required response to that risk is garden-variety). The court was referring to its decision in Gothia, where installing handrails was not related to naval policy. See Gothia v. United States, 115 F.3d 176, 181 (3d Cir. 1997) (“This case is not about a national security concern, but rather a mundane, administrative, garden-variety, housekeeping problem that is about as far removed from the policies applicable to the Navy’s mission as it is possible to get.”).

136. S.R.P., 676 F.3d at 342.

137. See id. at 340 (“[N]either condition for finding the challenged conduct outside the scope of the discretionary function exception is present in this case.”).

138. For a discussion of the court’s dual approaches to the case, see infra notes 140–50 and accompanying text.
S.R.P.’s failure to warn claim because the discretionary function exception applied under both modes of analysis. The court discussed its motive for analyzing the case under two additional criteria as preventing the discretionary function exception from rendering the FTCA useless. One commentator noted that the court may have simply “throw[n] the plaintiffs’ bar a bone.” Regardless, the Third Circuit opened the door for future plaintiffs who can successfully prove these two criteria.

Whether the government has the requisite knowledge under the Third Circuit’s approach depends on the specificity of the risk of harm. In S.R.P., the plaintiff was required to demonstrate that the government failed to warn him in a very specific way because warnings to treat barracudas with caution already existed in brochures and on signs around Buck Island. Without a previous barracuda attack to a shoreline bather, and with only one other barracuda attack in over twenty years on the island, the government was on better footing.

139. See S.R.P., 676 F.3d at 336–37, 341 (holding that “NPS’s decision not to post additional warning signs” was “susceptible to policy analysis” and that even if NPS had knowledge of specific risk of harm, it could not eliminate this risk without consulting policy considerations).

140. See id. at 338 (recognizing risk that broad interpretation of discretionary function exception could “easily swallow the FTCA’s general waiver of sovereign immunity and frustrate the purpose of the statute”).

141. See Murphy, supra note 4 (discussing Third Circuit’s decision in S.R.P. and noting that, though majority favored government in this case, it did offer two considerations for future plaintiffs to bring suit against government where government was aware of specific risk of harm and had garden-variety way of fixing it).

142. See id. (considering effect of decision on plaintiffs); see also S.R.P., 676 F.3d at 345 (Roth, J., concurring) (predicting that “majority’s opinion will eviscerate the discretionary function exception by inserting an improper element into the analysis”).

143. See S.R.P., 676 F.3d at 340–42 (majority opinion) (discussing how one prior barracuda attack on human in “deeper water” was not sufficient to put NPS on notice of “the risk of a shallow-water attack”). The court emphasized that the “key question” for the knowledge element is “not whether the Government was aware of danger in the most general sense, but whether it was on notice of a specific hazard.” Id. at 342.

144. See id. at 341 (discussing Perez’s argument that existing warnings were not sufficient to warn him of shallow-water attack). In fact, Perez set forth evidence that he claimed the district court ignored. See id. (noting plaintiff’s claim). He alleged the brochure was insufficient because it merely advised snorkelers to treat barracudas with caution, saying nothing about the risk of an attack on the shoreline. See id. (detailing plaintiff’s claim). Furthermore, if the deeper water attack was attributed to pouring fish oil in the water, the NPS failed to prevent future attacks on the shore by warning beachgoers not to put food in the water. See id. (same). Finally, Perez alleged that “splashing in the ‘shallows’ was a risk factor which increases the likelihood of a barracuda attack.” Id. The court found all of these arguments unpersuasive. See id. (noting court’s conclusion).

145. See id. at 341–42 (discussing previous barracuda attacks at Buck Island and how NPS structured its warnings around belief that barracudas generally were not aggressive toward humans); cf. Francis v. United States, No. 2:08CV244 DAK, 2011 WL 1667915, at *1, *8 (D. Utah May 3, 2011) (awarding plaintiff, who was killed by bear at campsite, damages under FTCA for Forest Service’s failure to
The garden-variety remedy is perhaps more promising to future tort plaintiffs in suits against the government. Judge Roth, concurring in S.R.P., wrote separately to express her concern that “inserting an improper element into the analysis” would “eviscerate the discretionary function exception.” She disagreed with the majority’s holding that the knowledge element required the garden-variety type of remedy in order to keep it within the discretionary function exception. But perhaps the majority is right in doing exactly what the concurrence accuses it of doing wrong: qualifying its holding with additional elements in the analysis. Rather than “eviscerating” the discretionary function exception, the additional elements put “teeth” in an otherwise wide-open analysis that could prevent meritorious tort claims from succeeding against the government.

warn campers of previous bear attack at same campsite just twelve hours prior to plaintiff’s attack).

146. For a discussion of cases where plaintiffs have been successful because of the government’s failure to address ordinary, routine, or garden-variety repairs or maintenance, see supra notes 89–97 and accompanying text.

147. S.R.P., 676 F.3d at 345 (Roth, J., concurring).

148. See id. at 346–47 (discussing how majority unnecessarily “limit[s] [its] holding by stating that ‘where the Government is aware of a specific risk and responding to that risk would only require the Government to take garden-variety remedial steps, the discretionary function exception does not apply’”). The concurrence notes that it is this final element—the garden-variety requirement—that the circuit judge takes issue with. See id. at 347 (“It is this ‘garden-variety’ language which has prompted my concurrence.”). One problem the concurrence sees with this language is that it is hard to define what a garden-variety remedy is. See id. (discussing difficulty in differentiating between garden-variety warning sign from one that is not). Judge Roth further argued:

If the determination of the hazard is protected by the discretionary function exception but the risk of liability depends on whether the remedial steps to correct or warn of this risk are “garden-variety,” or not, haven’t we eviscerated the exception? Haven’t we protected policy choices which require expensive, extensive, or complicated remedies, but left the NPS open to liability if the remedy is simple or inexpensive? Id.

149. See id. at 346–47 (discussing how majority qualifies its holding that discretionary function exception does not apply in this case because decision not to warn was susceptible to policy analysis).

150. See id. at 345 (accusing majority of eviscerating discretionary function exception); see id. at 338 (majority opinion) (discussing concern that discretionary function exception interpreted too broadly will swallow FTCA waiver of sovereign immunity); see also Bruno, supra note 11, at 449–50 (discussing how repealing discretionary function exception will allow meritorious tort claims to proceed where carelessness on behalf of governmental employee can be proven); Hyer, supra note 11, at 1149 (proposing incentive recognition approach to narrow scope of discretionary function exception); Levine, supra note 11, at 1538 (proposing administrative framework that will preserve remedies for those with valid tort claims); Peterson & Van Der Weide, supra note 51, at 502 (recommending that “discretionary function immunity be reserved for actual decisions about true policy factors made by officials with policy-making authority”).
IV. Conclusion

Practitioners wishing to take advantage of these two criteria should still be wary: the more specific the plaintiff’s injury is without a corresponding history of similar injuries, the less likely the court will find that the government was on notice of that specific risk of harm.\footnote{See S.R.P., 676 F.3d at 340–42 (discussing how NPS was not aware of specific risk of shoreline barracuda attack).} Furthermore, the remedy for this risk must be garden-variety in the sense that it does not involve significant policy considerations that relate to the regulatory regime.\footnote{See id. at 342 (finding supposed responses to known risk of shoreline barracuda attack would involve policy considerations “regarding the content of warning signs”).} The government still enjoys immunity if it can craft arguments that generalize the scope of the decision-making power it grants to its employees.\footnote{For a discussion of policies that granted broad discretionary power to its employees, where the discretion was susceptible to policy analysis, see supra notes 70–77 and accompanying text.} Moreover, the concurrence in S.R.P. also offers the argument that applying the garden-variety remedy to a known risk of harm could widely expose the United States to tort liability that Congress never intended.\footnote{See S.R.P., 676 F.3d at 345 (Roth, J., concurring) (accusing majority of “inserting an improper element into the analysis of whether sovereign immunity has been waived under the FTCA”).}

Although S.R.P. could have been resolved simply under the Berkovitz/Gaubert analysis, the Third Circuit added the extra considerations of the government’s knowledge of the specific risk of harm and whether eliminating this risk involves garden-variety type remedies.\footnote{See id. (discussing how majority limits its holding).} These additional criteria do not completely destroy the discretionary function exception, but instead add teeth to the exception by giving future plaintiffs more arguments in pursuit of claims that might otherwise be barred by the discretionary function exception.\footnote{For a discussion of the value of the two additional criteria set forth by the Third Circuit in S.R.P., see supra notes 138–50 and accompanying text.} By adding teeth to the discretionary function exception analysis, the Third Circuit ensures that the exception does not swallow the statute waiving sovereign immunity.\footnote{For a discussion of the court’s analysis, see supra notes 113–50 and accompanying text.}
NOT SO BLACK AND WHITE: THE THIRD CIRCUIT UPHOLDS
RACE-CONSCIOUS REDISTRICTING IN DOE EX REL. DOE
v. LOWER MERION SCHOOL DISTRICT

ALEXANDRA MUOLO*

“This Nation has a moral and ethical obligation to fulfill its his-
toric commitment to creating an integrated society that ensures
equal opportunity for all of its children.”

I. INTRODUCTION

Brown v. Board of Education was a landmark decision, symbolizing the
end of legalized racial discrimination. The commitment of Brown was to
provide equal educational opportunities for students of all races. After
Brown’s declaration that state laws establishing separate public schools for
black and white students were unconstitutional, the racial landscape
within the United States drastically changed as schools across the country
began the process of desegregation. Although desegregation gained mo-

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community for their tireless efforts in achieving social justice.


3. See generally id. (holding segregated public schools unconstitutional under
Equal Protection Clause of Fourteenth Amendment).

4. See id. at 493 (“[Education] is the very foundation of good citizenship. To-
day it is a principal instrument in awakening the child to cultural values, in prepar-
ing him for later professional training, and in helping him to adjust normally to
his environment. In these days, it is doubtful that any child may reasonably be
expected to succeed in life if he is denied the opportunity of an education. Such
an opportunity, where the state has undertaken to provide it, is a right which must
be made available to all on equal terms.”); see also Craig R. Heeren, Article, “To-
gether at the Table of Brotherhood”: Voluntary Student Assignment Plans and the Supreme
Court, 24 HARV. BLACKLETTER L.J. 133, 149 (2008) (stating Justices in
Brown were concerned with providing educational opportunities for all and positively enforc-
ing integration).

5. See Sean F. Reardon, Elena Grewal, Demetra Kalogrides & Erica Green-
berg, Brown Fades: The End of Court-Ordered School Desegregation and the Resegregation
advancement of desegregation after Brown). “In 1964, 99 percent of black students
in the South attended all-black schools.” Id. By 1971, however, “only about 20
percent [of black students] attended such schools . . . .” Id.; see also Bryant Smith,
Far Enough or Back Where We Started: Race Perception from Brown to Meredith, 37 J.L. &
EDUC. 297, 298 (2008) (“Pivotal, phenomenal, tremendous, and fundamental:
these are just a few terms used to illustrate the impact of Brown. Brown made a
global impact on society psychologically and prospectively.”). The Supreme Court
mentum during the civil rights movement, the push toward absolute equality within public schools ultimately subsided and racial segregation became the norm once again.\(^6\) African American students today are experiencing nearly the same racial isolation Linda Brown experienced almost sixty years ago.\(^7\) As the precedential line of Supreme Court decisions fostering desegregation move toward the distant past, it is apparent the objective of racial integration and educational equality might never be realized.\(^8\)

Public schools remain one of the most racially segregated and unequal institutions of American life.\(^9\) Nationwide, eighty percent of Latino students and seventy-four percent of African American students attend schools where a majority of the students are nonwhite.\(^10\) Moreover, forty-three percent of Latino students and thirty-eight percent of African American students attend schools that are deeply segregated.\(^11\)

decision in \textit{Brown} drastically changed societal norms by prohibiting segregated school systems. \textit{See id.} at 299 (demonstrating drastic change in social norms following \textit{Brown}). There was a huge shift in the public school system post-\textit{Brown}, but the social issues surrounding segregated schools still exist. \textit{See id.} at 300 (explaining that despite shift in school system, many schools remained segregated).


9. \textit{See} Heeren, \textit{supra} note 4, at 135 (“[D]espite significant success in dismantling segregation in most other realms, schools remain one of the most contentious and racially segregated aspects of American life.”).


11. \textit{See id.} (defining “intensely segregated” as those schools with only zero to ten percent of whites students).
Correspondingly, there is an increasing achievement gap between white and minority students. Racially segregated schools are strongly linked with various factors that limit educational opportunities and outcomes for minority students. Conversely, mounting evidence has demonstrated a substantial correlation between desegregated schools and profound social benefits for students of all races. Such benefits include prejudice reduction, heightened civic engagement, more complex thinking, and better learning outcomes in general.

12. See Eboni S. Nelson, What Price Grutter? We May Have Won the Battle, but Are We Losing the War?, 32 J.C. & U.L. 1, 8–9, 25–26 (2005) (discussing racial disparities in educational achievement); see also Steven Cann, Politics in Brown and White: Resegregation in America, 88 JUDICATURE 74, 74 (2004) (comparing “separate but equal” racial segregation policies prior to Brown and segregation issues in urban America today). Today, schools are still segregated by race. See id. (noting current segregation). “Every indicator from drop-out and graduation rates to test scores indicates that students of color in central city school districts are not receiving the same educational opportunities as their white counterparts in well-funded suburban schools.” Id. Although public schools are not explicitly segregated by race, the racial composition of urban schools and suburban schools is noteworthy. See id. at 77 (commenting on high segregation statistics). The difference in educational opportunities and preparedness for further education is a cause of concern. See id. (noting harmful effects of segregation).

13. See U.S. Dep’t of Educ., Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools (2011) [hereinafter U.S. Dep’t of Educ., Voluntary Use of Race], http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.html (“The academic achievement of students at racially isolated schools often lags behind that of their peers at more diverse schools. Racially isolated schools often have fewer effective teachers, higher teacher turnover rates, less rigorous curricular resources (e.g., college preparatory courses), and inferior facilities and other educational resources.”); see also Orfield et al., supra note 10, at 7–8 (“The consensus of nearly sixty years of social science research on the harms of school segregation is clear: separate remains extremely unequal. Schools of concentrated poverty and segregated minority schools are strongly related to an array of factors that limit educational opportunities and outcomes.”).

14. See Brief for 553 Social Scientists as Amici Curiae in Support of Respondents at 7–8, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2006) (Nos. 05-908 & 05-915), 2006 WL 2927079, at *7–8 (arguing racially integrated schools improve “life opportunities”); Brief for National Education Association et al. as Amici Curiae in Support of Respondents at 25–30, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2006) (Nos. 05-908 & 05-915), 2006 WL 2927085, at *25–30 (detailing educational benefits of integrated schools); Orfield et al., supra note 10, at 9–10 (noting benefits of racially integrated schools); Reardon et al., supra note 5, at 36–37 (noting improvement in academic achievement). While the effect of early desegregation policies on academic achievement is not entirely clear, many argue the narrowing achievement gap between black and white students was due to school policies like desegregation. See id. at 37 (offering argument that desegregation helps narrow achievement gap).

15. See Orfield et al., supra note 10, at 9–10. [Integrated schools] foster critical thinking skills that are increasingly important in our multiracial society—skills that help students understand a variety of different perspectives. Relatedly, integrated schools are linked to reduction in students’ willingness to accept stereotypes. Students attending integrated schools also report a heightened ability to communi-
Because the prevalence of racial segregation remains, the rationale of holding segregation policies unconstitutional still applies today.\(^\text{16}\) Separate is still not equal and racial segregation within our public school system is perpetuating educational inequality.\(^\text{17}\) Moreover, the negative consequences of racial segregation and the resulting widening achievement gaps impact society at large.\(^\text{18}\) Despite mounting evidence supporting racially integrated schools, the Supreme Court continues to strike down policies aimed at combating racial isolation.\(^\text{19}\) Recently, the Supreme Court issued a plurality decision in Parents Involved in Community Schools v. Seattle School District No. 1,\(^\text{20}\) holding the race-based student assignment plans at issue unconstitutional.\(^\text{21}\) Current desegregation jurisprudence and resegregation trends threaten the commitment of Brown by making educational equality an unrealistic aspiration.\(^\text{22}\)

Id.

\(^{16}\) See Kimberly Jenkins Robinson, The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools, 50 B.C. L. Rev. 277, 326 (2009) ("Today, even without the imprimatur of a law or official policy that explicitly seeks to divide students along racial lines and provide minority students substandard educational opportunities, racially isolated schools remain inferior to other schools.").

\(^{17}\) See Orfield et al., supra note 10, at xiii ("Separate is still unequal and many of the most critical dimensions of educational inequality are directly linked to segregation of our schools.").

\(^{18}\) See generally Gary Orfield, Daniel Losen, Johanna Wald & Christopher B. Swanson, Losing Our Future: How Minority Youth Are Being Left Behind by the Graduation Rate Crisis, The Civil Rights Project at Harv. Univ. (2004), http://www.urban.org/UploadedPDF/410986_LosingOurFuture.pdf (analyzing high dropout rates among African American students and its effect on national economy). Linking racial isolation to higher dropout rates, the study argued racial integration would ultimately lead to a better economy. See id. at 7. "In an increasingly competitive, global economy the consequences of dropping out of high school are devastating to individuals, communities and our national economy." Id. at 2.

\(^{19}\) For a discussion of desegregation jurisprudence, see infra notes 35–48 and accompanying text.


\(^{21}\) See generally id.; see also Robinson, supra note 16, at 285 (noting Parents Involved virtually closed door on use of race of individual students to make student assignments to schools).

\(^{22}\) See Eboni S. Nelson, Parents Involved & Meredith: A Prediction Regarding the (Un)constitutionality of Race-Conscious Student Assignment Plans, 84 Denv. U. L. Rev. 293, 297 (2006) ("Current resegregation trends threaten thirty years of progress that have been made in the desegregation of African-American students, thereby impeding the fulfillment of Brown’s promise of educational equality."); see also Orfield et al., supra note 10, at 1 ("Sadly, we are steadily undoing the great
In the immediate aftermath of *Parents Involved*, many civil rights advocates feared the possibility of racially integrated schools was no longer viable. In the concurring and controlling opinion, however, Justice Kennedy challenged school districts and their lawyers to innovate redistricting policies that would permissibly achieve the compelling interest of racial integration. While the Supreme Court never fully defined what a valid redistricting policy would look like, school districts have attempted to develop creative race-conscious redistricting plans that fit within the constitutional framework of Equal Protection and desegregation jurisprudence. Implementing a redistricting policy that racially integrated two district high schools, *Doe ex rel. Doe v. Lower Merion School District*, forced the Third Circuit to weigh in on this unsettled and controversial area of law.

This Casebrief argues the Third Circuit’s recent treatment of the Equal Protection Clause with respect to race-conscious redistricting is not only consistent with current desegregation jurisprudence, but, by applying rational basis review, has created flexibility in allowing school districts and practitioners to further *Brown*’s promise of equal educational opportunities for students of all races. Part II provides a brief history of racial segregation within the United States and examines the line of Supreme Court

triumph of the *Brown* decision and the subsequent civil rights revolution that spurred very significant desegregation of black students in the South. We are on the road away from *Brown* and accepting the return of school segregation . . . .

23. See Frankenberg & Le, supra note 8, at 1018 (discussing aftermath of *Parents Involved*). “[T]he dissents accused the plurality not only of hijacking *Brown* and its legacy, but also of threatening what little racial progress had been made.” *Id.*; see also James E. Ryan, The Supreme Court and Voluntary Integration, 121 Harv. L. Rev. 131, 133 (2007) (arguing *Parents Involved* took away any hope of integrated society).

24. See Frankenberg & Le, supra note 8, at 1018–19 (“With the dust now settled, however, some believe the immediate impact of the decision may not necessarily be as grave as originally feared, assuming, of course, that Justice Kennedy meant it when he said that some carefully crafted uses of race are permissible. For the creative and willing, opportunities to advance integration remain on the table.”). “The law emerging from *Parents Involved* need not foreclose educational equity and integration; with the right mindset and approach, it can spur greater innovation and effort. The Court having spoken without one clear voice, it is up to the people to determine the ultimate lesson and legacy of *Brown.*” *Id.* at 1072.

25. See Rebecca M. Abel, Note, Drawing the Lines: Pushing Past Arlington Heights and Parents Involved in School Attendance Zone Cases, 2012 BYU Educ. & L.J. 369, 370 (2012) (“Across the country, many students, parents, and community members recognize the benefits of diversity and would like their public schools to embody these values. Responding to community needs, urban, suburban, and rural school districts seek to implement voluntary plans that will diversify the student bodies of their schools. However, these districts fear potential legal consequences that can result from such plans. This fear has risen since the U.S. Supreme Court decision in *Parents Involved* . . . . Despite this transformative decision, many school districts remain committed to finding constitutional methods to integrate their public schools.”).

26. 665 F.3d 524 (3d Cir. 2011).

27. See generally id.
decisions triggering resegregation in recent years. Part III details the Third Circuit’s decision in Doe. Part IV discusses the importance of a racially integrated society and translates the Third Circuit’s analysis in Doe into practical strategies for practitioners attempting to facilitate racially integrated school districts. Finally, Part V concludes by addressing the overall impact of the Third Circuit’s approach to racial integration.

II. The Legal Development of Desegregation Policies

From the height of desegregation until now, the legal landscape regarding racial integration policies has drastically shifted. In the past thirty years, the Supreme Court has not issued a favorable opinion regarding school desegregation efforts. Against this backdrop, resegregation trends are a growing concern, as meaningful racial integration policies are not likely to pass constitutional muster. Such results encumber the commitment of Brown. This Part examines desegregation jurisprudence, particularly focusing on the recent Supreme Court decision in Parents Involved.

A. The Historical Development of Resegregation

While the Supreme Court recognized the inherent inequalities of segregation and the importance of equal opportunities to quality education in Brown, our public school system is even more segregated today than

28. For a discussion of the history of racial segregation within the United States and an examination of the Supreme Court decisions pertaining to resegregation in recent years, see infra notes 32–67 and accompanying text.

29. For a discussion of the Third Circuit’s decision in Doe, see infra notes 68–136 and accompanying text.

30. For a discussion of the importance of racial integration, see infra notes 143–48 and accompanying text. For a discussion of how the Third Circuit’s treatment of race-neutral redistricting policies will allow school districts to try and bridge the achievement gap between races, see infra notes 149–64 and accompanying text.

31. For concluding remarks, see infra notes 165–68 and accompanying text.

32. See Ryan, supra note 23, at 157 (“After decades of requiring racially explicit steps toward school integration and castigating school officials who did not listen, the Court now largely forbids those steps and would castigate those school officials who listened all too well.”).

33. See id. at 142 (“[T]he reality is that the Court has not issued a significant, favorable opinion regarding school desegregation in about thirty years.”).

34. See id. (“From this perspective, the current decision is a fitting capstone to the Court’s desegregation jurisprudence, which has generally—though not always intentionally—made meaningful integration fairly difficult to achieve.”).

35. See id. at 156 (commenting that Parents Involved is a dangerous decision because it will make school integration “even harder, if not impossible”).

36. For a discussion of desegregation jurisprudence, see infra notes 37–50 and accompanying text. For a discussion of Parents Involved, see infra notes 51–67 and accompanying text.
when *Brown* was decided nearly sixty years ago. Many factors have contributed to resegregation trends, most notably the series of Supreme Court decisions hindering desegregation efforts. While the Supreme Court has issued decisions fostering the notion of equal educational opportunities for minority students, it has also issued decisions impeding policies designed to promote racial integration.

Throughout the civil rights movement, the federal executive branch and a unanimous Supreme Court fought aggressively for school desegregation. During this period of pressure, massive policy changes occurred, altering the racial composition of public schools. As desegregation policies were put in place and enforced, the achievement gap between white

37. See Nelson, supra note 22, at 296–97 (“Many agree that public elementary and secondary schools are more segregated today than they were prior to the *Brown v. Board of Education* decision.”).

38. See Charles E. Dickinson, Note, *Accepting Justice Kennedy’s Challenge: Reviving Race-Conscious School Assignments in the Wake of Parents Involved*, 93 MINN. L. REV. 1410, 1419 (2009) (“While American cities remain extremely segregated, the Supreme Court has backtracked from its pro-integration decisions and presidential policies have turned away from desegregation efforts. The result was a return to the segregated schooling that left minority schoolchildren with the ‘devastating’ effects of an unequal education.”); see also Ryan, supra note 23, at 132 (noting why racial integration has faded from view).


40. See Orfield et al., supra note 10, at 3–4 (“In reality, the only period of consistent support for integrated schools from the executive branch and the courts was in the 1960s, following the hard-won passage of the 1964 Civil Rights Act. Between 1965 and 1969 the federal executive branch and a unanimous Supreme Court pressed aggressively for school desegregation.”).

41. See id. (noting that pressure from executive and Supreme Court resulted in massive changes, particularly in South where most blacks lived and policies vigorously enforced).
and black students began to narrow.\textsuperscript{42} Educational equality was slowly being realized across the nation.\textsuperscript{43}

Such progress came to a halt, however, with the election of President Richard Nixon.\textsuperscript{44} After President Nixon appointed four conservative Justices to the Supreme Court, the Court’s divided desegregation decisions ended the push toward educational equality through racial integration.\textsuperscript{45} By 1974, the Supreme Court handed down two decisions that held as unconstitutional school desegregation policies aimed at equalizing educational opportunities for students of all races.\textsuperscript{46} Continuing the derailment of desegregation policies into the 1990s, the Supreme Court decided three cases that further impeded any attempt at racial integration within the public school system.\textsuperscript{47} Together these Supreme Court decisions permitted school systems to abandon desegregation plans and cut off funds meant to remedy the educational inequalities resulting from a long history of racial segregation.\textsuperscript{48} Recently, the Supreme Court invalidated voluntary student assignment policies meant to further desegregation.\textsuperscript{49} Such

\textsuperscript{42.} See Paul Barton & Richard Coley, Educ. Teaching Serv., The Black-White Achievement Gap: When Progress Stopped 6 (2010), http://www.ets.org/Media/Research/pdf/PICBWGAP.pdf (noting large narrowing of achievement gap from early 1970s until late 1980s). While the narrowing of the achievement gap could be attributed to many factors, there may be a correlation to desegregation policies. See id. at 34 (examining possible reasons for narrowing achievement gap, including smaller class sizes and narrowing gaps in family resources).

\textsuperscript{43.} See Ryan, supra note 23, at 140 (noting problem with initial commitment to desegregation: “[I]t came late, and it was short-lived”).

\textsuperscript{44.} See Orfield et al., supra note 10, at 3–4 (“The 1968 presidential election, however, ended such cooperation as President Nixon shut down administrative enforcement of desegregation requirements, shifted the position of the Justice Department from proactive enforcement to passive acceptance, appointed four conservative Justices to the Supreme Court and attacked desegregation rulings.”).

\textsuperscript{45.} See id. (noting change in Supreme Court resulted in 5–4 desegregation decision, which was first non-unanimous decisions regarding desegregation since Brown).

\textsuperscript{46.} See Milliken v. Bradley, 418 U.S. 717, 745 (1974) (holding illegally segregated central city students had no right to gain access to better schools in suburbs); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (holding that local property taxation was constitutionally permissible method for school financing despite disparities in per-student funding).

\textsuperscript{47.} See Missouri v. Jenkins, 515 U.S. 79, 103 (1995) (holding remedies need only bring victims of past discrimination to point where they would have been if discrimination had not occurred); Freeman v. Pitts, 503 U.S. 467, 485 (1992) (holding districts could be released from desegregation orders piecemeal and end segregation with incremental approach); Bd. of Educ. of Okla. City v. Dowell, 498 U.S. 237, 259 (1991) (holding court ordered desegregation was intended to be temporary and return to local control was preferable when district made good faith effort to desegregate).

\textsuperscript{48.} See Reardon et al., supra note 5, at 35 (“Following the release from court order, white/black desegregation levels begin to rise within a few years of release and continue to grow steadily for at least 10 years.”).

shifting desegregation jurisprudence has contributed to recent resegregation trends.50

B. The Seminal Redistricting Case: Parents Involved in Community Schools v. Seattle Public School District No. 1

Acknowledging the potential harms of resegregation trends while being mindful of Supreme Court precedent limiting desegregation efforts, many school districts voluntarily implemented school assignment plans based on the racial composition of their students.51 In Parents Involved, for example, the Seattle school district and Jefferson County school district implemented new student assignment policies that relied on race in determining which school students would attend.52 The policies were designed to create classrooms that reflected the racial makeup of the community as a whole.53 Students affected by the assignment policy brought suit, alleging a violation of the Equal Protection Clause of the Fourteenth Amendment.54

The deeply divided Supreme Court ultimately concluded the assignment plans were unconstitutional, placing more limiting restrictions on desegregation efforts.55 While four members of the Court opposed all uses of race in public school assignment policies, four members approved the policies as satisfying the requirements of Equal Protection jurisprudence.56 Chief Justice Roberts’s plurality opinion found the assignment policy impermissibly classified individuals on the basis of race, thus provid-

50. See Ryan, supra note 23, at 149 (“It may be plausible to conclude from current trends that most districts have forever turned their backs on racial integration, either out of choice or necessity, and therefore that the long-term impact of this decision will be just as minimal as the short-term impact.”).

51. See Heeren, supra note 4, at 141 (noting many academics believed carefully crafted race-based K-12 assignment plans could survive judicial review by Supreme Court). Especially in the years immediately following the Supreme Court’s rulings on affirmative action in higher education, race-based assignment plans in public schools became appealing. See id.

52. See Parents Involved, 551 U.S. at 711–18 (describing student assignment plan in both school districts). While the Seattle school district classified the students as white or nonwhite, the Jefferson County school district classified the students as black or “other” during the assignment process. See id. at 709–10.

53. See id. at 710 (noting reasons for new race-based student assignment plans).

54. See id. at 714–18 (detailing procedural history).

55. See id. at 747–48 (holding desegregation efforts through race-based student assignment policies in school districts at issue were unconstitutional).

56. See id. at 708–48 (discussing analysis of plurality); see id. at 803–68 (Breyer, J., dissenting); see also Michael A. Helfand, How the Diversity Rationale Lays the Groundwork for New Discrimination: Examining the Trajectory of Equal Protection Doctrine, 17 WM. & MARY BILL RTS. J. 607, 610 (2009) (“[T]he plurality advanced colorblindness, at the expense of the potential remedial effects of diversity, while the dissent championed educational equality at the expense of colorblind policies. In between these two extremes stands Justice Kennedy’s concurrence—or so the common thinking goes—which articulated some sort of middle ground that incorporated elements of these two hard-line positions.”).
ing burdens and benefits accordingly.\textsuperscript{57} In reaching its decision, the plurality opinion held that racial classifications were not narrowly tailored to achieve a compelling government interest.\textsuperscript{58} Conversely, Justice Breyer wrote a derisive dissent criticizing the plurality decision.\textsuperscript{59} Noting the difference between policies that “include” compared to policies that “exclude” due to racial classifications in the law, the dissent advocated for a less stringent standard of review.\textsuperscript{60}

Justice Kennedy straddled the plurality and dissent by holding the policies unconstitutional, yet offered insight into how school districts and practitioners can develop race-conscious redistricting plans that avoid constitutional challenge.\textsuperscript{61} Thus, a majority of the Justices concluded school districts have flexibility in avoiding racial isolation.\textsuperscript{62} Qualifying the concurrence, Justice Kennedy affirmed race-conscious assignment policies by

\textsuperscript{57} See Parents Involved, 551 U.S. at 720 (applying strict scrutiny because assignment plans involved state distribution of burdens or benefits on basis of individual race classifications). The assignment plans specifically targeted students on the basis of their race and assigned students to various schools to achieve diversity within the school district. See \textit{id}; Ryan, supra note 23, at 151 (“The Chief Justice argues strenuously that colorblindness is most consistent with Brown and requires severely restricting, if not prohibiting, racial considerations regardless of the overall goal—whether to include or exclude, segregate or integrate.”).

\textsuperscript{58} See Parents Involved, 551 U.S. at 723–24 (determining diversity is not compelling interest in elementary schools).

\textsuperscript{59} See \textit{id}, at 804–67 (Breyer, J., dissenting) (detailing why plurality is wrong in its decision to invalidate race-based assignment plans). “The last half century has witnessed great strides toward racial equality, but we have not yet realized the promise of Brown. To invalidate the plans under review is to threaten the promise of Brown.” \textit{id}, at 868.

\textsuperscript{60} See \textit{id}, at 823–38 (arguing for rational basis standard of review). Although the dissent argued for rational basis review, it ultimately applied strict scrutiny and concluded that the plan passed even the higher standard of review. See \textit{id}, at 837 (concluding that prior decisions bound Court into strict scrutiny but plan served compelling state interest and was narrowly tailored); see also Heeren, supra note 4, at 152 (discussing “anti-subordination” type of reasoning utilized by dissent). “Anti-subordination” stands for the proposition that “racial identity may be legitimate, meaningful and have social utility.” \textit{id}, “[T]he use of race in student assignment for the purpose of integration or increasing racial diversity is a compelling interest because it produces greater achievement and educational opportunity.” \textit{id}, at 152–53.

\textsuperscript{61} See Heeren, supra note 4, at 141 (“As the controlling vote, Justice Kennedy precariously straddled the two sides by agreeing that the use of race in these plans is unconstitutional because they are not narrowly tailored, but also suggested that future race-based plans still could be successful if appropriately designed.”).

\textsuperscript{62} See \textit{id}, at 143 (“Justice Kennedy’s concurrence is the most important because it lays out a basic framework for assignment plans that might be constitutionally adequate to a majority of justices.”); see also Ryan, supra note 23, at 135 (“It is not entirely clear whether the tools left to them will be sufficient to the task, but Justice Kennedy, whose lone opinion is effectively controlling on this issue, does leave the door ajar for districts interested in racial integration.”). Justice Kennedy’s opinion is controlling because the four dissenting justices would seemingly allow any redistricting plan that satisfied Justice Kennedy’s standards. See \textit{id}, at 137 (“There are thus five votes for upholding some uses of race to achieve integration, but the only vote that really counts is Justice Kennedy’s.”).
noting, “it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body.” Recognizing the growing concerns of racial isolation within the public school system, Justice Kennedy continued:

If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.

Such race-conscious measures include drawing attendance zones with general recognition of the demographics of neighborhoods. Because these mechanisms are race-conscious but do not classify students exclusively by race, Justice Kennedy stated it would be unlikely the policies would demand strict scrutiny and such race-conscious measures would be permissible. Thus, the plurality opinion held Seattle and Jefferson County assignment policies unconstitutional, but left open the opportunity to develop refined policies that aligned with current Equal Protection and desegregation jurisprudence.

III. SHADES OF GREY: THE THIRD CIRCUIT APPROACH TO DESEGREGATION

In the wake of Parents Involved and the uncertainty surrounding the constitutionality of racial integration, the Third Circuit was the first federal court of appeals to respond to existing desegregation jurisprudence.

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63. Parents Involved, 551 U.S. at 788 (Kennedy, J., concurring); see also Heeren, supra note 4, at 143 (“Although he agreed that the case did not fit any existing compelling interest framework, Justice Kennedy argued, like Justice Breyer, that there was a compelling interest in avoiding racial isolation and achieving diversity in schools.”).

64. Parents Involved, 551 U.S. at 788–89 (Kennedy, J., concurring). Justice Kennedy argued that the country “has a moral and ethical obligation” to avoid racial isolation. See id. at 798–99 (“A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue.”).

65. See id. at 789 (noting means school districts can use to achieve goal of racial integration without violating Equal Protection Clause).

66. See id. (“These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.”).

67. See U.S. Dep’t of Educ., Voluntary Use of Race, supra note 13 (“Thus, although there was no single majority opinion on this point, Parents Involved demonstrates that a majority of the Supreme Court would be ‘unlikely’ to apply strict scrutiny to generalized considerations of race that do not take account of the race of individual students.”).

This Part of the Casebrief provides background on the Lower Merion School District’s race-conscious redistricting policy and discusses the Third Circuit’s analysis.69

A. Background Facts and Procedure

Recognized as one of the finest school systems in the United States, Lower Merion School District serves approximately 62,000 residents of the Philadelphia Main Line suburbs.70 The School District operates six elementary schools, two middle schools, and two high schools.71 Because the two high schools, Harriton and Lower Merion High School, were outdated and in need of significant investment, the Lower Merion Board of School Directors (Board of Directors) adopted a proposal to build two new high schools of equal enrollment capacity.72 At the time the proposal was approved, approximately 1,600 students attended Lower Merion High School and 900 students attended Harriton High School.73 With such imbalanced numbers, achieving equal enrollment in each new high school required redistricting.74

Prior to developing redistricting policies, the Board of Directors established a list of five “Non–Negotiables,” which served as a guide for the

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69. For a background discussion of Doe, see infra notes 70–94 and accompanying text. For a summary of how the Third Circuit reached its holding in Doe, see infra notes 95–136 and accompanying text.


71. See Doe ex rel. Doe v. Lower Merion Sch. Dist., 665 F.3d 524, 530 (3d Cir. 2011) (discussing development of redistricting plan). Lower Merion School District operates six elementary schools (Belmont Hills, Cynwyd, Gladwyne, Merion, Penn Valley, and Penn Wynne); two middle schools (Bala Cynwyd and Welsh Valley); and two high schools (Harriton and Lower Merion High School). See id.

72. See id. (choosing final proposal because students would benefit from stronger sense of community, better student-faculty interactions, and better educational outcomes). The committee considered the following plans: (1) creating a separate school for grade nine only and another school for grades ten through twelve; (2) building one new high school that all high school students would attend; (3) building two new high schools to replace Harriton and LMHS with the same student populations as Harriton and LMHS; and (4) building two new high schools with 1,250 students enrolled at each school. See id.

73. See id. (discussing enrollment of each high school).

74. See id. (noting under current districting lines Lower Merion High School enrolled 700 more students than Harriton).
redistricting process.\textsuperscript{75} Explicitly defining the primary objectives of redistricting, the Non-Negotiables included the following requirements: (1) high school enrollment will be equalized; (2) elementary schools will be at or under capacity; (3) the plan will not increase the number of required buses; (4) the class of 2010 will have the choice to follow the plan or attend their original high school; and (5) redistricting will be based on current and expected needs.\textsuperscript{76} Additionally, the Board of Directors compiled a list of values embraced by the Lower Merion community, which served as further guidance throughout the redistricting process.\textsuperscript{77} One such value was to “[e]xplore and cultivate whatever diversity—ethnic, social, economic, religious and racial—there is in Lower Merion.”\textsuperscript{78}

In developing various redistricting plans, the Board of Directors hired an outside consultant to review and analyze district enrollment data.\textsuperscript{79} Such data included racial composition, socioeconomic status, and disability.\textsuperscript{80} Upon assessing the enrollment data, the consultant prepared eight different redistricting scenarios to present to the Board of Directors.\textsuperscript{81} Guided by the Non-Negotiables, the eighth scenario was further developed into Plan 3R; the Board of Directors voted to implement the redistricting plan on January 12, 2009.\textsuperscript{82}

\textsuperscript{75} See id. at 532 (discussing Board of Directors’ establishment of guidelines for redistricting process).

\textsuperscript{76} See id. (describing objectives of redistricting).

\textsuperscript{77} See id. (explaining that Board of Directors hired two consultants to issue report listing five community values with help of public forums and online surveys). The list included the following:
1. Social networks are at the heart of where people live, and those networks expand as people grow older;
2. Lower Merion public schools are known for their excellence: academic as well as extracurricular;
3. Those who walk should continue to walk while the travel time for non-walkers should be minimized;
4. Children learn best in environments when they are comfortable—socially as well as physically; and
5. [E]xplore and cultivate whatever diversity—ethnic, social, economic, religious and racial—there is in Lower Merion.

\textsuperscript{78} Id.

\textsuperscript{79} Id. (stating that Board of Directors hired Dr. Ross Haber to create redistricting plans called scenarios).

\textsuperscript{80} See id. at 533 (explaining that data for each factor was not reported for every scenario).

\textsuperscript{81} See id. at 532–33 (outlining each scenario).

\textsuperscript{82} See id. at 537 (explaining Plan 3R and detailing why Board members voted as they did). Six Board members voted in favor of the plan, two voted against the plan, and then-Board President Lisa Pliskin supported the plan, but could not vote because she was hospitalized. See id. (explaining that all Board members supported plan because of educational benefits, not race). Diane DiBonaventuro voted against Plan 3R, stating the plan created an “additional stressor” for African American students by “asking Ardmore kids to take one for the team.” See id. David Ebby voted against Plan 3R for reasons excluding race. See id. at 538.
Prior to redistricting, the racial composition of Harriton and Lower Merion High School was unequal. The percentage of African American students at Lower Merion High School was double the percentage at Harriton. Throughout the redistricting process, the Board of Directors and developers of Plan 3R intentionally considered the racial composition of the school district. While the redistricting was based on the students’ place of residence, Plan 3R focused on Ardmore as the affected redistricting area, which contained the highest concentration of African American students. Students living in South Ardmore were redistricted for Harriton, while students living in North Ardmore remained districted for Lower Merion High School. Because Ardmore had the highest concentration of African Americans of all the neighborhoods in Lower Merion School District, equalized diversity between the two high schools was the decisive result.

On May 14, 2009, Students Doe 1 through 9 filed a complaint. Prior to the implementation of Plan 3R, Students Doe were districted for Lower Merion High School. Under Plan 3R, however, they were required to attend Harriton. Consequently, Students Doe claimed Lower Merion School District violated the Equal Protection Clause by adopting Plan 3R because Plan 3R discriminated against them on the basis of

83. See id. at 531 (noting 5.7% of Harriton’s total student population was African American, yet 10% of Lower Merion’s total student population was African American). During this time, both North and South Ardmore were districted for Lower Merion High School. See id.

84. See id. (discussing racial composition of both high schools).

85. See id. at 533 (noting racial composition of high school was included in presentation of scenarios and discussed by Board of Directors and developers of Plan 3R throughout redistricting process).

86. See Student Doe 1 v. Lower Merion Sch. Dist., Civil Action No. 09-2095, 2010 WL 1956585, at *6 (E.D. Pa. May 13, 2010) (discussing racial composition of district). In September 2008, South Ardmore had 308 students in Lower Merion schools, of which 140 were white, 140 were African American, 9 were Asian American, and 18 were Hispanic American. See id. at *6 n.2. North Ardmore had 167 school age children, of which 32 were white, 107 were African American, 12 were Asian American, and 16 were Hispanic American. See id.

87. See Doe, 665 F.3d at 535 (detailing Plan 3R). Prior to the redistricting of Lower Merion School District, all students living in Ardmore, North and South, could choose to attend either Harriton or Lower Merion High School. See id. at 531 (explaining options before redistricting).

88. See id. at 531, 536 (noting heavier African American population affected by redistricting). The proposed plan was projected to increase the African American student population at Harriton from 5.7% to 9.6%. See id. at 536 (providing redistricting projections).

89. See id. at 538 (discussing procedural history).

90. See id. at 531 (explaining districting of both high schools before Plan 3R).

91. See id. at 538 (“For the 2009–2010 academic year, Student Doe 4 chose to attend Harriton and all other Students Doe attended Penn Valley Elementary School or Welsh Valley Middle School.”).
race. The district court applied strict scrutiny and determined Plan 3R was constitutional because it was narrowly tailored to achieve a compelling state interest. Dissatisfied with the ruling, Students Doe appealed to the Third Circuit.

B. Third Circuit Analysis

Students Doe alleged Plan 3R violated the Equal Protection Clause because the redistricting improperly used racial criteria in mandating attendance at Harriton. According to the Equal Protection Clause, “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” The central purpose of the Clause is to prohibit states from intentionally discriminating against individuals on the basis of race. When intentional discrimination on the basis of race is demonstrated, the policy must pass review under the strictest of scrutiny. Policies that are merely race-conscious, however, do not necessarily imply intentional discrimination and might only demand rational basis review. In determining whether Plan 3R violated the Equal Protection Clause, therefore, the Third Circuit was required to identify the appropriate level of scrutiny.

1. Intentional Discrimination Shown by Racial Classification

The Supreme Court has established that classifications in the law explicitly based on race are “presumptively invalid and can be upheld only upon an extraordinary justification.” Thus, when policies distribute

92. See id. (alleging Lower Merion School District violated Equal Protection Clause of Fourteenth Amendment).
94. See Doe, 665 F.3d at 541 (noting Students Doe filed timely appeal).
95. See id. at 538–39 (stating violations alleged by plaintiffs).
96. U.S. CONST. amend. XIV, § 1.
97. See Washington v. Davis, 426 U.S. 229, 239 (1976) (determining Equal Protection racial discrimination claims could only be upheld if intentional discrimination could be proven).
98. See id. at 242 (stating applicable level of scrutiny); see also Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (holding state has burden of proving that policy is narrowly tailored and furthers compelling interest under strict scrutiny analysis).
99. See Crawford v. Bd. of Educ., 458 U.S. 527, 538 (1982) (“[A] distinction may exist between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters . . . . [T]he Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place.”). Such distinction suggests that race-conscious policies might pass constitutional muster because only rational basis review is applied. See id.
100. See Doe, 665 F.3d at 543–44 (discussing Equal Protection jurisprudence and when certain levels of scrutiny are applicable).
burdens or benefits to individuals on the basis of racial classifications, strict scrutiny is the appropriate standard of review. The Third Circuit has defined racial classifications as “governmental standard[s], preferentially favorable to one race or another, for the distribution of benefits.” Under the Third Circuit’s definition, a racial classification is formed, and is consequently discriminatory, when a policy explicitly distinguishes between individuals on the basis of race.

The Third Circuit determined Plan 3R did not fall into this category of Equal Protection violations. Because Plan 3R was based on the geographic location of students and did not redistrict Students Doe solely based on race, the policy was deemed race-neutral. The Third Circuit was able to distinguish Plan 3R from Parents Involved because race was not the primary factor in redistricting. Unlike the race-based student assignment policy in Parents Involved that relied exclusively on race, Plan 3R focused on the five Non-Negotiables throughout the redistricting process and only discussed race as an ancillary issue. Relying on Supreme Court precedent, the Third Circuit further reasoned that “race consciousness does not lead inevitably to impermissible race discrimination.” Despite evidence demonstrating Lower Merion School District was aware of the racial composition of Ardmore when redistricting, such awareness did not equate to a racial classification. As such, the Third Circuit held

102. See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) (noting benefit or burdens against racial classification is necessary for strict scrutiny to apply).

103. See Doe, 665 F.3d at 545 (quoting Anderson ex rel. Dowd v. City of Boston, 375 F.3d 71, 77 (1st Cir. 2004)).

104. See id. (“A statute or policy utilizes a ‘racial classification’ when, on its face, it explicitly distinguishes between people on the basis of some protected category.” (quoting Hayden v. Cnty. of Nassau, 180 F.3d 42, 48 (2d Cir. 1999)) (internal quotation omitted)).

105. See id. at 554 (discussing intentional discrimination shown by racial classification). The Third Circuit relied on Parents Involved in its analysis, which stated “when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.” Id. at 545 (quoting Parents Involved, 551 U.S. at 720) (internal quotation omitted).

106. See id. at 545 (“The Plan, on its face, neither uses racial classification as a factor in student assignment nor distributes any burdens or benefits on the basis of racial classification. The lack of racial classification in Plan 3R distinguishes Plan 3R from the policies in every Supreme Court equal protection education case upon which Appellants rely in their brief . . . .”).

107. See id. at 545–46 (distinguishing Plan 3R from prior precedent because in other cases policy at issue used race as sole factor).

108. See id. (noting importance of race in both cases).

109. Id. at 547 (quoting Parents Involved, 551 U.S. at 745–46) (internal quotation omitted).

110. See id. at 548 (“The consideration or awareness of race while developing or selecting a policy, however, is not in and of itself a racial classification. Thus, a decisionmaker’s awareness or consideration of race is not racial classification. Designing a policy ‘with racial factors in mind’ does not constitute a racial classification if the policy is facially neutral and is administered in a race-neutral fashion.”).
Plan 3R did not include racial classifications; therefore, strict scrutiny was not an appropriate standard of review on that basis.\textsuperscript{111}

2. \textit{Intentional Discrimination Shown by Discriminatory Impact and Purpose}

The Supreme Court has also established that facially neutral policies demonstrating discriminatory impact and purpose are invalid and must withstand strict scrutiny analysis.\textsuperscript{112} While disproportionate impact alone is not dispositive, demonstrating discriminatory impact is a necessary element to proving an Equal Protection violation.\textsuperscript{113} To establish discriminatory impact, the plaintiff must show that “similarly situated individuals of a different race were treated differently.”\textsuperscript{114} Notwithstanding discriminatory impact, the Supreme Court has held that “the Fourteenth Amendment guarantees equal laws, not equal results.”\textsuperscript{115} Thus, discriminatory purpose is also required for an Equal Protection violation.\textsuperscript{116}

Once discriminatory impact is proven, the constitutional analysis turns to whether the policy was motivated by a discriminatory purpose.\textsuperscript{117} A policy is motivated by discriminatory purpose when the decision-maker adopts the challenged policy at least partially because the policy would benefit or burden an identifiable group.\textsuperscript{118}

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\textsuperscript{111}. \textit{See} \textsuperscript{id.} (holding intentional discrimination was not demonstrated through racial classifications in Plan 3R).
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\textsuperscript{113}. \textit{See Washington v. Davis}, 426 U.S. 229, 242 (1978) (“Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination . . . .”).
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\textsuperscript{114}. \textit{See Doe}, 665 F.3d at 550 (discussing discriminatory impact analysis).
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\textsuperscript{116}. \textit{See Doe}, 665 F.3d at 552 (discussing how courts should analyze whether discriminatory purpose was motivating factor). Factors include: “(1) whether the official action has a racially disproportionate impact; (2) the historical background of the decision; and (3) the legislative or administrative history of the decision.” \textit{Id.}
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\textsuperscript{117}. \textit{See Arlington Heights}, 429 U.S. at 266 (explaining that discriminatory impact provides an “important starting point” but purposeful discrimination is condition that offends Constitution). According to the Supreme Court in \textit{Arlington Heights}, in order to determine whether “invidious discriminatory purpose was a motivating factor,” a court must conduct “a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” \textit{Id.} Relevant evidence includes “the historical background of the decision,” “[t]he specific sequence of events leading up to the challenged decision,” “[d]epartures from the normal procedural sequence,” “[s]ubstantive departures,” and “[t]he legislative or administrative history . . . especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.” \textit{Id.} at 267–68.
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\textsuperscript{118}. \textit{See Feeney}, 442 U.S. at 279 (noting discriminatory purpose “implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of’ [the action’s] adverse effects upon an identifiable group”). Thus, the mere awareness or consideration of race should
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policy will have a racially disparate impact, however, “does not invalidate an otherwise valid law, so long as that awareness played no causal role” in the adoption of the policy.119 When proof that discrimination on the basis of race was a motivating factor in the decision-making process, “judicial deference is no longer justified” and the court must apply strict scrutiny.120 Absence of a discriminatory purpose on the part of the decision-maker, either explicit or inferable, only demands rational basis review.121

The Third Circuit concluded Plan 3R did not fall into this category of Equal Protection violations.122 In assessing whether Plan 3R produced any discriminatory impact, the Third Circuit noted that Students Doe provided no evidence to demonstrate Plan 3R treated similarly situated students differently depending on race.123 Because Plan 3R was based on residency, all students living in South Ardmore, black and white, were redistricted to Harriton.124 Consequently, the redistricting did not bear more heavily on African American students.125

In addition to not having a discriminatory impact, Plan 3R was not motivated by a discriminatory purpose.126 From the beginning, the Board of Directors made clear the objectives of redistricting by explicitly listing the Non-Negotiables and community values.127 Not only were the Non-Negotiables neutral grounds for adopting Plan 3R, but the Board of Directors who voted in favor of the redistricting plan testified that race was not the basis for their decision.128 Throughout the trial, Students Doe alleged the Board of Directors and developers of Plan 3R considered race not be mistaken for racially discriminatory intent or for proof of an Equal Protection violation. See id.; see also Pryor v. Nat’l Collegiate Athletic Ass’n, 288 F.3d 548, 562 (3d Cir. 2002) (“A mere awareness of the consequences of an otherwise neutral policy will not suffice.”).

120. Arlington Heights, 429 U.S. at 265–66; see also Pryor, 288 F.3d at 562 (“Once a plaintiff establishes a discriminatory purpose based on race, the decisionmaker must come forward and try to show that the policy or rule at issue survives strict scrutiny . . . .”).
121. See Frazier, 981 F.2d at 95 (commenting on Equal Protection jurisprudence with regard to racially discriminatory criminal justice sentencing schemes).
122. See Doe ex rel. Doe v. Lower Merion Sch. Dist., 665 F.3d 524, 555 (3d Cir. 2011) (holding Plan 3R was not discriminatory in impact or purpose).
123. See id. at 550 (disclosing Students Doe provided no evidence to suggest Plan 3R impacted black students disproportionately). All students living in Ardmore were similarly situated and treated the same in the redistricting process because they were all redistricted to Harriton. See id.
124. See id. at 552 (“Plan 3R redistricts to Harriton a significant number of students who are not African-American. Even while grandfathering was still in effect, forty-four students were redistricted to Harriton for the 2009–2010 school year and thirty of those students, nearly two-thirds, are not African-American.”).
125. See id. (concluding no disproportionate impact).
126. See id. at 551–55 (outlining discriminatory purpose analysis).
127. See id. at 552 (noting all neutral ground that Plan 3R was based on).
128. See id. (indicating no evidence establishing district court clearly erred when it found testimonies that race was not basis of voting for Board of Directors credible).
throughout the redistricting process and targeted Ardmore because of its high concentration of African American students. In response, the Third Circuit emphasized that mere awareness of racial demographics does not constitute discriminatory purpose. As such, the Third Circuit held Plan 3R did not exhibit discriminatory impact or purpose; therefore, strict scrutiny was not an appropriate standard of review.

3. **Rational Basis Review**

The Third Circuit determined Lower Merion School District used “pristine, nondiscriminatory goals” as the focal points of redistricting. Because Plan 3R did not intentionally discriminate on the basis of race, the Third Circuit applied rational basis review. Under rational basis review, the challenged policy must be “rationally related to a legitimate state interest.” Applying such a deferential standard of review, Plan 3R—which lessened racial isolation within Lower Merion School District—passed constitutional muster. Although Students Doe appealed the decision, the Supreme Court denied certiorari, which may signal approval of a rational basis approach to this area of law.

129. See id. at 553 (recounting Students Doe’s argument). Students Doe focused on the administrative history of Plan 3R and emphasized statements made by the Board of Directors and the information included in reports and presentations. See id.

130. See id. (arguing that Board of Directors was aware of race in effort to avoid discriminating on basis of race).

131. See id. at 555 (concluding that Plan 3R did not trigger strict scrutiny analysis).

132. Id. at 529.

133. See id. at 556–57 (summarizing rational basis analysis of Plan 3R).

134. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976); see also Doe, 665 F.3d at 556 (“In determining whether Plan 3R is reasonably related to legitimate state interests, our review is highly deferential.”).

135. See Doe, 665 F.3d at 557 (holding Plan 3R passed rational basis review). Lower Merion School District presented evidence that Plan 3R was aimed at accomplishing the following goals: “(a) equalizing the populations at the two high schools, (b) minimizing travel time and transportation costs, (c) fostering educational continuity, and (d) fostering walkability.” Id. Because Plan 3R reasonably related to these four stated goals, the redistricting did not violate the Equal Protection Clause. See id. (stating reasoning of holding).


Lower Merion School District officials released the following statement: The nation’s highest court today let stand lower Federal judicial decisions in favor of the Lower Merion School District that affirmed the constitutionality of the District’s comprehensive 2009 redistricting plan. The District is pleased the litigation has come to an end with the U.S. Supreme Court declining to hear the final appeal filed by opponents of the Plan. The District has consistently maintained that the redistricting policy
After the Supreme Court invalidated race-based student assignment plans in *Parents Involved*, the availability of meaningful desegregation policies seemed exceedingly limited. Urging school districts to “bring to bear the creativity of experts, parents, administrators, and other concerned citizens to find a way to achieve the compelling interests” of avoiding segregation, Justice Kennedy left open the possibility of racial integration. Heeding Justice Kennedy’s directive, Lower Merion School District developed Plan 3R, which complied with *Parents Involved* and achieved racial integration. This Part of the Casebrief addresses the importance of racial integration and the flexibility school districts have in fostering desegregation efforts. Additionally, this Part offers guidance on how practitioners can help school districts take proactive steps to achieve racial integration while remaining consistent with Supreme Court precedent.

**A. The Benefits of a Racially Integrated Society**

Since the end of the civil rights movement, the Supreme Court has handed down decision after decision limiting the scope of desegregation policies. The results of these judgments: resegregation and growing achievement gaps. In order to narrow such disparity between white and minority students, educational policies must address the continuing

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137. See Robinson, supra note 16, at 280 (“*Parents Involved* and the Supreme Court’s requirements for strict scrutiny make any consideration of race in student assignments so difficult and impractical that very few districts, if any, are likely to choose to continue to consider the race of individual students when they assign students to schools.”).


139. See Robinson, supra note 16, at 279 (“[R]ecent evidence indicates that, although some districts abandoned efforts to promote diversity after the *Parents Involved* decision, many school districts continue to pursue diversity but have adjusted their approach to doing so.”).

140. For a discussion of the importance of a racially integrated society, see infra notes 142–48 and accompanying text.

141. For a practical look at how practitioners can help school districts achieve racial integration, see infra notes 149–64 and accompanying text.

142. For a discussion on prior Supreme Court cases ruling on racial desegregation, see supra notes 37–67 and accompanying text.

143. See Robinson, supra note 16, at 326 (“[A]voiding racial isolation and promoting diversity remains an important component of equal educational opportunity because . . . racially isolated educational settings offer inferior educational opportunities to their students and produce inferior outcomes, while diverse educational settings reap important benefits.”).
reseggregation trends in our public school system.\textsuperscript{144} While education reform is often guided by an objective of attaining higher academic achievement, desegregation serves an added purpose.\textsuperscript{145} In addition to the standard reading and math curriculum, schools act as an "entry into the mainstream of society."\textsuperscript{146} Racially integrated schools foster higher academic achievement and better equipped students to manage our diverse society.\textsuperscript{147} Racial isolation is prevalent across our entire nation and school districts must respond to counter it.\textsuperscript{148}

\textsuperscript{144} See Nat’l Acad. of Educ., Comm. on Soc. Sci. Research Evidence on Racial Diversity in Sch., Race-Conscious Policies for Assigning Students to Schools: Social Science Research and the Supreme Court Cases 3 (Robert L. Linn & Kevin G. Wehner eds., 2007), http://www.naeducation.org/xpedio/groups/naedsite/documents/webpage/NAED_080863.pdf ("[R]esearch evidence supports the conclusion that the overall academic and social effects of increased racial diversity are likely to be positive"); see also Orfield et al., supra note 10, at xix ("Federal and state education policy has been based on the assumptions that the continuing resegregation of students is not a fundamental educational problem, and racial and ethnic equality can be achieved primarily through tougher and tougher systems of accountability and sanctions, while doing nothing about the intensifying isolation of students by race and poverty. . . . Almost all states that had strategies fostering integration have abandoned them, instead adopting accountability policies that failed to meet their promises to close achievement gaps, policies that have branded thousands of segregated schools as failures.").

\textsuperscript{145} See Nat’l Acad. of Educ., supra note 144, at 21 ("Although the plaintiff’s primary concern in the [\textit{Brown}] case was to gain access to equal educational opportunities for African American children, many social scientists also believed that school desegregation held the potential to improve intergroup relations."); see also Orfield et al., supra note 10, at 12 ("School desegregation is often discussed as if it were a kind of educational reform for poor nonwhite children, but it also has much broader purposes for all groups of students, including whites and Asians. Most critics look at nothing but test scores, usually in only two subjects. The broader purposes of schools are very hard, often impossible, to achieve in segregated settings.").

\textsuperscript{146} Orfield et al., supra note 10, at 12. "Integrated education is the training ground for integrated communities in a successful multiracial society." \textit{Id.}

\textsuperscript{147} See Nat’l Acad. of Educ., supra note 144, at 43–44 (discussing primary conclusions of research regarding effects of racial diversity on academic achievement). While the effects of racial integration do not harm white students, studies suggest the academic achievement of black students is improved by such efforts. \textit{See id.} (noting effects of desegregation on white and black students respectively); see also Orfield et al., supra note 10, at 12 ("Segregated education has a self-perpetuating character, but so does integration. Children who grow up in integrated schools lead more integrated lives and are better equipped to deal with diversity in their adult lives.").

\textsuperscript{148} See Orfield et al., supra note 10, at 32 ("The Northeast—where the presence of small, deeply fragmented school districts and severe housing segregation foster patterns of school racial and socioeconomic isolation—is the only region where the segregation of black students in 90–100% minority schools increased every decade between 1968 and 2001.").
B. *The Third Circuit Opens the Door to Race-Conscious Redistricting Policies*

With this backdrop, it is clear that meaningful change can only come with a restructuring of our current public school system.  

149. See id. at xxii ("Conditions will only change if we decide to change them.").

150. See Robinson, supra note 16, at 361–62 (arguing direction of our nation regarding desegregation depends on how courts assess race-conscious integration policies post-*Parents Involved*).

151. See Orfield et al., supra note 10, at xxii ("A changed Supreme Court or a national administration making integration a serious priority could make a major difference."); see also Ryan, supra note 23, at 137–38 ("[S]chool officials interested in racial integration, as well as their attorneys, are rightly poring over the opinion for guidance going forward.").

152. See U.S. DEP’T OF EDUC., TECHNICAL ASSISTANCE FOR STUDENT ASSIGNMENT PLANS (2009), available at http://www2.ed.gov/programs/tasap/index.html ("The [Technical Assistance for Student Assignment Plans] program provides one-time competitive grants to local educational agencies to procure technical assistance in preparing, adopting, or modifying, and implementing student assignment plans to avoid racial isolation and resegregation in the Nation’s schools, and to facilitate student diversity, within the parameters of current law."). Post-*Parents Involved*, the federal government funded grants specifically designed to help school districts seek assistance in implementing policies that integrate schools. See id.

153. See Robinson, supra note 16, at 280 (detailing two approaches school districts may adopt to reduce racial isolation and create diverse schools).

154. See id. (describing how school districts can reduce racial isolation and create diverse schools in aftermath of *Parents Involved*); see also U.S. DEP’T OF EDUC., VOLUNTARY USE OF RACE, supra note 13 (setting out considerations when school districts implement desegregation policies).

155. See Robinson, supra note 16, at 280 (analyzing holding of *Parents Involved* and determining approaches necessary to avoid constitutional challenge).

156. See id. (noting policies indirectly rely on race).
based on race. These race-conscious approaches are unlikely to demand strict scrutiny and therefore are likely to pass constitutional muster.

When school districts are faced with Equal Protection challenges, the first step of the court will be to determine the appropriate level of scrutiny. While race-conscious integration policies only demand rational basis review, the policies still must be rationally related to a legitimate state interest. Though there are several approaches that school districts can take to avoid constitutional challenge, Doe provides a practical example. By explicitly listing race-neutral grounds for redistricting—the Non-Negotiables and community values—Lower Merion School District was able to implement a race-conscious policy that was rationally related to the legitimate purposes outlined by the Board of Directors. In the case of student redistricting policies, therefore, practitioners must advise school districts to document the legitimate, race-neutral interests for redistricting. As such, the developers of the redistricting plan may also consider racial impact, which will foster integration.

157. See Parents Involved in Cnty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 788–89 (2007) (“If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.”).

158. For a discussion of Justice Kennedy’s concurrence, see supra notes 58–64 and accompanying text.

159. For a discussion of Equal Protection jurisprudence, see supra notes 92–97 and accompanying text.


161. See Robinson, supra note 16, at 280 (providing guidance on numerous avenues school districts can take to integrate on race-neutral grounds). “Examples of such efforts include (1) student assignment plans that integrate based on socioeconomic status, (2) drawing school attendance zones to bring diverse groups together, and (3) offering magnet programs.” Id.

162. See Doe, 665 F.3d at 556 (“Plan 3R is rationally related to a legitimate interest ‘if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.’” (quoting Donatelli v. Mitchell, 2 F.3d 508, 513 (3d Cir. 1993))).

163. See U.S. Dep’t of Educ., Voluntary Use of Race, supra note 13 (outlining key steps for implementing programs to achieve diversity or avoid racial isolation).

164. See id. (detailing how school districts can redraw attendance zones to achieve racial integration).
V. Conclusion

According to Chief Justice Roberts, “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”\textsuperscript{165} The solution to racial segregation, however, is not so black and white.\textsuperscript{166} The Third Circuit’s decision in \textit{Doe} marks a progressive step toward a racially integrated society.\textsuperscript{167} By providing some flexibility to current Equal Protection desegregation jurisprudence, school districts and practitioners are given the opportunity to implement race-conscious policies, which operate to meaningfully integrate our public school system and realize the commitment of \textit{Brown}.\textsuperscript{168}

\begin{itemize}
\item \textsuperscript{165} Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).
\item \textsuperscript{166} See Orfield et al., supra note 10, at xv (“The problem is not just about skin color; the fact is that segregation is multidimensional. The history of our society links opportunity to race in ways that produce self-perpetuating inequalities—even without any intentional discrimination by educational and political leaders.”); \textit{see also} Barton & Colby, supra note 42, at 38 (“We have, advertently and inadvertently, spun a wide and sticky web of conditions that are holding back progress. . . . It will be necessary to move forward with all deliberate thought, care, and speed.”).
\item \textsuperscript{167} See Robinson, supra note 16, at 362 (noting decisions like \textit{Doe} would help nation continue “unfinished civil rights agenda”).
\item \textsuperscript{168} See id. at 351 (“Given the ability of race-neutral efforts to advance the provision of equal educational opportunity and to avoid many of the harms of racial classifications, school districts should enjoy wide latitude to adopt race-neutral student assignment plans.”).
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INHERENT INCOMPATIBILITY DOCTRINE CIRCLES THE DRAIN IN
KNEPPER v. RITE AID CORP.: “HYBRID” WAGE & HOUR
CLAIMS FLOAT IN THIRD CIRCUIT

CHAD ODINER*

I. INTRODUCTION

The finest distinctions in procedural minutiae can make all the difference in the real world. For example, when a group of employees sues an employer for unpaid wages, the size of the certified group can vary wildly depending on whether the claim is brought under federal or state law. Similarly situated employees cannot join a collective action under the Fair Labor Standards Act (FLSA) unless they affirmatively “opt in.” In contrast, similarly situated employees are automatically joined in class actions brought under most state wage-and-hour laws unless they affirmatively “opt out.”

Federal courts have had some difficulty reconciling these two procedures, especially when FLSA and state law actions are filed at the same time in combined, or “hybrid,” actions in federal court. Courts have disagreed over whether the specified opt-in procedure in the FLSA should bar federal jurisdiction over a corresponding state law claim governed by the opt-out procedure of Federal Rule of Civil Procedure 23 (Rule 23).

* J.D. Candidate, 2014, Villanova University School of Law. I would like to thank the staff of the Villanova Law Review—in particular Glenn McGillivray and Megan Lagreca—for their tireless effort in bringing this article to publication. I would also like to thank my wife for her constant moral and logistical support during the writing process and throughout our 10 years of marriage.


3. For a discussion of the FLSA’s opt-in procedure, see infra notes 29–30 and accompanying text.

4. For a discussion of Rule 23’s opt-out procedure, see infra notes 31–32 and accompanying text.

5. For a discussion of the dilemma in federal courts, see infra notes 33–34 and accompanying text.

In recent years, an argument that these procedures are “inherently incompatible” gained steam in the Third Circuit. Attorneys defending employers have welcomed this doctrine, as group wage-and-hour litigation has become more prevalent in federal practice.

For several years, district courts have employed a disorganized variety of rationales for extending or rejecting supplemental jurisdiction over concurrent state law wage-and-hour claims. The general argument for allowing dual-certification under both the FLSA and Rule 23 is that the FLSA does not expressly prohibit these hybrid actions. Adopting this line of reasoning, several circuit courts have rejected the inherent incompatibility doctrine. In spite of the doctrine’s treatment at the appellate

Hastings L.J. 275, 278 (2009) (surveying district courts’ struggle over inherent incompatibility issue); Todd Schneider & William H. Willson IV, Concurrent Wage-and-Hour Class and Collective Actions in Federal Court: Courts Around the Country Agree to Disagree, ANDREWS CLASS ACTION LITIG. REP. (Thomson Reuters West), July 17, 2008, at *1, available at 2008 WL 2761267 (“[F]ederal courts have struggled with the question of whether the different procedures for state and federal wage-and-hour class actions should prevent a plaintiff from bringing both sets of claims in the same action.”).

7. See De Asencio v. Tyson Foods, Inc., 342 F.3d 301, 311 (3d Cir. 2003) (“[M]andating an opt-in class or an opt-out class is a crucial policy decision . . . .”); see also David J. Comeaux & Flyn L. Flesher, “Hybrid” Wage and Hour Class Actions Approved by Third Circuit, OGLETREE DEAKINS (July 31, 2012), http://www.ogletree deakins.com/publications/2012-07-31/“hybrid”-wage-and-hour-class-actions-approved-third-circuit (stating that Third Circuit was most favorable jurisdiction for inherent incompatibility doctrine).

8. See Bouaphakeo v. Tyson Foods, Inc., 564 F. Supp. 2d 870, 887 (N.D. Iowa 2008) (noting popularity of hybrid wage-and-hour claims among district courts); see also Schneider & Willson, supra note 6, at *1 (“Wage-and-hour class-action litigation is an increasingly prevalent part of federal court dockets throughout the United States.”). See generally Nicholas P. Cholis, After Ervin: How Combined Actions Will Affect Wage and Hour Class Litigation in Illinois, 100 Ill. B.J. 430 (2012) (chronicling upward trend in number of wage-and-hour suits in federal courts).

9. See Lopez, supra note 6, at 278 (explaining lack of unified rationale in courts’ rejection or acceptance of inherent incompatibility).

10. See Ervin v. OS Rest. Servs., Inc., 632 F.3d 971, 974 (7th Cir. 2011) (“Nothing in the text of the FLSA or the procedures established by the statute suggests either that the FLSA was intended generally to oust other ordinary procedures used in federal court or that class actions in particular could not be combined with an FLSA proceeding.”); see also Lindsay v. Gov’t Emps. Ins. Co., 448 F.3d 416, 420–24 (D.D.C. 2006) (holding that FLSA does not prohibit federal jurisdiction over corresponding state wage-and-hour law claims).

11. See Ervin, 632 F.3d at 980 (“[T]he ‘conflict’ between the opt-in procedure under the FLSA and the opt-out procedure under Rule 23 is not a proper reason to decline jurisdiction . . . .”); Shahriar v. Smith & Wollensky Rest. Grp., Inc., 659 F.3d 234, 247 (2d Cir. 2011) (rejecting argument that inherent incompatibility between opt-in and opt-out procedures constitutes “compelling reason” for declining supplemental federal jurisdiction over state law class action); Wang v. Chinese Daily News, Inc., 623 F.3d 743, 761 (9th Cir. 2010) (finding that supplemental jurisdiction over state law class action was within discretion of district court) vacated on other grounds, 132 S. Ct. 74 (2011); Lindsay, 448 F.3d at 424 (“While there is unquestionably a difference—indeed, an opposite requirement—between opt-in and opt-out procedures, we doubt that a mere procedural difference can curtail
level, many district courts continued to have misgivings about combining state law class actions with the FLSA’s collective actions.12

This article discusses the diminishing viability of the inherent incompatibility doctrine in the context of combined, or hybrid, wage-and-hour group litigation.13 Part II summarizes the legal background of federal and state wage-and-hour regulations, including an explanation of the procedures applicable in actions brought under federal and state law.14 Part II also discusses the jurisdictional principles that govern federal courts adjudicating dual-filed wage-and-hour actions.15 Finally, Part II outlines the development and treatment by courts of the inherent incompatibility doctrine.16 Part III examines the Third Circuit’s opinion in Knepper v. Rite Aid Corp.,17 and analyzes the court’s reasoning.18 Part IV offers suggestions to practitioners in the Third Circuit on how best to take advantage of or mitigate Knepper’s outcome.19 Part V provides a brief conclusion.20

12. See, e.g., Fisher v. Rite Aid Corp., 764 F. Supp. 2d 700, 705 (M.D. Pa. 2011) aff’d in part, rev’d in part sub nom. Knepper v. Rite Aid Corp., 675 F.3d 249 (3d Cir. 2012) (listing courts that have held Section 216(b) and Rule 23 class actions as inherently incompatible); Otto v. Pocono Health Sys., 457 F. Supp. 2d 522, 524 (M.D. Pa. 2006) (“To allow [a] Section 216(b) opt-in action to proceed accompanied by a Rule 23 opt-out state law class action claim would essentially nullify Congress’s intent in crafting Section 216(b) and eviscerate the purpose of Section 216(b)’s opt-in requirement.”); see also De La Fuente v. FPM Ipsen Heat Treating, Inc., No. 02 C 50188, 2002 WL 31819226 (N.D. Ill. Dec. 16, 2002) (rejecting Rule 23 certification of state law class because of risk of confusion to plaintiffs upon receiving class action notice requiring them to opt in and opt out for same action).

13. For a discussion of the inherent incompatibility doctrine, see infra notes 36–38 and accompanying text. Throughout this article I will use the term “hybrid” to refer to the practice of bringing state law class actions and FLSA collective actions that are founded on the same basic employer action in federal court simultaneously.

14. For a further discussion of the procedures governing group wage-and-hour litigation under the FLSA, Rule 23 of the Federal Rules of Civil Procedure, and state law regulations, see infra notes 22–35 and accompanying text.

15. For a further discussion of the scope of original and supplemental federal jurisdiction over hybrid wage-and-hour claims, see infra notes 36–49 and accompanying text.

16. For a further discussion of the inherent incompatibility doctrine’s development in district and circuit courts, see infra notes 50–78 and accompanying text.

17. 675 F.3d 249 (3d Cir. 2012).

18. For a further discussion of the Third Circuit’s holding and reasoning in Knepper, see infra notes 76–122 and accompanying text.

19. For a further discussion of Knepper’s impact on Third Circuit practitioners, see infra notes 123–32 and accompanying text.

20. For a further discussion of the demise of inherent incompatibility doctrine, see infra 130–34 and accompanying text.
II. BACKGROUND: FEDERAL AND STATE WAGE-AND-HOUR LAW

In 1938, Congress passed the FLSA, following a change in the Supreme Court’s posture toward federal wage-and-hour regulation. The FLSA’s minimum wage and overtime requirements established a regulatory floor for labor conditions to achieve a minimum living standard. The statute’s savings clause empowered states to set equivalent or more stringent wage-and-hour regulations. Accordingly, most states enacted wage-and-hour regimes, many of which create substantive rights that mirror the FLSA.


22. See 29 U.S.C. § 202 (addressing labor conditions “detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers”); id. § 206 (mandating federal minimum wage); id. § 207 (mandating time-and-a-half pay for hours worked in excess forty-hour work week); see also Lopez, supra note 6, at 280–81 (describing regulatory floor-setting policy behind FLSA). See generally John S. Forsythe, Legislative History of the Fair Labor Standards Act, 6 L. & CONTEMP. PROBS. 464 (1939) (discussing FLSA’s development and policy objectives).

23. See 29 U.S.C. § 218 (“No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter . . . .”); see also Overnite Transp. Co. v. Tianti, 926 F.2d 220, 222 (2d Cir. 1991) (noting that “every Circuit that has considered the issue” has concluded that FLSA does not preempt state wage law). But see Alexander, supra note 6, at 549–58 (arguing that hybrid state claims should be dismissed on theory that Rule 23 procedure erects “obstacle” in front of purposes and objectives of Congress as expressed in FLSA).

24. See Schneider & Willson, supra note 6, at *1 (identifying forty-eight states, as well as Puerto Rico and District of Columbia, as jurisdictions with wage-and-hour regimes). Although most state wage-and-hour regimes mirror the FLSA, some states have gone beyond the FLSA by setting a higher minimum wage or imposing harsher penalties for employer violations. See Allen, supra note 2, at *2 (noting treble damages imposed by some state regimes).
A. To Opt In or to Opt Out? That is the Question

The FLSA created a private cause of action for employees to recover unpaid wages due under the statute. Originally, such actions could be pursued (1) individually, (2) collectively by an employee “on behalf of other employees similarly situated,” or (3) by a non-party representative designated by a group of similarly situated employees. In 1947, Congress eliminated representative action by passing the Portal-to-Portal Act. In passing the law, Congress addressed a perceived increase in wage litigation initiated by union leaders with no direct stake in the claims, which some believed created impermissible impediments to economic activity. Under the amended FLSA Section 216(b), only aggrieved employees can represent a class, and any employee wishing to join a FLSA action must affirmatively opt in.

The FLSA’s opt-in requirement stands in sharp contrast to the opt-out mechanism applicable to most class actions under Rule 23. Under Rule

25. See Lopez, supra note 6, at 281 (describing procedural provisions of FLSA as originally passed).


27. See Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84 (1947) (codified as amended in scattered sections of 29 U.S.C); see also Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 173 (1989) (“The relevant amendment was for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions.”). The Act also narrowed employer liability for “portal pay,” or pay allegedly due employees for time spent traveling on site to and from their workstations. See Fraser, supra note 26, at 101 (discussing wave of anti-FLSA political activity leading to eventual passage of Portal-to-Portal Act).

28. See Fraser, supra note 26, at 101 (explaining historical context of FLSA reforms); see also Marc Linder, Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947, 39 BUFF. L. REV. 53, 54 (1991) (describing intense political debate over scope of FLSA as “one of the greatest legal-economic controversies in American history . . . .”).

29. See 29 U.S.C. § 216(b) (2006) (creating opt-in requirement for FLSA collective actions). The term “opt-in” is not used in the statute: An action to recover [under Sections 206 and 207] may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. Id. (emphasis added).

23, members of a court-certified class are bound as parties to the action unless they actively opt out by filing for exclusion. 31 One of Rule 23’s requirements for classification is that “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” 32

Importantly, very few state wage law regimes foreclose opt-out class actions under Rule 23, assuming federal jurisdiction exists. 33 On the other hand, courts have consistently ruled that the clear conflict between these two procedures forecloses use of a Rule 23 opt-out class action to enforce rights created under the FLSA. 34 The question remains as to whether federal courts may enforce state law wage-and-hour class actions under Rule 23 while concurrently enforcing FLSA collective actions under the Section 216(b) scheme. 35

B. Hybrid State and Federal Actions: A Question of Jurisdiction

Importantly, the difference between the opt-in procedure under Section 216(b) and the opt-out procedure under Rule 23 leads to a significant discrepancy in the number of plaintiffs in a FLSA collective action versus a state law wage-and-hour collective action. 36

(prohibiting wage discrimination based on age and incorporating FLSA opt-in procedures); see also Lopez, supra note 6, at 275 (characterizing FLSA’s opt-in procedure as “antiquated vestige” from “infancy of group litigation”).

31. See Fed. R. Civ. P. 23(c)(3) (binding any certified class members “who have not requested exclusion, and whom the court finds to be class members”). Interestingly, prior to a 1966 revision, Rule 23 employed an opt-in procedure essentially equivalent to the FLSA Section 216(b) procedure. See Andrew C. Brunsden, Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts, 29 BERKELEY J. EMP. & LAB. L. 269, 279–81 (2008) (discussing developmental interplay between Rule 23 and FLSA Section 216(b) group litigation procedures).


33. See Schneider & Willson, supra note 6, at *1 (surveying state wage-and-hour regulations and noting that only four jurisdictions require opt-in procedures akin to FLSA’s collective action opt-in procedure). Accordingly, most state law wage-and-hour claims are pursued as class actions. See id. (explaining that employers that fit definition in state wage law class action complaint are considered members of class unless they opt out). Because the FLSA only applies to companies making over half a million dollars or engaging in interstate commerce, some states’ wage-and-hour regulations expressly extend only to intrastate employers not covered under FLSA. See id. (exploring unique state law wage-and-hour schemes); see also 29 U.S.C. § 203 (2006) (describing scope of federal wage-and-hour regulations).

34. See, e.g., Knepper v. Rite Aid Corp., 675 F.3d 249, 257 (3d Cir. 2012) (“Courts have concluded that the plain language of this provision bars opt-out class actions . . . under the well-established principle that, where Congress has provided a detailed remedy, other remedies are unavailable.”); LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 288 (5th Cir. 1975) (noting “fundamental, irreconcilable difference” between opt-out procedure in Rule 23 class actions and opt-in procedure in FLSA Section 216(b) collective actions).

35. See De Asencio v. Tyson Foods, Inc., 342 F.3d 301, 312 (3d Cir. 2003) (holding that in certain cases opt-out procedure may be inherently incompatible with opt-in procedure).
state law class action.\footnote{36} Courts have sometimes agreed with litigants that proceeding in the face of this discrepancy presents an inherent jurisdictional problem.\footnote{37} Whether or not to allow both claims to proceed in federal court is ultimately a question of when and how far federal courts’ jurisdiction over state law claims can and should extend.\footnote{38} There are two potential sources of federal jurisdiction over state wage-and-hour claims: supplemental jurisdiction under Title 28, Section 1367 of the United Stated Code and original jurisdiction stemming from the Class Action Fairness Act (CAFA).\footnote{39}

1. \textit{Supplemental Jurisdiction Under Section 1367}

Federal courts have original federal question jurisdiction over FLSA actions regardless of their collective or individual status.\footnote{40} In addition, courts may exercise supplemental jurisdiction over state law claims that “form part of the same case or controversy” as the federal claim to which the court’s original jurisdiction extends.\footnote{41} Because most state wage-and-hour regulations are substantively similar or identical to the FLSA, state

\footnote{36} See id. (holding that inordinate size of state law class contributes to substantial predomination over federal law claim); see also Brunden, supra note 31, at 291–94 (estimating that only about fifteen percent of potential FLSA plaintiffs opt in to collective federal actions, while about one percent of certified class members in state law class actions governed by Rule 23 opt out of such actions); Les A. Schneider & J. Larry Stine, Hybrid Action, Collective Actions, and Class Actions, WAGE & HOUR L.: COMPLIANCE & PRACTICE (Thomson Reuters West), 2013 (discussing disparity between number of opt-in plaintiffs and opt-out plaintiffs typical of hybrid actions).

\footnote{37} See Knepper v. Rite Aid Corp., 764 F. Supp. 2d 707, 713 (M.D. Pa. 2011) (explaining that inherent incompatibility doctrine extends even to cases filed under CAFA) aff’d in part, rev’d in part, 675 F.3d 249 (3d Cir. 2012). But see Ervin v. OS Rest. Servs., Inc., 632 F.3d 971, 980 (7th Cir. 2011) (“[W]hile there may in some cases be exceptional circumstances or compelling reasons for declining jurisdiction, the ‘conflict’ between the opt-in procedure under the FLSA and the opt-out procedure under Rule 23 is not a proper reason to decline jurisdiction under section 1367(c)(4).”).

\footnote{38} For a discussion of the \textit{Knepper} court’s rejection of non-jurisdictional arguments, see infra notes 109–12 and accompanying text. For a discussion of the \textit{Knepper} court’s rejection of the Rules Enabling Act challenge, see infra notes 113–14 and accompanying text.


\footnote{40} See U.S. Const. art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .”); 28 U.S.C. § 1331 (2006) (granting federal courts federal question jurisdiction authorized by Article III); see also Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 807 (1986) (noting that federal courts have “federal question” jurisdiction at least over causes of action created by federal statute).

\footnote{41} See 28 U.S.C. § 1367(a) (outlining rules for supplemental federal jurisdiction over state law claims). For claims to form part of the same case or controversy, they must “derive from a common nucleus of operative fact.” See United Mine
claims usually rest on the same nucleus of facts as corresponding FLSA claims.42

But federal courts retain discretion to decline supplemental jurisdiction where, for example, a claim raises “novel or complex” state law issues, or where the state law claim “substantially predominates over” the federal claim that supported original jurisdiction.43 Federal courts may also decline supplemental jurisdiction if, “in exceptional circumstances, there are other compelling reasons . . . .”44 Where jurisdiction over state law claims is merely supplemental, some federal courts have claimed discretion to dismiss the state class actions.45

2. Original Jurisdiction Under CAFA

Under the CAFA, federal jurisdiction is not merely supplemental.46 Instead, the CAFA relaxes the rules for federal diversity jurisdiction for large class action suits.47 Thus, the statute also grants original federal jurisdiction over many state law wage-and-hour class action suits.48 Impor-


42. For a discussion of similarities between rights created under state and federal wage-and-hour laws, see supra note 24 and accompanying text.

43. 28 U.S.C. § 1367(c)(1), (2) (expressly granting federal courts discretion to decline supplemental jurisdiction under limited conditions); see also De Asencio v. Tyson Foods, Inc., 342 F.3d 301, 312 (3d Cir. 2003) (discussing state wage-and-hour class action because it would substantially predominate over FLSA claim); Gibbs, 383 U.S. at 726 (“[T]he justification [for supplemental jurisdiction] lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims . . . .”).

44. 28 U.S.C. § 1367(c)(4).

45. For a discussion of De Asencio and the extent of courts’ discretion to reject supplemental jurisdiction, see infra notes 53–55 and accompanying text.

46. For a discussion of federal jurisdiction in large class action suits under the CAFA, see infra notes 46–49 and accompanying text.

47. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.) (amending diversity requirements for class actions). For example, the CAFA significantly expanded federal jurisdiction over class actions, primarily by replacing the “complete diversity” requirement with a “minimal diversity” requirement, which only entails diversity between any plaintiff and any defendant. See 28 U.S.C. § 1332(d)(2) (setting minimal diversity requirement for diversity jurisdiction over class actions). The CAFA also replaced the usual non-aggregated $75,000 minimum amount in controversy requirement with a $5,000,000 requirement that may be aggregated. See id. § 1332(d)(6) (allowing aggregation for purposes of calculating amount in controversy).

48. See Jason R. Bristol, Thomas A. Downie & Ashley A. Weaver, Intended and Unintended Consequences: The 2006 Fair Minimum Wage Amendment of the Ohio Constitution, 58 CLEV. ST. L. REV. 367, 375 (2010) (discussing impact of CAFA on jurisdiction over wage-and-hour actions). To satisfy the CAFA’s relaxed diversity rules, only one plaintiff must be from a different state than the employer being sued. See Brunsden, supra note 31, at 283 (discussing CAFA’s expansion of federal jurisdiction over interstate class actions).
tantly, where diversity jurisdiction exists under the CAFA, federal courts cannot dismiss state class actions based on the discretionary supplemental jurisdiction theory outlined above.49

C. Courts Grapple with Hybrid Actions and Inherent Incompatibility

The Third Circuit became the first circuit court to grapple with the supplemental jurisdiction question in *De Asencio v. Tyson Foods, Inc.*50 In *De Asencio*, hourly employees at a chicken processing plant gained collective treatment in an FLSA suit, and only filed for class certification under Rule 23 after the fact under a unique Pennsylvania contract law theory.51 The district court ultimately granted Rule 23 certification for the state law claims and the defendant plant-owner disputed jurisdiction on interlocutory appeal.52

The Third Circuit held that the state law claim substantially predominated over the FLSA claim for two reasons.53 First, the presence of complex and unique state law questions militated against supplemental jurisdiction.54 Additionally, the court held that the “sheer difference in numbers” between the Rule 23 opt-out class and the FLSA opt-in class might constitute substantial predomination.55 Moreover, although framed as a jurisdictional issue, the court clearly placed a heavy emphasis on the policy behind Congress’s decision to require an opt-in procedure for FLSA claims.56

49. For a discussion of supplemental jurisdiction and discretion to decline jurisdiction under Section 1367, see supra notes 40–45.
50. 342 F.3d 301 (3d Cir. 2003). The Third Circuit held that the district court exceeded its discretion under 28 U.S.C. 1367(c)(1) by extending supplemental jurisdiction to the Pennsylvania wage law class action. See id. at 307–12 (concluding that district court exceeded its discretion).
51. See id. at 305 (describing employees’ uncompensated time spent donning and doffing protective clothing to prevent disease associated with handling of chicken slaughtering refuse). At the time *De Asencio* was being decided, the Supreme Court of Pennsylvania had not yet ruled on the state law theory. See id. at 309 (discussing unique implied oral contract theory for establishing employment under Pennsylvania law).
52. See id. at 305 (discussing procedural posture of case).
53. See id. at 308–09 (discussing statutory limits of federal supplemental jurisdiction under Section 1367 and scope of federal court discretion in determining substantial predomination).
54. See id. at 309 (“[A] district court will find substantial predomination ‘where a state claim constitutes the real body of the case, to which the federal claim is only an appendage’ . . . .” (quoting United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 727 (1966))).
55. See id. at 311 (“Predominance under section 1367 generally goes to the type of claim, not the number of parties involved. But the disparity in numbers of similarly situated plaintiffs may be so great that it becomes dispositive by transforming the action to a substantial degree, by causing the federal tail represented by a comparatively small number of plaintiffs to wag what is in substance a state dog”) (emphasis added).
56. See id. (“[I]t is sufficient to note that mandating an opt-in class or an opt-out class is a crucial policy decision. Congress has selected an opt-in class for FLSA
D. Other Circuit Courts Respond to Inherent Incompatibility

In Lindsay v. Government Employees Insurance Co.,\(^{57}\) the District of Columbia Circuit Court rejected a jurisdictional argument similar to the one posed in De Asencio.\(^{58}\) Importantly, Lindsay did not involve either the complex state law issues or the large disparity in Rule 23 and FLSA class sizes present in De Asencio.\(^{59}\) Nonetheless, Lindsay stands for the proposition that any conflict inherent in the two procedures is overcome by Congress’s clear policy interest in expansive supplemental jurisdiction.\(^{60}\)

In the more recent case of Ervin v. OS Restaurant Services, Inc.,\(^{61}\) the Seventh Circuit took on De Asencio directly, distinguishing it on the basis of the unique state law issues presented there.\(^{62}\) The Ervin court also called into question De Asencio’s suggestion that disparity in numbers alone might constitute substantial predominance.\(^{63}\) The court reasoned that Section

57. 448 F.3d 416 (D.C. Cir. 2006).
58.  See id. at 424 (limiting court discretion to dismiss state law claims on substantial predominance theory).
59.  See id. at 424–25 (holding that differences between opt-in and opt-out procedures did not constitute “exceptional circumstances” justifying discretionary rejection of supplemental jurisdiction under Section 1367(c)). The court did not directly distinguish De Asencio, which came down the same year, but the state law issues in Lindsay were nearly identical to the FLSA issues and the FLSA claim achieved an unusually high opt-in rate. See id. at 425 n.12 (rejecting substantial predominance argument).
60.  See id. at 424 (“While there is unquestionably a difference—indeed, an opposite requirement—between opt-in and opt-out procedures, we doubt that a mere procedural difference can curtail section 1367’s jurisdictional sweep. Regardless of any policy decision implicit in [FLSA]’s opt-in requirement . . . Congress made its intent regarding the exercise of supplemental jurisdiction clear: ‘Congress conferred a broad grant of jurisdiction upon the district courts, indicating a congressional desire that, supplemental jurisdiction at least in the first instance . . . go to the constitutional limit . . . ’”) (citation omitted).
61.  632 F.3d 971 (7th Cir. 2011).
62.  See id. at 980 (noting that plaintiffs’ Illinois Wage Payment and Collection Act claims “essentially replicate” their FLSA claims).
63.  See id. (“As long as the claims are similar between the state plaintiffs and the federal action, it makes no real difference whether the numbers vary.”). Although the disparity in class sizes in Ervin was greater than Lindsay, it was not as vast as the disparity in De Asencio. The disparity in Lindsay was a narrow 204 FLSA claimants and 228 state law claimants. See id. (comparing disparity of class sizes in Lindsay, Ervin, and De Asencio). In Ervin, the FLSA action garnered thirty opt-in claimants and the Rule 23 action would have achieved between 180 and 250 claimants. See id. (same). In De Asencio, the disparity was far more severe with only 447 FLSA claimants compared to a Rule 23 class of 4,100 claimants. See id. at 981 (same).
1367’s efficiency policy would not be served by requiring two separate trials on the same facts simply because the class sizes were different.64

The Ervin court also rejected the district court’s inherent incompatibility holding.65 According to the district court, Rule 23’s opt-out procedure undermined the congressional intent behind the FLSA’s opt-in procedure, rendering Rule 23 actions categorically incompatible when combined with FLSA actions in federal court.66 The Ninth Circuit acknowledged the procedural tension but held that the FLSA’s language provides no textual justification for dismissing state law claims.67

E. Inherent Incompatibility Arguments in District Courts After Ervin

After Ervin, it was unclear whether inherent incompatibility would go any further, at least on the Section 1367 supplemental jurisdiction argument.68 But some courts continued to dismiss hybrid actions on jurisdictional grounds, embracing the inherent incompatibility argument in several different iterations.69 The most common argument—rejected in the circuit court decisions discussed above—continues to be that massive state law class actions will tend to “predominate” over corresponding federal claims for purposes of Section 1367 supplemental jurisdiction.70 Importantly, the passage of the CAFA may render this line of cases moot.71

64. See id. at 981 (speculating that requiring separate litigation on same facts would undermine efficiency policy in most cases). The court did not entirely foreclose the possibility that De Asencio’s reasoning might apply in exceptional cases. See id. at 980 (declining to take position on “whether a state law class might ever so dwarf a federal FLSA action that supplemental jurisdiction becomes too thin a reed on which to ferry the state claims into federal court”).

65. See id. at 974 (“[T]here is no insurmountable tension between the FLSA and Rule 23(b)(3).”)

66. See Ervin v. OS Rest. Servs., Inc., No. 08 C 1091, 2009 WL 1904544, at *2 (N.D. Ill. July 1, 2009) (“[T]here is a clear incompatibility between the ‘opt out’ nature of a Rule 23 action and the ‘opt in’ nature of a Section 216 action.”).

67. See Ervin, 632 F.3d at 977 (“[T]he court jumped too quickly to congressional intent. Before taking that step, we must examine the text of the FLSA itself.”).

68. See Cholis, supra note 8, at 432–33 (discussing impact of Ervin on Illinois district courts’ handling of hybrid wage-and-hour actions).

69. See Schneider & Willson, supra note 6, at *2 (“No definitive line of cases has emerged, and the sheer volume of cases addressing this subject makes it impossible to put them into a finite number of categories.”).

70. For a discussion of supplemental jurisdiction under Section 1367, see supra notes 40–45 and accompanying text; see also McClain v. Leona’s Pizzeria, Inc., 222 F.R.D. 574, 577 (N.D. Ill. 2004) (holding that Section 1367’s grant of supplemental jurisdiction “does not contemplate a plaintiff using supplemental jurisdiction as a rake to drag as many members as possible into what would otherwise be a federal collective action.”).

71. For a discussion of the CAFA’s jurisdictional sweep and underlying policy objectives, see supra notes 46–49 and accompanying text. For a further discussion of the CAFA’s impact on hybrid wage claims, see supra notes 46–49 and accompanying text.
Another argument against hybrid actions is that the plaintiff notification process would be too confusing to potential participants and would create manageability issues when Rule 23 and FLSA notifications are simultaneously employed.\(^{72}\) However, courts rejecting inherent incompatibility have made precisely the opposite argument: forcing litigation of identical factual and nearly identical legal issues in two separate forums creates needless inefficiency.\(^{73}\)

A few courts have embraced the inherent incompatibility doctrine in its purest form, arguing that Rule 23’s opt-out default simply strays too far from Congress’s clear intent in creating the FLSA’s opt-in procedure for wage-and-hour actions.\(^{74}\) One district court in Pennsylvania has accepted the inherent incompatibility theory—including in cases on appeal in *Knapper* below—so it seemed possible that the Third Circuit might be ripe ground for a circuit split.\(^{75}\)

III. *Knapper v. Rite Aid Corp.*

In *Knapper* the Third Circuit became the fifth court of appeals to reject the inherent incompatibility argument against hybrid claims.\(^{76}\) Specifically, the Middle District of Pennsylvania embraced inherent incompatibility where independent federal jurisdiction existed over the state law claims under the CAFA, and where the state law claims were filed separately from the FLSA claims.\(^{77}\) But the Third Circuit’s rejection of the doctrine in this context likely applies more broadly, as it addressed the heart of the legislative intent argument that forms the basis for inherent incompatibility.\(^{78}\)

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\(^{72}\) See Lopez, *supra* note 6, at 286 (discussing Rule 23 notification requirements).

\(^{73}\) See Fraser, *supra* note 26, at 102–05 (discussing efficiency considerations behind modern Rule 23).

\(^{74}\) For a discussion of courts that have declined jurisdiction over state law class actions solely because of a conflict between Rule 23 and FLSA, see *supra* note 12 and accompanying text.


\(^{76}\) For a discussion of appellate court treatment of the inherent incompatibility doctrine, see *supra* notes 56–67 and accompanying text.

\(^{77}\) For a list of courts that have declined jurisdiction over state law class actions solely because of a conflict between Rule 23 and FLSA, see *supra* note 12 and accompanying text.

\(^{78}\) For a summary of the Third Circuit’s policy analysis in *Knapper*, see *infra* notes 97–102 and accompanying text.
A. Factual and Procedural Background

James Fisher and Robert Vasvari, both former assistant Rite Aid store managers, were opt-in plaintiffs in a nationwide FLSA collective action against Rite Aid for unpaid overtime wages. Plaintiffs claimed that Rite Aid misclassified assistant store managers as exempt from the FLSA’s overtime requirements under Section 207. Shortly after joining the FLSA claim, Fisher and Vasvari independently initiated Rule 23 class action claims against Rite Aid based on state law theories very similar to the FLSA claim, and sought compensation for unpaid overtime under Maryland and Ohio law respectively. Both claims made their way to the Middle District of Pennsylvania, where the FLSA collective claim was being litigated.

The district court agreed with Rite Aid that Rule 23’s opt-in procedure is inherently incompatible with the FLSA’s opt-out scheme because it

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79. See Knepper v. Rite Aid Corp., 675 F.3d 249, 252 (3d Cir. 2012) (reciting procedural background); see also Craig v. Rite Aid Corp., Civil Action No. 4:08-CV-2317, 2011 WL 3652175, at *1 (M.D. Pa. Aug. 18, 2011), report and recommendation adopted, No. 08-CV-2317, 2011 WL 3651360 (M.D. Pa. Aug. 18, 2011) (recognizing as similarly situated for purposes of collective action under FLSA “[a]ll individuals classified as exempt from the FLSA’s overtime pay provisions and employed as salaried Assistant Store Managers during any workweek within the previous three years in any of the 4,901 [Rite Aid] stores . . . .”).

80. See Knepper, 675 F.3d at 252 (explaining overtime claim under FLSA Section 207). Section 207’s overtime requirement requires time-and-a-half pay for hours worked beyond forty weekly hours:

Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.


82. See Knepper, 675 F.3d at 252 (explaining transfer and re-filing procedures). Citing judicial efficiency principles, the District of Maryland dismissed Fisher’s class action claim without prejudice and Fisher re-filed with the Middle District of Pennsylvania. See Fisher v. Rite Aid Corp., Civil Action No. RDB-09-1909, 2010 WL 2332101, at *2 (D. Md. June 8, 2010) (explaining first-to-file rule and granting defendant’s motion to dismiss). Fisher successfully re-filed in the Middle District of Pennsylvania based on diversity jurisdiction. See Knepper, 675 F.3d at 252 (explaining Fisher’s re-filing in Middle District of Pennsylvania). The Northern District of Ohio transferred Vasvari’s claim to the Middle District of Pennsylvania because of a transfer clause in his employment contract with Rite Aid. See id. at 253 (providing reason for transferring Vasvari’s claim). The Middle District of Pennsylvania then substituted Daniel Knepper as the plaintiff in Vasvari’s claim after Vasvari died. See id. at 252 (explaining that claim did not otherwise change in any respect).
undermines Congress’s intent to limit the volume of wage-and-hour litigation, as well as preventing plaintiffs’ rights from being litigated without their knowledge.\(^\text{83}\) Interestingly, although inherent incompatibility has generally been invoked only in hybrid actions, the district court held that the doctrine bars federal courts from processing parallel state law wage-and-hour claims under any circumstance.\(^\text{84}\) Specifically, the court held that separately filed FLSA and state law wage-and-hour actions conflict with the policy underlying both Section 216(b)’s opt-in requirement, as well as that underlying hybrid actions.\(^\text{85}\) On the other hand, noting that Congress only intended the FLSA to set a regulatory floor, the district court succinctly rejected Rite Aid’s argument that federal labor standards preempted any similar rights created by state law.\(^\text{86}\) Thus, the district court’s dismissal would not prevent plaintiffs from re-filing their state law claims in state court.\(^\text{87}\)

\[\text{B. Third Circuit Rejects Inherent Incompatibility}\]

The Court of Appeals for the Third Circuit began its analysis by providing a detailed history of the opt-in procedure and its incorporation into the FLSA through the Portal-to-Portal Act.\(^\text{88}\) In particular, the court highlighted Congress’s concern that early FLSA litigation had created immense, unpredictable, and retroactive employer liability.\(^\text{89}\) According to the court, in this regard Congress was primarily targeting so-called “repre-

\(^{83}\) See id. at 253 (summarizing district court holding). The Middle District of Pennsylvania pointed to its own previous findings on the inherent incompatibility argument, as well as precedent from other district courts accepting inherent incompatibility. See, e.g., Fisher, 764 F. Supp. 2d at 705 (providing cases supporting inherent incompatibility doctrine); Otto v. Pocono Health Sys., 457 F. Supp. 2d 522, 524 (M.D. Pa. 2006) (“To allow an [sic] Section 216(b) opt-in action to proceed accompanied by a Rule 23 opt-out state law class action claim would essentially nullify Congress’s intent in crafting Section 216(b) and eviscerate the purpose of Section 216(b)’s opt-in requirement.”).

\(^{84}\) See Fisher, 764 F. Supp. 2d at 706 (extending inherent incompatibility doctrine to separately filed FSLA and state wage-and-hour claims).

\(^{85}\) See id. (“[D]enying a plaintiff the opportunity to litigate a claim in one action, but allowing the claim to proceed in an action that only differs from the original by docket number, does not vindicate the purposes behind application of the doctrine in the first place.”).

\(^{86}\) See Knepper v. Rite Aid Corp., 764 F. Supp. 2d 707, 712 (M.D. Pa. 2011), aff’d in part, rev’d in part, 675 F.3d 249 (3d Cir. 2012) (noting that presence of “savings clause” in FLSA constitutes clear evidence that “states are free to enact relevant laws that are more protective than the scope of the FLSA.”).

\(^{87}\) See Fisher, 764 F. Supp. 2d at 707 (dismissing state law claim without prejudice and holding that plaintiff had no basis for relief in federal court on state law claim).

\(^{88}\) See Knepper, 675 F.3d at 253 (acknowledging dispute over purpose of 1947 amendment “and its implications for federal opt-out class actions based on state law”).

\(^{89}\) See id. at 255 (discussing congressional intent behind Portal-to-Portal Act’s amendments to Section 216(b) of FLSA).
sentative" actions, allegedly initiated by non-employee union leaders as a bargaining strategy.90

A secondary legislative concern, according to the court, was the prospect of one-way intervention, whereby large numbers of passive employees might choose to sit out of FLSA litigation initially, opting to be bound by the judgment once it became clear that the outcome would be in their favor.91 The court also noted that the conflict between opt-in and opt-out procedures only became relevant when Rule 23 was revised to its current opt-out form.92

The Third Circuit next acknowledged the agreement among courts that the opt-in requirement in Section 216(b) clearly precludes use of a Rule 23 opt-out class action to enforce FLSA violations themselves.93 As the court explained, the inherent incompatibility argument essentially extends this logic to state law wage-and-hour claims filed in federal court.94 But, following the Seventh Circuit’s lead in Ervin, the Third Circuit found no evidence that the text of Section 216(b) or Congress’s intent indicated any unacceptable conflict between the two procedures.95

Undergoing a textual analysis of Section 216(b), the Third Circuit determined that, on its face, the statute only requires application of the opt-in mechanism to actions initiated under Sections 206, 207, or 215(a)(3) of the FLSA, which (respectively) cover minimum wage, overtime pay, and employer retaliation against employees who file FLSA actions.96 Specifically, the court flatly disagreed with the district court’s


91. See Knepper, 675 F.3d at 255–57 (identifying legislative purpose for filed consent requirement in 1947 amendment). The court also noted Congress’s concern that Section 216(b) claims might be used by derelict plaintiffs to circumvent the statute of limitations. See id. (clarifying Congress’s intent that collective FLSA actions not prevent running of statute of limitations for plaintiffs who only join action after statute of limitation has run).

92. See id. at 257 (discussing effect of Rule 23’s 1966 revision on FLSA claims).

93. See id. (“[W]here Congress has provided a detailed remedy, other remedies are unavailable.”). The same logic applies to other federal causes of action that incorporate FLSA’s opt-in mechanism. See, e.g., LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 289 (5th Cir. 1975) (holding Age Discrimination in Employment Act’s express adoption of FLSA opt-in mechanism to be irreconcilable with invocation of Rule 23 for purpose of circumventing Section 216(b)’s consent requirement).

94. See Knepper, 675 F.3d at 258 (examining reasoning, context, and development of inherent incompatibility doctrine). In Knepper the district court extended the same logic even as far as state law wage-and-hour class action claims filed in federal court independent of a related FLSA collective action. See id. (explaining district court’s application of inherent incompatibility doctrine).

95. See id. at 258–59 (identifying Ervin as “[t]he most thorough examination” of inherent incompatibility argument).

96. See id. (examining text of Section 216(b)). Indeed, Section 216(b) states, “[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing . . . .” 29 U.S.C. § 216(b) (2006) (emphasis added). It is clear from
finding that the scope of Section 216(b) was ambiguous on the issue of whether it applied to causes of action originating in state law.97 Furthermore, the court noted that Section 216(b) makes no mention of state law causes of action, and the FLSA includes an express savings clause preserving state regulatory regimes from federal preemption.98

The Third Circuit also disapproved of the trial court’s emphasis on perceived congressional intent without any “clear textual or doctrinal basis.”99 More importantly, the Third Circuit disagreed with the trial court that Congress’s primary intent in passing the Portal-to-Portal Act amendments to Section 216(b) was to ensure that “absent individuals would not have their rights litigated without their input or knowledge.”100 Instead, in the court’s view, Congress’s primary purpose was to prevent union representatives from “manufactur[ing] litigation in which they had no personal stake,” and to prevent “one-way intervention by plaintiffs who would not be bound by an adverse judgment.”101

the context that “any such action” refers narrowly to “[a]n action to recover the liability prescribed in either of the preceding sentences,” which only includes employer violations of “the provisions of section 206 or section 207 . . . . [Or] the provisions of section 215(a)(3) . . . .” Id.

97. See Knepper, 675 F.3d at 259 (finding that explicit limitation to actions under FLSA and absence of mention of state law causes of action does not constitute ambiguity). In a footnote, the court also highlighted a clear statement in the Portal-to-Portal Act’s legislative history indicating that the opt-in requirement “shall be applicable only with respect to actions commenced under the Fair Labor Standards Act of 1938.” Id. at 260 n.14 (quotation and citation omitted).

98. See id. at 258–59 (summarizing Seventh Circuit’s inquiry into statutory ambiguity).

99. See id. at 259–60 (citing principle that extrinsic materials only appropriate in statutory interpretation where text is otherwise ambiguous). The Third Circuit echoed the Seventh Circuit in this regard. See Ervin v. OS Rest. Servs., Inc., 632 F.3d 971, 977 (7th Cir. 2011) (“[T]he court jumped too quickly to congressional intent. Before taking that step, we must examine the text of the FLSA itself.”).

100. Knepper, 675 F.3d at 259 (quoting Fisher v. Rite Aid Corp., 764 F. Supp. 2d 700, 705 (M.D. Pa. 2011)). The court acknowledged that there “was some concern [among legislators] that plaintiffs could be bound by a decision” without their knowledge or input. See id. at 260 (discussing Portal-to-Portal Act’s legislative record); see also Otto v. Pocono Health Sys., 457 F. Supp. 2d 522, 524 (M.D. Pa. 2006) (“It is clear that Congress labored to create an opt-in scheme when it created Section 216(b) specifically to alleviate the fear that absent individuals would not have their rights litigated without their input or knowledge.”).

101. Knepper, 675 F.3d at 260. The court explained that historical evidence establishes the primary legislative purposes behind the Portal-to-Portal Act. See id. (discussing significance of legislative intent). The court also noted two divergent interpretations of “representative” action: whereas the Portal-to-Portal Act sought to prevent non-employee third parties from litigating the rights of others without their knowledge through “representative” actions, Rule 23 allows for “representative” actions only by interested members of the class whose rights are at issue. Compare id. at 260 n.15 (speculating that modern Rule 23 representative actions are more akin to concept of “collective” action endorsed in legislative history of Portal-to-Portal Act), with Knepper v. Rite Aid Corp., 764 F. Supp. 2d 707, 714 (M.D. Pa. 2011) (equating opt-out actions with representative actions that Congress sought to limit with Portal-to-Portal Act amendments).
Furthermore, the court explained that the congressional intent behind the CAFA must also be balanced.\textsuperscript{102} According to the court, the CAFA articulates a countervailing legislative goal of extending federal jurisdiction to all state law class actions that meet the statute’s requirements.\textsuperscript{103} Thus, without a clear textual mandate, federal jurisdiction otherwise contemplated by Congress under the CAFA should not be declined merely because it purportedly curtails another legislative goal.\textsuperscript{104}

The court also revisited its decision in \textit{De Asencio}—which Rite Aid argued supported application of inherent incompatibility—distinguishing it on two grounds.\textsuperscript{105} First, the issue in \textit{De Asencio} was one of supplemental jurisdiction, and the court declined jurisdiction because the complexity of the state claims at issue and the size of the state law class.\textsuperscript{106} In contrast, the state law claims at issue in \textit{Knepper} are substantively and factually similar to the FLSA claim.\textsuperscript{107} More importantly, the court noted that, unlike

\begin{itemize}
  \item \textsuperscript{102} See \textit{Knepper}, 675 F.3d at 260–61 (rejecting assumption that legislative purpose behind Portal-to-Portal Act is only consideration relevant to evaluating inherent incompatibility inquiry).
  \item \textsuperscript{103} See \textit{id} (arguing that courts should not invoke extratextual materials to decline jurisdiction otherwise authorized by statute).
  \item \textsuperscript{104} See \textit{id} at 261 (noting that plaintiffs’ satisfaction of CAFA jurisdictional requirements was not disputed by defendant or district court); see also 28 U.S.C. § 1332(a), (d) (2006) (establishing requirements for extending and declining federal jurisdiction over class actions).
  \item \textsuperscript{105} See \textit{Knepper}, 675 F.3d at 261 (clarifying \textit{De Asencio}’s holding and scope); see also \textit{De Asencio} v. Tyson Foods, Inc., 342 F.3d 301, 315 (3d Cir. 2003) (reversing district court’s exercise of supplemental jurisdiction over state wage class action). For a discussion of \textit{De Asencio}, see \textit{supra} notes 49–55 and accompanying text; see also \textit{Ervin} v. OS Rest. Services, Inc., 632 F.3d 971, 980 (7th Cir. 2011) (distinguishing \textit{De Asencio} as case involving complex state law issues); \textit{Wang} v. Chinese Daily News, Inc., 623 F.3d 743, 761 (9th Cir. 2010) (discussing unique circumstances of \textit{De Asencio}), cert. granted, judgment vacated on other grounds, 132 S. Ct. 74 (2011); \textit{Lindsay} v. Gov’t Employees Ins. Co., 448 F.3d 416, 424 (D.C. Cir. 2006) (characterizing \textit{De Asencio} as involving more than mere procedural differences).
  \item \textsuperscript{106} See \textit{Knepper}, 675 F.3d at 261 (distinguishing \textit{De Asencio} on jurisdictional and factual grounds); see also \textit{De Asencio}, 342 F.3d at 308 (rejecting supplemental jurisdiction based on substantial predominance). The \textit{De Asencio} court stated: “Here, the inordinate size of the state-law class, the different terms of proof required by the implied contract state-law claim, and the general federal interest in opt-in wage actions suggest the federal action is an appendage to the more comprehensive state action.” \textit{Id} at 312; see also 28 U.S.C. § 1367(c) (authorizing federal courts to decline supplemental jurisdiction where state law claims substantially predominate federal issues forming basis for original jurisdiction). Under Section 1367(c), supplemental jurisdiction may be declined if:
  \begin{enumerate}
    \item the claim raises a novel or complex issue of State law,
    \item the claim substantially predominate over the claim or claims over which the district court has original jurisdiction,
    \item the district court has dismissed all claims over which it has original jurisdiction, or
    \item in exceptional circumstances, there are other compelling reasons for declining jurisdiction.
  \end{enumerate}

\textit{Id}.\textsuperscript{107}

\item \textsuperscript{107} See \textit{Knepper}, 675 F.3d at 261 (noting absence of complex or novel issues). Interestingly, the court did not address the size discrepancy between the state law

\textit{supra} notes 49–55 and accompanying text; see also \textit{De Asencio} as case involving complex state law issues); \textit{Wang} v. Chinese Daily News, Inc., 623 F.3d 743, 761 (9th Cir. 2010) (discussing unique circumstances of \textit{De Asencio}), cert. granted, judgment vacated on other grounds, 132 S. Ct. 74 (2011); \textit{Lindsay} v. Gov’t Employees Ins. Co., 448 F.3d 416, 424 (D.C. Cir. 2006) (characterizing \textit{De Asencio} as involving more than mere procedural differences).


\textit{De Asencio} as case involving complex state law issues); \textit{Wang} v. Chinese Daily News, Inc., 623 F.3d 743, 761 (9th Cir. 2010) (discussing unique circumstances of \textit{De Asencio}), cert. granted, judgment vacated on other grounds, 132 S. Ct. 74 (2011); \textit{Lindsay} v. Gov’t Employees Ins. Co., 448 F.3d 416, 424 (D.C. Cir. 2006) (characterizing \textit{De Asencio} as involving more than mere procedural differences).

\item \textsuperscript{107} See \textit{Knepper}, 675 F.3d at 261 (noting absence of complex or novel issues). Interestingly, the court did not address the size discrepancy between the state law
the supplemental jurisdiction in De Asencio, independent federal jurisdiction over the state class actions in Knepper existed under the CAFA, which provides no relevant basis for declining jurisdiction.108

The court next turned to Rite Aid’s preemption argument, which it rejected succinctly.109 In the court’s view, a fatal flaw for the preemption argument was the fact that the conflicting classification procedures at issue were both provided by federal law.110 Thus, because no other conflict existed between state and federal law, the court affirmed the district court’s judgment that the FLSA does not preempt the relevant state laws.111 Finally, the court also rejected Rite Aid’s argument that classification under Rule 23 violates the Rules Enabling Act (REA) because it abridges the substantive rights of both employers and employees under the FLSA.112 The REA argument assumes that FLSA Section 216(b) creates a substantive right for employers—to not be sued through representative action—and for plaintiffs—to not have their rights litigated without their knowledge or input.113

108. See id. (clarifying difference between supplemental and CAFA jurisdiction).

109. See id. at 262–64 (characterizing preemption argument as recapitulation of inherent incompatibility argument and affirming district court’s holding of no preemption); see also Knepper v. Rite Aid Corp., 764 F. Supp. 2d 707, 712 (M.D. Pa. 2011) (holding that presence of savings clause indicates Congress intended FLSA standards to serve as mere regulatory floor).

110. See Knepper, 675 F.3d at 263 (ruling preemption “inapplicable” because “federal law cannot preempt another federal law” and because Portal-to-Portal Act of 1947 “cannot impliedly repeal” jurisdiction sweep of CAFA, which came long after).

111. See id. at 264 (affirming district court’s judgment on preemption issue). The court explained that preemption was untenable because the state wage-and-hour laws at issue were not substantively in conflict with FLSA’s virtually identical standards. See id. (rejecting “counterintuitive” argument that “enforcement of [state law] standards that are identical with [FLSA standards]” would present any obstacle to fulfillment of congressional purpose); see also Brief for the Sec’y of Labor as Amicus Curiae Supporting Plaintiff-Appellants at 9, Knepper v. Rite Aid, Corp., 675 F.3d 249 (3d Cir. 2011) (Nos. 11–1684, 11–1685), 2011 WL 2603762, at *9 (rejecting preemption argument).

112. See Knepper, 675 F.3d at 264–65 (rejecting argument that Rule 23’s classification and preclusive effect abridges employers’ substantive rights under FLSA not to be sued in representative actions, and plaintiffs’ rights not to have their rights litigated without their knowledge or input). See generally Lopez, supra note 6 (examining REA argument against hybrid actions in light of plaintiffs’ substantive rights and arguing that REA precludes hybrid actions as regulating more than merely procedure).

C. Analyzing Knepper

In *Knepper*, the Third Circuit became the fifth federal appeals court to reject inherent incompatibility, finding insufficient legislative and historical evidence to support the argument that Congress intended to eliminate opt-out classification for the FLSA.\(^\text{114}\) It also held that the FLSA’s purposes do not indicate any disapproval of opt-out class actions and that Rule 23 opt-outs were not yet extant at the time of passage.\(^\text{115}\) On its face, the Third Circuit was correct that the FLSA includes no textual prohibition on using any federal procedures normally available to state law claims.\(^\text{116}\) There is simply no indication from the statute that Congress intended to prevent state claims from going forward through Rule 23 classification; in fact, the presence of a “saving clause” lends credence to the argument because Congress clearly intended to support, rather than hinder, state wage-and-hour regulation.\(^\text{117}\) Particularly where defendants voluntarily remove state law class actions to federal court, it seems fundamentally reasonable not to permit them to argue for dismissal on grounds of incompatibility with federal procedures.\(^\text{118}\)

Nonetheless, the Third Circuit too quickly overlooked the fact that FLSA’s opt-in requirement was specifically designed to prevent easy classification based on a policy of trying to limit so-called representative suits.\(^\text{119}\) Hybrid claims employing a Rule 23 opt-out class clearly undermine this policy choice.\(^\text{120}\) Nonetheless, the court was perhaps correct to leave resolution of this policy tension to the legislature, rather than creating a new jurisdictional doctrine out of whole cloth.\(^\text{121}\)

IV. Impact of Knepper

*Knepper* likely marks the end of the inherent incompatibility doctrine because the Supreme Court is not likely to grant certiorari on this issue, given such a strong degree of uniformity among the circuit courts.\(^\text{122}\) Ad-
ditionally, because the Third Circuit itself wrote the only circuit court opinion that offered support to the doctrine in *De Asencio*, the court’s clear circumscribing of *De Asencio* in *Knepper* erects a significant barrier in front of the doctrine’s proponents.123 Thus, in both the Third Circuit and beyond, the *Knepper* holding offers encouragement to plaintiffs’ lawyers considering hybrid wage-and-hour claims, which can be very powerful weapons for recovering unpaid wages.124

Given this legal reality, hybrid actions may become even more numerous in the coming years than they already have been in the past.125 An increase in hybrid actions is likely to lead to significantly larger awards for plaintiff classes because of the combination of Rule 23’s larger class sizes and the FLSA’s more lenient classification standard, as well as the fact that employers will face penalties under state and federal law.126 For this reason, plaintiffs’ lawyers in Pennsylvania and throughout the Third Circuit should bring dual-filed state and federal class actions without worrying that the state claims might be dismissed by employer-friendly district courts.127 When investigating other employment issues, such as discrimination, plaintiffs’ lawyers should also inquire into wage-and-hour issues like overtime work, unpaid breaks, and misclassification of workers.128

As for defense lawyers and corporate counsel, the threat of these suits makes vigilant compliance with the FLSA and state wage regulations more important than ever.129 This includes avoiding costly “misclassification” mistakes when applying overtime exemptions and fostering a corporate

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123. For a discussion of the Third Circuit’s handling of inherent incompatibility in *De Asencio*, see *supra* notes 50–56 and accompanying text.


125. See Cholis, *supra* note 8, at 430 (noting upward trend in number of wage-and-hour suits in federal courts).

126. See id. at 433 (explaining that defendants face increased liability because FLSA and state regulations each impose separate penalties); see also Lizak v. Great Masonry, Inc., No. 08-C-1930, 2009 WL 3065396, at *9–10 (N.D. Ill. Sept. 22, 2009) (allowing for recovery of damages under both FLSA and Illinois wage-and-hour laws); Two-Headed Monsters: DOL Says Workers Should Be Able to Sue Under State, Federal Law at Same Time, EMPLOYER’S GUIDE TO FAIR LAB. STANDARDS ACT NEWSL. (Thompson Publ’g Grp., Inc.), Mar. 2010 (describing hybrid actions as “two-headed monsters” that expose employers to increased liability).

127. For a discussion of the Pennsylvania district courts’ treatment of the inherent incompatibility doctrine, see *supra* note 75 and accompanying text.


129. See id. at 3 (discussing increased state law penalties, including liquidated damages in excess of wages owed for noncompliance with wage-and-hour regulations).
culture that reduces systematic miscalculation of wages. If violations have already occurred, employers and their lawyers should focus on vigorously challenging classification under Rule 23’s complex class action requirements, rather than attempting to re-litigate Knepper and the inherent incompatibility issue.

V. CONCLUSION

For several years, the inherent incompatibility doctrine appeared to be a promising strategy for attorneys fending off hybrid wage-and-hour claims, but the doctrine now appears to be circling the drain. Knepper conclusively resolved the question against inherent incompatibility in cases where federal courts have original CAFA jurisdiction over state wage-and-hour law claims. However, in hybrid actions that do not meet the CAFA’s diversity requirements, the question of inherent incompatibility remains technically unsettled. Nonetheless, the increased applicability of the CAFA renders this narrow issue increasingly irrelevant. Furthermore, even in such narrow cases, the doctrine’s treatment in other circuit courts does not bode well for employers defending against these actions. Thus, employers and their attorneys need to search for other innovative strategies to stem the rising tide of group wage-and-hour litigation.

130. See id. at 5 (discussing need for organization-wide training to avoid susceptibility, particularly among small businesses, to systematic failures to pay wages due under statute).

131. See Cholis, supra note 8, at 433 (discussing futility of employers in Seventh Circuit relying on inherent incompatibility doctrine after Ervin).

132. See Schneider & Willson, supra note 6, at *7 (noting substantial authority on both sides of inherent incompatibility argument).


134. See Cholis, supra note 8, at 444 (“If the appellate circuits are to become as divided as district courts, combined actions may soon warrant review by this nation’s highest court.”).

135. For a discussion of the CAFA’s jurisdictional sweep and underlying policy objectives, see supra notes 46–48 and accompanying text.

136. For a discussion of the negative treatment of the inherent incompatibility doctrine at the appellate level, see supra notes 57–67 and accompanying text.
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EXCEPTION PERCEPTION: THE THIRD CIRCUIT’S STRICT VIEW OF THE EXCEPTIONS TO THE STATUTE OF LIMITATIONS UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

SAMANTHA PERUTO*

“[E]ducation is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. . . . [A] principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”

I. INTRODUCTION

Daniel, a young boy from the suburbs of Philadelphia, struggled to keep up with his classmates in school. 2  Daniel exhibited issues with reading and demonstrated problems socializing with the other students. 3  His troubles began in kindergarten, which he attended for two years, and continued to third grade when Daniel was finally diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and offered appropriate accommodations by the school district. 4

Thankfully, Congress has developed a statutory scheme whereby struggling students like Daniel will receive the proper services and education from an early age. 5  When services are denied, students may seek equitable remedies, such as compensatory education, to help them attain the

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1. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (“In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right, which must be made available to all on equal terms.”), supplemented by 349 U.S. 294 (1955); see also Perry A. Zirkel, Does Brown v. Board of Education Play a Prominent Role in Special Education Law?, 34 J.L. & EDUC. 255, 270 (2005) (noting that Brown represents “sea of change in the legal approach to students that based on group characteristics faced separation or exclusion”).


3. See id. (discussing academic and behavioral issues).

4. See id. at 242 (discussing diagnosis and eligibility for specialized services).


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same level of education as their classmates. Unfortunately for Daniel and millions of other students, those remedies are unavailable when their parents fail to act within the statute’s two-year limitations period.

The Individuals with Disabilities Education Act (IDEA) serves to accommodate and protect the rights of disabled children by requiring public educational institutions to “identify and effectively educate” children with special needs. To benefit from the IDEA, children must rely on parents and teachers to recognize their needs and advocate for their best interests. Unfortunately, neither parents nor teachers can adequately advocate in isolation. Rather, it “takes a village”—a collaboration between teachers capable of identifying disabled children (Child Find) and providing the free appropriate public education (FAPE) to those in need of specialized services, and parents willing and able to raise a flag when educational institutions fall short.

6. See id. § 1415(i)(2)(C)(iii) (requiring judges to award “such relief as the court determines is appropriate”); infra notes 151–57 and accompanying text (discussing compensatory education remedy).

7. See, e.g., infra notes 55–67 (discussing litigation surrounding this issue and how courts apply the statute of limitations).

8. See 20 U.S.C. § 1400(d) (listing purposes of Individuals with Disabilities Education Act); id. § 1401(3) (amended 2010) (defining “child with a disability” as “(i) with intellectual disabilities, [hearing, speech, language, or visual] impairments, serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services”); D.K. v. Abington Sch. Dist., 696 F.3d 233, 244 (3d Cir. 2012) (noting effective education may require schooling outside public school systems’ and school districts’ duty to pay for child’s education elsewhere if institution is unable to provide specialized services (citing P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist., 585 F.3d 727, 735 (3d Cir. 2009))); Elisa Hyman, Dean Hill Rivkin & Stephen A. Rosenbaum, How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering, 20 AM. U. J. GENDER SOC. POL’Y & L. 107, 116 (2011) (acknowledging IDEA protection is available to all disabled students, including students in public and private schools, and those who are “homeless, or in a hospital, jail, prison, or foster care placement”).

9. See Erin Phillips, Note, When Parents Aren’t Enough: External Advocacy in Special Education, 117 YALE L.J. 1802, 1806 (2008) (noting children lack capacity to identify disabilities or understand how their needs differ from other students). The structure of IDEA forces children to rely on “their parents’ willingness and ability to advocate for them.” Id.


11. See Judith Wilson, A Conversation with Toni Morrison, ESSENCE, July 1981, at 84 (statement by Toni Morrison) (“I don’t think one parent can raise a child. I don’t think two parents can raise a child. You really need the whole village.”); cf. Phillips, supra note 9, at 1823–37 (discussing challenges and responsibilities facing both parents and educators in providing most effective education to disabled students). Child Find is the school district’s obligation to identify, locate, and evaluate children in need of special education services. See 20 U.S.C. § 1412(a)(3). This obligation is “an affirmative one,” and the IDEA does not require parents to request an evaluation of their child. See Reid ex rel. Reid v. District of Columbia, 401 F.3d 516, 518 (D.C. Cir. 2005) (“School districts may not ignore disabled stu-
Under the IDEA’s current statutory scheme, parents have a short, two-year period to request a due process hearing for any alleged IDEA violations. However, the limitations period will not apply under two exceptions: first, if the parents were unable to request the hearing due to specific misrepresentations made to the parents by the local educational agency (LEA) in regard to resolution of their child’s disability; and second, if the LEA withheld information from the parents of the disabled child. Unfortunately, several courts have been reluctant to apply these exceptions.

In D.K. v. Abington School District, the Third Circuit delineated the scope of the exceptions to the IDEA’s statute of limitations for the first time. When D.K.’s parents requested a due process hearing and alleged violations of the IDEA for the school district’s failure to diagnose their child, they were unfortunately confronted with the IDEA’s statute of limitations, which excluded the parents from claiming any conduct by the LEA that occurred more than two years prior to the hearing request. Consequently, D.K.’s claim was barred because the school district’s conduct that formed the basis for D.K.’s complaint fell beyond the two-year period.

Parents’ needs, nor may they await parental demands before providing special instruction.”; accord Hyman et al., supra note 8, at 116 n.46 (same). The duty “is triggered when [a school district] has reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability.” Dep’t of Educ. v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 (D. Haw. 2001). The “Child Find” provision includes “[c]hildren who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade.” 34 C.F.R. § 300.125(a)(2)(ii) (2000); see Hyman et al., supra note 8, at 116 n.47 (discussing examples of children exhibiting signs of disabilities, which trigger Child Find obligations).


14. See infra notes 55–67 and accompanying text for a discussion of how courts interpret and apply the statute of limitations exceptions.

15. 696 F.3d 233 (3d Cir. 2012).


17. See 20 U.S.C. § 1415(f) (allowing only two years to file request for due process hearing).
period reviewable by the court, and no exceptions applied to rescue the claim.18

The Third Circuit held that in order to toll the statute of limitations under the first exception, the school district must have knowingly and intentionally misrepresented information to the parents.19 Alternatively, under the second exception, the LEA must have withheld statutorily required information from the parents.20 For either exception to apply, the LEA’s conduct must have caused the parents’ failure to request a due process hearing within the two-year statute of limitations period.21 The court also rejected any application of equitable tolling doctrines to the IDEA.22

While giving better guidance on application of the exceptions, the Third Circuit’s holding is a stringent test, and limits parents’ ability to overcome the statute of limitations.23 The implications are far-reaching, as many families are unaware of IDEA violations until it is too late, making the remedies under the IDEA practically ineffective.24 This decision places an even higher burden upon parents of disabled children to become more involved, informed, and aware, and to raise and resolve IDEA issues in a timely manner.25

This article examines how the Third Circuit’s decision will impact future litigation of IDEA claims, outlines how parents may successfully navigate the statute’s exceptions to toll the limitations period, and advocates for a broader interpretation of the exceptions in the future.26 Part II examines the history of special education in the United States and the devel-

18. See D.K., 696 F.3d at 240–42 (summarizing facts showing teachers allowed D.K. to continue through school despite difficulties); id. at 245–48 (holding no exception to statute of limitations applied).

19. For the Third Circuit’s interpretation of the first exception, see infra notes 97–100 and accompanying text.

20. For the Third Circuit’s interpretation of the second exception, see infra notes 101–03 and accompanying text.

21. For the Third Circuit’s analysis of causation under the statute, see infra notes 104–06 and accompanying text.

22. See D.K., 696 F.3d at 248 (providing further discussion of courts’ rejection of equitable tolling under IDEA).

23. For a discussion of how the Third Circuit’s decision will impact future litigation of IDEA claims for plaintiffs, see infra notes 111–29, 138–47 and accompanying text.

24. See infra notes 138–47 and accompanying text (discussing impact of decision on parental burdens under IDEA).

25. See generally Phillips, supra note 9 (arguing parents of disabled children need assistance to achieve optimal outcomes for their children due to complexities of IDEA system and child’s disabilities); see also infra notes 138–47 and accompanying text (same).

26. For an analysis of the decision’s impact on future litigation, see infra notes 111–20 and accompanying text; see also Lynn M. Daggett, Perry A. Zirkel & LeeAnn L. Gurysh, For Whom the School Bell Tolls but Not The Statute of Limitations: Minors and the Individuals with Disabilities Education Act, 38 U. Mich. J.L. Reform 717, 723 (2005) (defining tolling as “the suspension or interruption of the statute of limitations—in other words, temporarily putting the statute of limitations clock on hold”).
opment of the IDEA. Further, Part II addresses how other courts have interpreted the IDEA’s statute of limitations and its exceptions. Part III explains the Third Circuit’s decision in *D.K. v. Abington School District* in greater detail and examines the rationale behind the ruling. Finally, Part IV critically analyzes the decision and provides guidance to practitioners, highlights policy issues on both sides of the dispute, and assesses the strengthened role of parents.

II. BACKGROUND

While this article examines a limitation on the IDEA, it is important to first understand the history of special education in the United States. Prior to the IDEA—a relatively new piece of legislation—students with special needs were inadequately represented in the political process. This section highlights the major changes in special education protection throughout the twentieth century, which eventually led to the enactment of the IDEA. Further, this section explores the general principles of the IDEA, the role of parents in a child’s education, and the statute of limitations.

A. The Evolution of Special Education in the United States

Education plays a vital role in the development of society and shaping the future of the United States. Despite its importance, special ed}

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27. For further discussion of the development of the IDEA and special education law in the United States, see infra notes 37–49 and accompanying text.

28. For an overview of the statute of limitations under the IDEA and interpretations thereof, see infra notes 50–67 and accompanying text.


30. For an in-depth discussion of the practical implications of *D.K. v. Abington School District* for practitioners, students, and parents, see infra notes 107–47 and accompanying text.

31. See infra notes 35–41 discussing developments in special education legislation in the United States.

32. See infra note 37 and accompanying text for a discussion of inadequate special education law in the twentieth century.

33. See infra notes 38–41 and accompanying text for brief highlights of legislative milestones leading to the IDEA.

34. See infra notes 42–67 and accompanying text for a detailed description of relevant IDEA provisions.

35. See Phillips, supra note 9, at 1809–13 (discussing developments leading to IDEA’s enactment).

tion was largely underrepresented in the political arena until the 1970s and the rise of the disability rights movement.\footnote{See Phillips, supra note 9, at 1809 (discussing public’s lack of concern with special education until advocates fought to promote rights of disabled individuals).} A major milestone for special education and disabilities advocates was Section 504 of the Rehabilitation Act of 1973, which disallowed any federally funded program from discriminating on the basis of disability.\footnote{See Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 394 (codified at 29 U.S.C. § 794(a) (2000)) (“No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.”). Section 504 prompted a strong societal push towards accommodation of disabled individuals, specifically, students in public school systems. See Phillips, supra note 9, at 1810 (noting regulations framed Section 504 as “declaration of civil rights for disabled people”). Despite its success, members of Congress did not anticipate any extraordinary results from Section 504. See Scotch, supra note 37, at 54.} 

Shortly thereafter, Congress enacted the Education for All Handicapped Children Act (EAHCA) of 1975, subsequently renamed in 1990 as the Individuals with Disabilities Education Act (IDEA).\footnote{See Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 901, 104 Stat. 1103, 1141–42 (codified as amended at 20 U.S.C. § 1400) (renaming EAHCA as Individuals with Disabilities Education Act); Phillips, supra note 9, at 1813 (confirming basic substantive law of EAHCA remained in IDEA after changing name). As of 2012, the IDEA served almost 6.5 million students with disabilities by providing specialized education services. See Individuals with Disabilities Education Act (IDEA) Data, DATA ACCOUNTABILITY CENTER, www.idea-data.org (last visited Feb. 16, 2013) (analyzing IDEA statistics).} The IDEA was the result of a congressional finding that an exorbitant number of disabled children were inadequately educated, including millions who were
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“excluded entirely” from public school systems. Finally, Congress recognized a disabled child’s right to special education, a step beyond Section 504 of the Rehabilitation Act.

B. The Individuals with Disabilities Education Act

1. Principles and Policies

The IDEA is a federal special education statute that offers funding to state educational agencies (SEAs) that commit to adopt the necessary policies and procedures to comply with the IDEA’s twenty-five listed conditions. In states receiving IDEA funding, schools must identify children requiring special education services (Child Find) and provide a FAPE to those students. The FAPE must be tailored to the particular needs of the child through an individual educational program (IEP).

The IDEA places a strong emphasis on the role of parents in a child’s education. Prior to the IDEA, Congress recognized that schools, acting

40. See 20 U.S.C. § 1400(c)(2) (2006) (listing reasons why educational needs of disabled children were not met prior to enactment); Mayes et al., supra note 36, at 36 (noting number of children excluded from adequate education was “intolerable”).


42. See 20 U.S.C. § 1412(a) (listing twenty-five conditions); Mayes et al., supra note 36, at 36–37 (noting conditions are intended to ensure disabled children in every IDEA funded state receive FAPE and describing how funds are allocated amongst state and local educational agencies).


45. See, e.g., 20 U.S.C. § 1400(d)(1)(B) (acknowledging parents’ rights also protected under IDEA); id. §§ 1414(a)(1)–(2), 1415(a)–(c) (parent involvement in IDEA eligibility determinations); id. § 1414(a)(1)(D)(i)(I) (parental consent to provision of and placement in special education); id. § 1414(d)(1)(B) (parent in-
alone, frequently fail to satisfactorily treat disabled students.\textsuperscript{46} Further, Congress found that incorporating parents in the educational process yields positive results.\textsuperscript{47} Thus, Congress believed a central parental role would ensure the effectiveness of the IDEA and each student’s educational program.\textsuperscript{48} As a result, the IDEA provides for parent involvement in procedures including, but not limited to, IDEA eligibility determinations and requires parental consent to the provision of and placement in special education programs.\textsuperscript{49}

\begin{itemize}
  \item involvement on IEP teams; \textit{id.} \S 1415(b)(1) (parents’ right to examine all records related to child and participate in all IDEA meetings); \textit{id.} \S 1415(b)(2)(A) (assigning surrogate parents when parents unknown); \textit{id.} \S 1415(k) (providing for parent involvement in discipline decisions).
  \item See 20 U.S.C. \S 1400(c)(5) (2000) (“Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by . . . strengthening the role of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home . . . .”); cf. 20 U.S.C. \S 1400(c)(5) (2006) (adding to 2000 version of statute that “strengthening the role and responsibility of parents” increases effectiveness of education of children with disabilities) (emphasis added).
  \item See Daggett et al., \textit{supra} note 26, at 728 (“Congress’s purpose in creating the IDEA parent role and rights was utilitarian. . . . [And] essential to the success of the student’s education program.”); Martin A. Kotler, \textit{The Individuals with Disabilities Education Act: A Parent’s Perspective and Proposal for Change}, 27 U. Mich. J.L. Reform 331, 362 (1994) (“[T]he history of the Act makes it apparent that policymakers viewed parental involvement in decisions affecting the child as the primary means by which earlier abuses were to be corrected.”). For further discussion and analysis of all IDEA provisions concerning parents, see Daggett et al., \textit{supra} note 26, at 728–35.
  \item The high burden on parents under the IDEA is justified because their “strong emotional attachment to their children and considerable knowledge of their particular needs make parents the child-specific experts most qualified to assess and pursue their children’s best interests in most circumstances.” Buss, \textit{supra} note 10, at 647. Therefore, control over the education of children traditionally remains within the family. See Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (holding that Amish parents need not comply with compulsory education laws). But see Buss, \textit{supra}, note 10, at 647 (arguing that law should not give absolute deference to parents because state interests in educating children and promoting social welfare sometimes justify interference with traditional parental authority).
  \item See 20 U.S.C. \S 1415(a)–(c) (2006) (noting parental involvement in IDEA eligibility determinations); \textit{id.} \S 1414(a)(1)(D)(i)(I) (providing for parental consent to placement in special education programs). For more examples of parental involvement under the IDEA, see \textit{supra} note 45.
\end{itemize}
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2. The Statute of Limitations and its Exceptions

In 2004, Congress amended the IDEA to include, among other provisions, a statute of limitations.50 The IDEA indicates that parents should request the impartial due process hearing “within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint.”51 This addition reflects Congress’s desire for prompt filing and resolution of IDEA claims and a uniform statute of limitations across all states.52

50. See Daggett et al., supra note 26, at 766 (discussing all 2004 amendments).

Prior to 2004, the IDEA did not specify the time limits for filing for due process hearings. See id. at 748 (noting lack of textual time limits in pre-2004 IDEA). Absent federal guidance, most courts borrowed from analogous state statutes of limitations. See id. (noting states could also borrow from analogous federal statutes of limitations or use equitable principles, but few courts exercised these options). Courts adopting analogous state statutes generally adopted the torts statutes of limitations, which are typically two or three years. See id. at 748 n.180 (noting, however, that tort statutes of limitations are not obviously analogous to IDEA claims, especially given vast differences in parental roles under IDEA); see generally Allan G. Osborne, Jr., Statutes of Limitations for Filing Lawsuits Under the IDEA: A State by State Analysis, 191 EDUC. L. REP. 545 (2004) (discussing each state’s statute of limitations period prior to IDEA 2004). However, under the 2004 amendments, the IDEA still permits states to adopt the state statute of limitations. See 20 U.S.C. § 1415(f)(3)(C) (2006) (allowing two year timeline to request due process hearings, “or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.”); S.H. ex rel. A.H. v. Plano Indep. Sch. Dist., 487 F. App’x 850, 862–64 (5th Cir. 2012) (adopting Texas statute of limitations, but same exceptions and other substantive IDEA provisions applied).


52. See Daggett et al., supra note 26, at 769 (discussing various theories of congressional intent behind statute of limitations in IDEA 2004); id. at 749.
The 2004 amendments specify two exceptions that limit the applicability of the statute of limitations. The limitations period will not apply when the parents of the disabled child are:

[P]revented from requesting the due process hearing due to—
(i) specific misrepresentations by the [LEA] that it had resolved the problem forming the basis of the complaint; or
(ii) the [LEA]'s withholding of information from the parent that was required under this subchapter to be provided to the parent.

Courts have struggled to interpret these exceptions since their enactment, and many recognize that "statutory and regulatory guidance are lacking." Several courts have noted the statute’s preference to leave interpretation of "misrepresentations" to the "purview of the hearing officer." Thus, plaintiffs bear a tough burden of proving that the

nn.182–83 (discussing various limitations periods among several states (citing Perry Zirkel & Peter Maher, The Statute of Limitations Under the Individuals with Disabilities Education Act, 175 Educ. L. Rep. 1, 6–7 (2003))). Prior to the IDEA 2004, state statutes of limitations for IDEA claims varied from sixty days to five years. See id. at 749 n.182 (surveying court decisions and noting only North Carolina used sixty-day limitations period compared to longer periods in Third Circuit). Thus, the federal statute of limitations shortened the timeline for some jurisdictions. See id. (noting many jurisdictions adopted three-year timeline).

Moreover, prompt filing leads to prompt resolution, which serves a primary goal of the IDEA: to provide eligible students with FAPE as soon as possible. See id. at 769 (discussing legislative intent). Some argue the short deadline forces parents to become adversarial very quickly, which makes the educational process and parental role less effective. See Cory D. v. Burke Cnty. Sch. Dist., 285 F.3d 1294, 1299 n.4 (11th Cir. 2002) (noting court decisions finding short limitations periods inconsistent with congressional goals). These critics argue the short timeline dilutes the "procedural rights' effectiveness by denying parents sufficient time to consider and evaluate an adverse decision by school authorities." Id. However, Congress clearly rejects this notion. See 20 U.S.C. § 1415(f) (imposing limitations period). For further discussion of the policy justifications for statutes of limitations, see infra notes 130–37 and accompanying text.

54. Id. (emphasis added).
exceptions are met, and courts must undertake a “highly factual inquiry” to determine whether either exception applies. 57

To toll the statute of limitations under the first exception, most courts required an intentional, knowing misrepresentation, while others allow mere negligence. 58 Courts refuse to allow the action for which the IDEA claim was brought to be a sufficient action to toll the statute of limitations because “doing so would allow the exception to become the rule, and the limitations period would be all but eliminated.” 59 However, the Western District of Pennsylvania allowed mere negligent misrepresentation to toll the statute of limitations where the school district should have known of the student’s disability. 60

The second exception speaks only of statutorily required information, which includes a procedural safeguards notification. 61 The procedural safeguards notice includes a full explanation of the parents’ rights under


58. Compare Evan H., 2008 WL 4791634, at *6 (“[A]t the very least, a misrepresentation must be intentional in order to satisfy the first [exception],”) and I.H., 842 F. Supp. 2d at 775 (same), with J.L., 2009 WL 1119608, at *11–12 (allowing negligent misrepresentation to toll limitations period). In most courts, a misrepresentation must be more than a merely inadequate evaluation of a student. See I.H., 842 F. Supp. 2d at 775. In I.H., the court held that a school district’s inadequate evaluation of a student, resulting in a failure to accommodate the student’s disabilities, is not an intentional, or even negligent, misrepresentation. See id.

59. I.H., 842 F. Supp. 2d at 775 (indicating that without more, action forming basis of claim itself was insufficient, but not indicating what additional information was required); see Evan H., 2008 WL 4791634, at *6 n.3 (“Such an exception would swallow the rule established by the limitation period.”).

60. See J.L., 2009 WL 1119608, at *11–12 (relying on Pennsylvania law allowing intentional, negligent, or innocent misrepresentation).

61. See 20 U.S.C. § 1415(d)(2) (2006) (requiring procedural safeguards notification to include full explanation of safeguards written in native language of parents and in easily understandable manner). The notification must contain an explanation of the procedural safeguards available to parents relating to several aspects of the child’s education, including “the opportunity to present and resolve complaints . . . .” See id. (listing all available topics for procedural safeguards notice). The notice must also include the time period for parents to file complaints, information regarding the agency’s ability to resolve the complaint, and available mediation remedies. See id.

Further, the complaint must affirmatively allege the information was statutorily required for the court to apply the exception. See I.H., 842 F. Supp. 2d at 774–75 (refusing to apply second exception where plaintiffs alleged school’s failure to promptly evaluate child prevented guardians from understanding nature of child’s disabilities, but did not indicate any statutorily required information was withheld). The type of information contemplated under the second exception does not include information that would have stemmed from an evaluation that might affect how parents understand the nature of a disability. See id. (holding information from evaluations insufficient to toll limitations period). Failing to promptly evaluate the child is the IDEA violation itself, which cannot be the basis for tolling the statute of limitations. See id.
the IDEA relating to their child’s education, including a description of the relevant timelines.\textsuperscript{62} Parents are entitled to this information in only three circumstances: “(1) the student is referred for, or the parents request an evaluation; (2) the parents file a complaint; or (3) the parents specifically request the forms.”\textsuperscript{63}

Finally, even if a school district misrepresented or withheld information, that conduct must have \textit{prevented} the parents from requesting the hearing (the “causation requirement”), further limiting application of the exceptions.\textsuperscript{64} For example, consider a situation in which a school district withholds the procedural safeguards notice from parents of a disabled student who are entitled to the information.\textsuperscript{65} Because the parents do not have the procedural safeguards notification, they are unaware of their right to request a due process hearing or file a complaint against the school district and therefore do not request a hearing within the two-year statutory timeline.\textsuperscript{66} Under these circumstances, the withholding of information prevented the parents from requesting the hearing within the limitations period and the statute of limitations would be tolled under the second exception.\textsuperscript{67}

\textsuperscript{62} See 20 U.S.C. § 1415(d) (listing required information); see also Kotler, \textit{supra} note 48, at 362 (arguing procedural safeguards ensure educators do not act unilaterally unless informed parents relinquish responsibility). \textit{Compare} \textit{Evan H.}, 2008 WL 4791634, at *7 (holding plaintiffs allegations that school district withheld information not statutorily required was insufficient to toll statute of limitations), \textit{with S.H. ex rel. A.H. v. Plano Indep. Sch. Dist.}, 487 F. App’x 850, 862–64 (5th Cir. 2012) (holding failure to include required individuals in ARDC meeting constituted withholding of required information).

\textsuperscript{63} D.K. v. Abington Sch. Dist. 696 F.3d 233, 247 (3d Cir. 2012) (citing 20 U.S.C. § 1415(d)). Unfortunately, unless parents are entitled to this information in one of the three circumstances, parents are uninformed about the availability of specialized services for their child. \textit{See Evan H.}, 2008 WL 4791634, at *7 (“Section 1415(d) . . . states how and when a [procedural safeguards notice] must be made available to parents and details what information such a notice must contain. It does not refer to any of the substantive information, regarding specific services available to a student and a particular student’s educational progress . . . .”).

\textsuperscript{64} See, \textit{e.g.}, \textit{S.H.}, 487 F. App’x at 862–63 (distinguishing cases where school districts withheld information, but did not prevent parents from requesting hearing).

\textsuperscript{65} \textit{See supra} text accompanying note 62 (listing circumstances entitling parents to notification).

\textsuperscript{66} \textit{See, e.g.}, D.G. v. Somerset Hills Sch. Dist., 559 F. Supp. 2d 484, 492 (D.N.J. 2008) (applying second exception where parents requested evaluation and school failed to provide procedural safeguards notice, thus denying parents of information about right to file complaint or request due process hearing).

\textsuperscript{67} \textit{See, e.g.}, \textit{S.H.}, 487 F. App’x at 862 (applying second exception where parents were unaware of IDEA procedures).
III. THE THIRD CIRCUIT’S APPROACH

In D.K. v. Abington School District, the Third Circuit closely scrutinized D.K.’s entire educational history in the district. Ultimately, the court applied the same strict standard adopted by a majority of district courts. The following discussion shows how the Third Circuit used the facts presented to conclude D.K.’s educational background did not justify any exception to the IDEA’s statute of limitations.


In D.K. v. Abington School District, the plaintiffs, D.K.’s parents, appealed a district court decision, affirming the state agency’s decision that the public school district did not violate the IDEA by failing to designate a struggling student as disabled. The student, D.K., began kindergarten in the fall of 2003. During his first year, D.K. exhibited difficulties in the classroom, including both behavioral issues and reading problems. The school district recommended that D.K. repeat kindergarten before moving on to first grade. At this time, the school district’s psychologist noted that D.K.’s behavior was not uncommon amongst children his age, and D.K.’s issues did “not necessarily indicate a disorder.”

In D.K.’s second year, he made little progress with his behavioral issues, despite improved math and reading skills. To address these concerns, D.K.’s teachers did not conduct a functional behavioral assessment, but rather implemented informal behavior plans in the classroom.

68. See infra notes 70–95 and accompanying text for a detailed discussion of D.K.’s education in the school district.

69. See infra notes 97–98 and accompanying text for a discussion of the Third Circuit’s standard.

70. See infra notes 99–106 and accompanying text for a discussion of the court’s application of the standard to D.K.’s educational background.

71. See D.K. v. Abington Sch. Dist., 696 F.3d 233, 243 (3d Cir. 2012) (quoting district court’s opinion that “the [School] District had insufficient reason to believe that D.K. was a student with a mental impairment”) (alteration in original).

72. See id. at 240 (noting D.K. attended Copper Beech Elementary in Abington, Pennsylvania).

73. See id. (noting that two school district psychologists, Drs. Suzanne Grim and Jan Kline, stated D.K. “failed to progress in . . . following oral directions, listening to and acknowledging the contributions of others, exhibiting self-control, following rules, producing neat and legible work, completing class work [on time], and using non-instructional time appropriately”).

74. See id. (noting D.K. attended half-day kindergarten program in year one and full day program in year two).

75. See id. (discussing findings of Dr. Suzanne Grim and school principal Dr. Jan Kline).

76. See id. (noting D.K.’s difficulty controlling himself, as he experienced forty-three tantrums in only two months and turned in rushed and incomplete assignments).

77. See id. (noting behavior plans, including sticker chart and system using popsicle sticks, yielded beneficial results as D.K. played well with classmates throughout school year and performed well academically).
D.K.’s parents were optimistic about the behavior plans, but by the end of the year, both parents and teachers expressed major concerns about D.K.’s ability to handle a first grade environment.78

Despite those concerns, D.K. advanced to first grade where his behavioral problems continued.79 D.K.’s teachers recommended measures that D.K.’s parents could take at home to address these issues but did not discuss the possibility of a formal evaluation.80 A subsequent conference in December 2005 revealed D.K. was still struggling with behavioral issues but was not yet a candidate for formal testing because he was not failing academically.81

D.K.’s parents requested an evaluation of D.K. in January 2006, the results of which indicated D.K. was not in need of special education services.82 Though still struggling, D.K. continued to advance through the school system.83 He continued to show progress academically, but his behavioral interactions with other students remained troublesome.84

78. See id. at 241 (noting concerns about advancing to first grade stemming from little behavioral progress in second kindergarten year).
79. See id. (discussing parent-teacher conference held only two months after beginning first grade where D.K.’s teacher informed his parents that he was copying work from other students, “was unable to recall instructions, exhibited poor organizational and planning skills,” and other behavioral issues).
80. See id. (noting conference held in November 2005 for purpose of addressing D.K.’s behavioral weaknesses).
81. See id. (noting that D.K.’s teacher told parents that formal evaluation may be option down the road). Due to his poor social skills, the school district placed D.K. in a special social skills group. See id. The school’s psychologist, Dr. Grim, claimed D.K. was “on par with” other students in the group. See id. The social skills group, however, was not the result of a formal evaluation or diagnosis. See id. (noting D.K. was not yet evaluated at this time, but parents requested evaluation later that month).
82. See id. (noting school district did not evaluate D.K. until April 24, 2006). The school district, through Dr. Grim, administered several tests including a cognitive ability test, a visual-motor integration test, a Wechsler Intelligence Scale for Children Fourth Edition, and a Wechsler Individual Achievement Test Second Edition. See id. (describing testing). Dr. Grim also observed D.K. in his classroom and used the Behavior Assessment System for Children (BASC) to assess whether D.K. suffered from ADHD. See id. The tests revealed D.K. did not need special education services because his scores placed him in “average and low-average ranges.” Id. At this time, the school did not provide a functional behavioral assessment (FBA), which D.K.’s parents believed rendered the April 2006 evaluation inadequate. See id. at 249–51 (noting inadequate evaluation as one basis of parents’ claims of Child Find violations). However, the court found the testing legally adequate because the IDEA does not require an FBA under these circumstances. See id. at 251. Moreover, the fact that subsequent testing reveals a disability does not automatically render prior testing legally inadequate. See id. (noting IDEA and regulations do not require FBA testing during initial testing for suspected disabilities).
83. See id. at 241 (noting D.K. began second grade in fall of 2006 after his parents approved results of April 2006 evaluation and signed Notice of Recommended Education Placement form).
84. See id. (noting D.K. fought with other children on playground and bus). D.K.’s parents disagreed with the school district regarding D.K.’s progress in
Around March 2007, Dr. Linn Cohen, a private therapist, notified the school district and D.K.’s teachers that D.K. needed special educational placement and should be formally retested.\textsuperscript{85} At the end of the school year, D.K.’s father notified the school district that D.K. had been diagnosed with “auditory processing” and “sensory stimulation” problems.\textsuperscript{86} That summer, the parents requested a second formal evaluation, hoping for a more comprehensive result.\textsuperscript{87}

D.K. was finally diagnosed with ADHD in September 2007 by a private pediatric neurological evaluation obtained by D.K.’s parents.\textsuperscript{88} In November 2007, the school district finally retested D.K. and found him eligible for special education services.\textsuperscript{89} On November 30, 2007, the school district offered an IEP.\textsuperscript{90}

Pursuant to the IDEA, D.K.’s parents requested a due process hearing on January 8, 2008, challenging the school district’s conduct since D.K. began school.\textsuperscript{91} The state agency hearing officer denied the claims and the district court affirmed.\textsuperscript{92} The district court held that the statute of school.

\textsuperscript{85} See id. (describing both parties’ opinions on progress). His parents claimed that the extra reading and math help D.K. received was insufficient and that D.K. still struggled academically. See id. Conversely, the school district believed he made “considerable progress.” Id.

\textsuperscript{86} See id. (noting D.K. had been seeing Dr. Cohen since January). Dr. Cohen “was [e]xtreemely convinced D.K. needed special placement.” Id. The school district discussed the results of their prior evaluation with Dr. Cohen, yet she still recommended re-testing. See id.

\textsuperscript{87} See id. at 242 (describing parents’ actions at end of D.K.’s second grade year).

\textsuperscript{88} See id. (noting D.K.’s parents requested evaluation before beginning of third grade, but D.K. was not tested until November 2007 by school district).

\textsuperscript{89} See id. (describing diagnosis and findings). Dr. Peter Kollros diagnosed D.K. in September 2007, two months after his parents requested the school’s evaluation, but still months before the school actually performed its own evaluation, despite the request. See id. at 241–42 (describing timeline of events). Dr. Kollros opined, “D.K.’s ‘learning would be enhanced if he were to have the [usual accommodations] for children with ADHD,” such as preferential seating, testing in distraction-free environments, and various other supports. Id. at 242. Still, D.K. waited two more months for the school’s evaluation. See id.

\textsuperscript{90} See id. at 242 (noting school district classified D.K. as student with “other health impairment”). See generally Individuals with Disabilities Education Act (IDEA) Data, supra note 39 (analyzing statistics of disability classifications under IDEA and other related statistics).

\textsuperscript{91} See D.K., 696 F.3d at 242 (noting that while district offered IEP in November, it would not be implemented until March 2008, almost four years after D.K. began schooling).

\textsuperscript{92} See id. (noting requested award of compensatory education for September 2004 through March 2008, when D.K.’s IEP would be implemented); supra note 12 and accompanying text (describing parents’ right to due process hearing); infra notes 151–57 and accompanying text (describing compensatory education remedy).

\textsuperscript{93} See D.K., 696 F.3d at 242–43 (noting that appeals panel also affirmed hearing officer’s decision and found no abuse of discretion). Because the parents had exhausted all administrative remedies, they sought review of the hearing officer and appeals panel’s decisions in the district court. See id. at 242 (describing deci-
limitations barred plaintiffs’ claims arising from conduct before January 8, 2006, two years before the due process hearing request, and neither exception to the statute of limitations applied.93

D.K.’s parents appealed to the Third Circuit, arguing that the exceptions to the statute of limitations should apply.94 The plaintiffs argued under the first exception that the school district misrepresented D.K.’s success by advising D.K.’s parents that D.K.’s issues could be resolved through alternative means “short of special education placement” (i.e., the behavioral plans).95 Under the second exception, the parents argued the school district’s failure to provide a permission to evaluate form and a procedural safeguards notice until January 5, 2006 constituted a withholding of information sufficient to toll the statute of limitations.96


93. See D.K., 696 F.3d at 242–43 (describing district court’s decision). The district court agreed with the hearing officer that the school district did not violate its obligations to identify students requiring special education (Child Find). See id. The court reasoned that prior to D.K.’s second evaluation and ADHD diagnosis, there was no sufficient reason to believe D.K. had a mental impairment because children develop at different rates, and D.K.’s difficulties were not so pronounced during his early school years. See D.K. v. Abington Sch. Dist., No. 08-4914, 2010 WL 1223596, at *7 (E.D. Pa. Mar. 25, 2010). Further, the court held the school district did not fail to provide a FAPE before November 2007 because the school was not required to conduct a functional behavioral assessment during the initial April 2006 evaluations. See id. at *8–9 (finding testing legally adequate). The court also rejected the plaintiffs’ request to introduce additional evidence. See id. at *10–11.

94. See D.K., 696 F.3d at 244 (noting parents argued, alternatively, that equitable tolling doctrines should apply). The parents did not dispute that the statute of limitations generally would limit their claims to conduct after January 8, 2006 because they requested the due process hearing on January 8, 2008. See id. They merely argued the application of the exceptions and equitable tolling doctrines. See id. (rejecting application of equitable tolling doctrines); accord Daggett et al., supra note 26, at 768–79 (discussing application of equitable tolling doctrines to IDEA and related policy issues).

95. D.K., 696 F.3d at 244–45; see also Brief and Appendix Volume I of Appellants at 23, D.K. v. Abington Sch. Dist., 696 F.3d 233 (3d Cir. 2012) (No. 10-2189), 2011 WL 6800592 [hereinafter Brief for Appellants] (arguing behavioral plans were “inadequately-developed”).

96. See D.K., 696 F.3d at 245, 247 (listing plaintiffs’ arguments under second exception and noting school district did not provide documents until after parents requested evaluation in January 2006); Brief for Appellants, supra note 95, at *24 (“[T]he District, in the face of [D.K.’s] well-documented educational needs . . . failed to provide [the forms] until approximately January 8, 2006 . . . .”).
B. Third Circuit Applies a Strict Standard

Applying the standard set forth by several district courts, the Third Circuit adopted the majority view that plaintiffs “must show that the school intentionally misled them or knowingly deceived them regarding their child’s progress” to satisfy the first exception. Here, the first exception did not apply because the record showed that the school initiated several conferences with D.K.’s parents to notify them of his poor performance. Moreover, the school’s proposed solutions and suggestion of an evaluation in the future did not constitute a misrepresentation with an intent to deceive, but rather an intent to help D.K.

Analyzing the second exception, the court relied on the statute’s plain language and only examined whether the parents were denied any statutorily required information. The plaintiffs argued the school’s failure to provide a permission to evaluate form and a procedural safeguards notification until after their requested evaluation in January 2006 constituted a misrepresentation. While this article discusses only the court’s application of the statute of limitations exception, see D.K., 696 F.3d at 249–53 for the court’s analysis of the alleged IDEA violations on the merits.

97. While this article discusses only the court’s application of the statute of limitations exception, see D.K., 696 F.3d at 249–53 for the court’s analysis of the alleged IDEA violations on the merits.

98. D.K., 696 F.3d at 246. “[T]he alleged misrepresentation . . . must be intentional or flagrant rather than merely a repetition of an aspect of the FAPE determination.” Id. at 245 (alterations in original) (internal quotation marks omitted). The court distinguished inadequate evaluations from specific misrepresentations, stating, “Plaintiffs must establish not that the [school’s] evaluations of the student’s eligibility under IDEA were objectively incorrect, but instead that the [school] subjectively determined that the student was eligible for services under IDEA but intentionally misrepresented this fact to the parents.” Id. (alterations in original) (citations omitted). Thus, D.K.’s parents could not successfully argue that a faulty evaluation in April 2006, or a failure to evaluate prior to that time, was equivalent to the school subjectively determining D.K. was disabled but misrepresenting that information to the parents. See id. (describing difference between parents’ argument and standard).

Moreover, the court reiterated the legislators’ preference to leave such determinations to the discretion of the hearing officer. See supra note 56 and accompanying text (describing statute’s deference to hearing officers and refusal to define “misrepresentation”). Therefore, while required to delineate the scope of the exceptions, the court owed significant deference to the hearing officers. See id. Such decisions are only reviewed for clear error. See supra note 92 (describing standard of review at judicial level).

99. See D.K., 696 F.3d at 247 (noting numerous conferences held with D.K.’s parents “specifically aimed” to address D.K.’s issues, implying school’s desire to involve parents rather than intention to deceive or mislead).

100. See id. (noting school district merely proposed solutions, but did not confidently express such solutions would resolve D.K.’s issues). The court also reasoned that because the behavioral plans did yield some improvement and the results of those plans were accurately reported to D.K.’s parents, no intentional misrepresentation could be established. See id. Thus, the court construed the exceptions to apply when the school’s conduct works against the progress of the child rather than to advance the child’s education. See id. (implying intent to help D.K.). For further discussion of the court’s multi-factor test, see infra notes 111–13 and accompanying text.

101. See D.K., 696 F.3d at 246–48 (describing statutory language as requiring “little elaboration”).
tuted an impermissible withholding of information.102 However, the school was not required by statute to provide such information prior to that point.103

Finally, the court added that even if the two exceptions did apply, the parents could not establish the school district’s conduct caused their failure to request the due process hearing within the two-year period.104 The evidence of D.K.’s parents’ request for an evaluation showed they knew of their right to an evaluation.105 The court established that where “parents were already fully aware of their procedural options, they cannot excuse a late filing by pointing to the school’s failure to formally notify them of those safeguards.”106

IV. CRITICAL ANALYSIS: THE IMPACT OF D.K. V. ABINGTON SCHOOL DISTRICT ON PRACTITIONERS, POLICY, AND PARENTS

Prior to D.K. v. Abington School District, no circuit court had interpreted the exceptions to the statute of limitations so explicitly.107 The Third Circuit’s decision is thus beneficial to practitioners because it clarifies some prior inconsistencies amongst the district courts.108 However, the decision established a stringent test, which will have the practical effect of limiting the number of cases in which parents may successfully toll the statute of limitations.109

102. See id. at 247 (describing plaintiffs’ claim against school district under second exception).

103. See id. (noting limited circumstances in which information is required); supra note 63 and accompanying text (listing when parents are entitled to information).

104. See D.K., 696 F.3d at 247–48 (finding school’s conduct, even if sufficient under either exception, did not cause parents to delay hearing request).

105. See id. at 248 (noting fact of parents’ “unprompted” evaluation request indicates knowledge of IDEA procedures and rights). Moreover, even if the parents were not independently aware of their right to an evaluation, the fact that D.K.’s teachers suggested an evaluation as a future option imputes knowledge to the parents of that right. See id. (imputing knowledge of right to parents). Therefore, the parents could not claim that their lack of knowledge of the right to an evaluation caused their failure to request a hearing sooner. See id. (refusing to allow parents’ purported ignorance of evaluation right to satisfy causation requirement).


107. See D.K., 696 F.3d at 245 (“[T]he scope of these exceptions is an issue of first impression for United States Courts of Appeals.”); Gerl, supra note 16 (noting Third Circuit is first to address exceptions to statute of limitations, making D.K. case “a big deal”).


109. See id. (noting parents will have great difficulty establishing that exception to statute of limitations should apply in future cases).
A. A “Highly Factual Inquiry”: Deconstructing the Third Circuit’s Approach

To invoke the first exception under this strict test, parents will first have to show that the school was aware of the extent of the disability or the adequacy of the proposed solutions. Next, the school must have actual knowledge that its representations of the student’s progress or disability are untrue or inconsistent with the school’s own assessments. The court’s use of “inconsistent” is vague and undefined, thus leaving room to dispute any discrepancies found between the school’s knowledge and the information communicated to parents.

The Third Circuit indicated that circumstances showing the school intended to help the student’s progress promote a finding that the school did not knowingly misrepresent information. For instance, the court highlighted the fact that the school district conducted several conferences with D.K.’s parents intending to notify them about their son’s poor performance. Also, the parents were kept apprised of all improvements and challenges throughout his schooling, and the district sought parental permission and input at every step. Considered as a whole, the circumstances imply the school wanted to help D.K., not hinder his progress.

The court did not, however, indicate which facts, if changed, could yield an alternative result. For example, it is unclear whether the court placed much weight on whether additional conferences were routine procedure for the school district, or if extra conferences show an additional

110. See supra text accompanying note 57 (describing analysis as “highly factual inquiry”).

111. See D.K., 696 F.3d at 247 (noting this actual knowledge is required to show intentional misrepresentation). If the basis of parents’ claim is a faulty evaluation that did not reveal a disability, the school district could not logically know the extent of the disability. See id. (finding no misrepresentation where school did not know D.K. had ADHD prior to November 2007). Further, parents could not show the school had knowledge of the adequacy of the behavioral programs. See id.

112. See id. at 246 (reasoning that requiring actual knowledge of inconsistencies between representations to parents and actual evaluations best represents language and intent of IDEA provisions, rather than mere negligence).


114. See D.K., 696 F.3d at 247 (outlining facts contributing to finding that no misrepresentation made to D.K.’s parents).

115. See id. (noting teachers’ detailed descriptions of D.K.’s “misconduct, frustration, challenges, and development” to parents).

116. See id. at 240–42 (outlining parental involvement and communication during early education years).

117. See id. at 247 (noting these facts “fall well short” of type of misrepresentation required to toll statute of limitations under first exception).

118. See id. (discussing facts in their entirety to support conclusion, but not indicating which facts were most persuasive or compelling).
effort to get the parents involved. Thus, litigants should closely scrutinize the information disclosed in conferences as compared to other facts or circumstances known to the school that could show a disability, but were not communicated to the parents. Any inconsistencies could arguably support a misrepresentation claim.

Further, the school district’s expressed confidence to parents that proposed solutions would be effective helps plaintiffs invoke the first exception. In D.K., the school district proposed solutions but never expressed any confidence in the effectiveness of the solutions, although they did yield some improvement. The Third Circuit placed significant weight on the district’s silence regarding the plans’ efficacy, and it further implied that expressing confidence in the effectiveness of programs that do not yield favorable results would more likely be a misrepresentation than no expression of confidence at all.

The most compelling fact is likely whether the school district suggests an evaluation might be necessary down the road. The Third Circuit placed great emphasis on the fact that D.K.’s teachers suggested a future evaluation to impute knowledge to D.K.’s parents of their right to an evaluation. This suggests that if the teachers did not recommend a future evaluation, the parents would not have known of their right to the evaluation, thus defeating the rationale used in the Third Circuit’s causation analysis. Moreover, if the district recommended an evaluation and the

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119. See id. (discussing conferences).
120. See supra notes 112–13 and accompanying text (discussing court’s vague use of “inconsistent” to compare information in determining misrepresentations).
121. See D.K., 696 F.3d at 246 (noting school’s knowledge of inconsistencies is required).
122. See id. at 247 (“The School District proposed solutions, but it did not imply, let alone state with any confidence, that these measures would succeed or eliminate the eventual need for an evaluation.”). Thus, if the school did imply the measures would succeed, the balance might have tipped towards a misrepresentation. See id. (using school’s level of confidence in proposed solution as factor in determining whether school made misrepresentation). However, stating with confidence would presumably be even more persuasive. See id.
123. See id. (noting behavioral plans did help D.K. improve and school district reported favorable results to parents).
124. See id. (using effectiveness of behavioral plans as evidence that even if teachers implied or expressed confidence in plans, no inconsistencies between teachers’ expressions and actual results justify finding misrepresentation).
125. See id. (noting evaluation suggestion is relevant to both misrepresentation and causation analyses).
126. See id. (using evaluation suggestion as support for conclusion that no misrepresentation occurred). While not necessarily dispositive, the fact of the suggestion indicates the teachers were unaware of an actual disability because no formal evaluation or diagnosis occurred and the teachers were not intending to communicate to the parents that they had resolved the issue, but rather they were unsure whether an issue even existed. See id.
127. See id. (noting parents’ knowledge of right to evaluation implied school district’s failure to notify could not have caused parents’ delay in requesting due process hearing).
parents decided to request the evaluation immediately, they would have been entitled to a procedural safeguards notification explaining the timelines for challenging the district’s decisions.128 Then, the parents would have known of the two-year timeline and would have been able to file a timely hearing request.129

B. Consistent with Congressional Intent and Public Policy

While the statute of limitations is a tough hurdle to overcome, the Third Circuit’s approach is consistent with Congress’s intent in adding the statute of limitations in 2004 and with the general purpose of all statutes of limitations.130 First, Congress sought to motivate parents to be involved with their child’s education, and Congress’s imposition of a statute of limitations forces parents to stay involved and resolve issues quickly.131 Moreover, the longer a child remains in an ill-suited educational environment, the more the purpose of the statute is evaded.132 By setting a two-year limit, Congress envisioned quicker resolution of these issues so that children, the ultimate beneficiaries of the IDEA, would be placed in suitable programs.133 The Third Circuit’s approach reinforces this deadline, decreasing the number of cases falling under an exception and furthering congressional intent.134

128. See supra note 63 and accompanying text (describing three circumstances in which parents are entitled to procedural safeguards notification).


130. See Daggett et al., supra note 26, at 768–69 (outlining Congress’s intent and purpose for adding uniform statute of limitations); see also supra note 52 and accompanying text for a discussion of congressional intent behind the IDEA limitations period.

131. See Daggett et al., supra note 26, at 769 (discussing Congress’s desire for IDEA disputes to be resolved more promptly than other federal litigation).

132. See id. (noting short deadline best serves primary goal of IDEA to provide eligible students with appropriate programs as quickly as possible). Moreover, Congress’s strong emphasis on the parental role under the IDEA is intended to ensure each student eligible under the IDEA receives the most effective educational program possible. See id. at 728 (noting consistency between congressional intent and imposition of limitations period). Requiring parents to request the hearing in a short amount of time ensures students are placed into the appropriate special education programs as quickly as possible because it is typically the parents requesting the hearing. See id.

133. See id. at 769 (“This choice of fairly short time periods suggests that Congress thought that prompt resolution of IDEA disputes best served the IDEA’s primary goal of providing eligible students with appropriate educational programs . . . . ”); see also supra note 52 (addressing counterarguments and problems with shorter deadline).

134. See generally D.K. v. Abington Sch. Dist., 696 F.3d 233 (3d Cir. 2012) (tightening standards for exceptions to IDEA, thus limiting cases in which exceptions apply).
Second, statutes of limitations are intended to weigh the balance between protecting the interests of individuals bringing the claims and the courts’ interests in avoiding stale cases.135 Thus, the Third Circuit’s decision respects that while parents of disabled children should have their day in court, they must do so within a limited time to avoid burdening courts with overdue cases where relevant evidence may be difficult or even impossible to find.136 However, courts should still consider “whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances.”137

C. Parents Face Higher Burdens, Students Face Harsh Results

The Third Circuit’s interpretation also places a very high burden of responsibility on the parents.138 It requires parents to be aware of their rights and responsibilities from the very beginning and quickly file a hearing request at the first sign of any IDEA violation.139 The rule makes two critical assumptions.140 First, it assumes parents have sufficient knowledge of the IDEA to be able to recognize a violation.141 Second, it assumes

135. See Johnson v. Ry. Express Agency, 421 U.S. 454, 463–64 (1975) (“[Statutes of limitations] reflect[ ] a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.”).

136. See Burnett v. N.Y. Cent. R.R. Co., 380 U.S. 424, 428 (1965) (“[Statutes of limitations] promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.”).

137. Id. at 427 (noting congressional intent is indicated by “the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act”).

138. See supra notes 45–49 (discussing active parent role envisioned by Congress).

139. See 20 U.S.C. § 1415(f)(3)(C) (2006) (requiring parents to request hearing within two years of date parents knew or should have known about action forming basis of complaint). If D.K.’s parents requested the due process hearing at the first sign of a violation, the court would have evaluated the school district’s conduct on the merits of the IDEA claims in the two-year period immediately preceding the date the parents requested the hearing. See D.K., 696 F.3d at 244–48 (discussing time period reviewable by court). However, this assumes the parents would recognize a potential violation and know of their right to request a hearing. Cf. id. (imputing knowledge of right to evaluation to parents where teacher mentioned future evaluation).

140. See Phillips, supra note 9, at 1823–36 (discussing IDEA’s “dangerous assumptions”).

141. See id. at 1829–32 (discussing parents’ lack of knowledge about educational options and disabilities); Stanley S. Herr, Special Educational Law and Children with Reading and Other Disabilities, 28 J.L. & EDUC. 337, 374 (1999) (noting special education requires complex and specialized training and services, making few parents competent to effectively advocate for their children); Kotler, supra note 48, at 372–73 (noting many parents are unaware how quickly their children should be progressing academically, which inhibits their ability to recognize problems).
parents recognizing a violation would know of their right to a due process hearing or other remedies.142

The parental burden will have a harsh impact on students without involved or informed parents.143 While D.K.’s parents were fortunate enough to hire private therapists, many families without means will not have the same advantages.144 Moreover, many families go through the process of filing IDEA claims without a lawyer.145 As a result, they are unable to establish their case, nonetheless meet their burden of proof to overcome the statute of limitations.146 Thus, perhaps the Third Circuit has pushed the statute’s purpose too far—giving parents too much credit and assuming parents are more involved and informed than practically possible.147

142. See David M. Engel, Law, Culture, and Children with Disabilities: Education Rights and the Construction of Difference, 1991 DUKE L.J. 166, 179 (1991) (discussing parents’ lack of knowledge about children’s substantive educational rights). Parental participation in children’s education seems to be the exception, not the rule. See id.; see also Buss, supra note 10, at 648 (“[N]ot all parents are this competent and self-sacrificing.”); Phillips, supra note 9, at 1823 (noting parents rarely request due process hearings).

143. See generally Hyman et al., supra note 8 (discussing how parents without access to lawyers and advocates will be most harmed by statute requiring active parental involvement). Low-income, poorly educated parents will be most affected, as research shows few school districts comply with the requirement that procedural safeguards notices be issued in easy-to-read language that may be understood by persons without a college education. See id. at 132 (citations omitted). However, placing the burden on parents is consistent with Congress’s findings about effectiveness of parental involvement. See supra note 47 and accompanying text (discussing congressional findings regarding parents).

144. See Hyman et al., supra note 8, at 144 (noting low income families cannot pay experts or afford services to establish records necessary to win on IDEA claim at judicial level).

145. See M. Brendhan Flynn, In Defense of Maroni: Why Parents Should Be Allowed to Proceed Pro Se in IDEA Cases, 80 ISO L.J. 881, 881 (2005) (“Should the ability to pay for the services of an attorney determine which students have a better chance of receiving [a FAPE] because they can afford an attorney . . . ? I think we would all agree that the answer to that question is a resounding ‘no.’”); Hyman et al., supra note 8, at 113 (“Access to attorneys in the special education realm is relatively rare.”). The national special education bar is small, comprised mainly of solo practitioners and small firms. See id. at 113 n.22.

146. See Hyman et al., supra note 8, at 144 (“Those families cannot pay experts, will not have access to IEEs, and cannot afford to purchase the services on an up-front basis to establish a record of progress and success.”); see also R.B. ex rel. F.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 942–43 (9th Cir. 2007) (noting that expert testimony of persons who frequently interact with student, such as physicians and other service providers, help establish plaintiffs’ case); Pachl v. Scagren, 453 F.3d 1064, 1067, 1072–73 (8th Cir. 2006) (illustrating how parents frequently introduce testimony of educational experts to establish case).

147. See Phillips, supra note 9, at 1827–28 (discussing obstacles to effective parental advocacy). The IDEA presumes that parents are both capable of and willing to advocate for children. See id.; see also Herr, supra note 141, at 366 (“[P]arental participation is often limited because of excessive parental deference
D. Competing Purposes

The Third Circuit’s approach to the statute of limitations renders the IDEA’s available remedies virtually unattainable to well-deserving students like D.K.\(^{148}\) Courts fear that interpreting the exceptions broadly will make the statute of limitations practically meaningless.\(^{149}\) However, interpreting the exceptions so narrowly arguably limits the IDEA’s ability to achieve its very purpose—to effectively educate children with disabilities by promptly placing them in appropriate special education programs.\(^{150}\)

For example, the equitable remedy of compensatory education is triggered when a school knew or should have known a student was receiving an inappropriate education.\(^{151}\) Unfortunately, when the statute of limitations interferes—when the parents request a due process hearing more than two years after the denial of a FAPE—this remedy is unavailable because the denial of a FAPE alone is insufficient to toll the statute of limitations under either exception.\(^{152}\) Thus, where a school should have known—or even did in fact know—about a student’s disability, the IDEA affords no relief absent a showing of a knowing misrepresentation or withholding of required information.\(^{153}\)

Consequently, a school could prevent plaintiffs from successfully asserting the first exception merely by performing minimal evaluations.\(^{154}\) to professional educational judgment . . . .”); Kotler, supra note 48, at 361 (“[T]he belief that educators have superior knowledge . . . may lead to deference [by parents] to their decisions.”). Parents are also hesitant to advocate for their child’s FAPE for “fear of retaliation against the student; a desire to maintain good relations with the school; cultural norms that place educators in positions of unquestioned authority; feelings of shame about having a child with a disability; and a sense of powerlessness.” Hyman et al., supra note 8, at 135 n.150 (citations omitted).


\(^{149}\). See supra note 59 and accompanying text (discussing courts’ fear of broad exceptions swallowing rule).

\(^{150}\). See supra notes 39–44 and accompanying text (discussing purposes and development of IDEA).


\(^{152}\). See supra note 59 and accompanying text (noting courts’ refusal to allow IDEA claim itself to overcome statute of limitations).

\(^{153}\). See D.K., 696 F.3d at 251 n.6 (noting that conduct occurring outside of two-year limitations period is not even considered in determining IDEA violations and therefore, no remedy is available as long as limitations period applies).

\(^{154}\). See, e.g., J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 661 (S.D.N.Y. 2011) (recognizing Child Find does not require formal evaluation of
Basic evaluations may not reveal any disability at all, which precludes a plaintiff from arguing that the school knowingly misrepresented information about the disability.\footnote{155} Granted, this argument assumes the school would take advantage of parents’ tendency to request due process hearings more than two years after the alleged IDEA violation occurred.\footnote{156} Conversely, if the parents filed within the two-year timeline, the school might face a tougher challenge.\footnote{157}

V. CONCLUSION

The importance of education in our society is undeniable.\footnote{158} The Supreme Court recognized that “[a]n educated populace is essential to the political and economic health of any community, and a state’s efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the state’s citizenry is well-educated.”\footnote{159} Therefore, in assessing the Third Circuit’s interpretation of the statute of limitations’ exceptions, it is important to consider which interests should prevail under the circumstances: the legislature’s interest in providing a free public education for disabled children, or the courts’ interest in excluding stale claims?\footnote{160}

While credible arguments can be made for each side, the Third Circuit’s test remains.\footnote{161} Future litigants should take care to closely scrutinize the facts of the case, focusing especially on any inconsistencies that

\footnote{155. See P.P., 585 F.3d at 738–39 (noting while evaluations should be tailored to student’s specific problems, evaluations need not identify and diagnose every possible disability). But see G.D. ex rel. G.D. v. Wissahickon Sch. Dist., 832 F. Supp. 2d 455, 465–67 (E.D. Pa. 2011) (noting evaluation of student with significant behavioral problems overemphasized student’s academic success, giving insufficient weight to behavioral problems, rendering testing inadequate and insufficient to satisfy Child Find obligations).}

\footnote{156. See supra notes 142–46 (discussing typical barriers to parental action).}

\footnote{157. See, e.g., P.P., 585 F.3d at 739 (analyzing award of compensatory education where parents filed within statutorily required timeline). Because the parents did not have to bear the burden of proving that exceptions to statute of limitations applied, the court thus placed more emphasis on whether the school provided appropriate education to the student in compliance with IDEA principles. See id.}

\footnote{158. See supra note 1 and accompanying text (highlighting education’s importance).}


\footnote{160. Compare supra notes 130–37 (describing Congress’s purpose in establishing statute of limitations period in IDEA and purposes of limitations periods in general), with supra notes 36–49 (describing purpose of IDEA to protect rights of disabled students). But see Daggett et al., supra note 26, at 739 n.129 (noting IDEA encourages settlements, which are resolved more quickly, but also sometimes result in less than full FAPE for children).}

\footnote{161. See supra notes 97–106 and accompanying text (discussing Third Circuit’s interpretation of statute of limitations exceptions under IDEA).}
may be highlighted to support a finding that the school misrepresented information to the plaintiffs. 162 Further, to effectively advocate for their clients, attorneys specializing in education law should make an effort to disseminate knowledge of the rules, to inform parents of their rights, and encourage prompt filing of complaints. 163

Moving forward, litigation of similar issues will likely arise in neighboring circuits. 164 For the sake of disabled children, it is essential to raise awareness of these issues and promote solutions to benefit these students. 165 After all, “no greater benefit can be bestowed upon a long be-nighted people than giving to them . . . the means of useful education.” 166

162. See supra notes 110–29 and accompanying text (explaining factual analysis).

163. See supra notes 141–47 and accompanying text (discussing parents’ lack of knowledge as barrier to effective advocacy and prompt resolution of claims within two-year timeline).

164. See D.K. v. Abington Sch. Dist., 696 F.3d 233, 245 (3d Cir. 2012) (noting Third Circuit was first to address scope of limitations exceptions, but also discussing inconsistent cases in other circuits).

165. See Hyman et al., supra note 8, at 145–61 (proposing solutions for families without means); Phillips, supra note 9, at 1837–51 (proposing statutory revisions and supplemental programs).

I. INTRODUCTION

The fundamental right to effective representation is a cornerstone of the criminal justice system, and at no time is that effective representation more crucial than during the investigation and presentation of mitigating evidence in a capital case. Because the death penalty is reserved for the most heinous of crimes, inextricably interwoven in a capital case is a defendant’s right to present mitigating evidence to demonstrate extenuating circumstances that may justify a departure from the death penalty.

1. See Dale E. Ho, Silent at Sentencing: Waiver Doctrine and a Capital Defendant’s Right to Present Mitigating Evidence After Schriro v. Landrigan, 62 FLA. L. REV. 721, 725, 735 (2010) (explaining that right to present mitigating evidence during capital case “is grounded firmly in the Court’s capital punishment jurisprudence, arising in response to . . . Eighth Amendment concerns”); Emily Hughes, Arbitrary Death: An Empirical Study of Mitigation, 89 WASH. U. L. REV. 581, 582 (2012) (“A capital jury’s opportunity to consider mitigating evidence is one of the critical procedures the Supreme Court has endorsed to alleviate arbitrariness in the jury’s decision of whether a defendant deserves to die.”). Proper investigation of mitigating evidence is an immense task. See Ursula Bentele & William J. Bowers, How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse, 66 BROOK. L. REV. 1011, 1055 (2001) (explaining challenges in developing mitigating evidence, calling it “an extraordinarily complicated and difficult task that requires the skillful blending of lay and expert testimony”).

2. See California v. Brown, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring) (explaining that mitigating evidence, including defendant’s “disadvantaged background” or “emotional and mental problems,” is extremely significant to consider in capital cases because it may indicate that particular defendant is less culpable than others who lack this type of “excuse”). In the broadest sense, mitigating evidence is any type of factor that could cause a jury to issue anything less than the death penalty. See Craig M. Cooley, Mapping the Monster’s Mental Health and Social History: Why Capital Defense Attorneys and Public Defender Death Penalty Units Require the Services of Mitigation Specialists, 30 OKLA. CITY U. L. REV. 23, 51–52 (2005) (explaining role mitigating evidence plays in sentencing phase of death penalty case). The Supreme Court has identified a non-exhaustive list of potential mitigating factors. See id. at 48 (“[M]itigating factors have included such things as family history; youthfulness; underdeveloped intellect and maturity; favorable prospects for rehabilitation; poverty; military service; cooperation with authorities; character; prior criminal history; mental capacity; age; and good behavior while awaiting trial.”) (footnotes omitted).
Therefore, the presentation of mitigating evidence is a critical juncture in a capital case. Put simply, if a defendant does not present any mitigating evidence during the trial or sentencing phase, the defendant faces a highly unfavorable outcome and decreases his or her chance of avoiding the death penalty.

Investigating and presenting mitigating evidence is not an easy task, as a surprising number of “uncooperative” defendants facing the death penalty hinder a defense counsel’s attempt to gather or present the evidence. Further, it is not uncommon for defendants in capital cases to be poorly represented. Inadequate representation, coupled with the complexities involved in investigating and presenting mitigating evidence, leads many defendants seeking post-sentencing relief to file claims for ineffective assistance of counsel regarding their representation at the sentencing phase of a capital case. Often, this type of claim hinges on whether the defendant waived the right to present mitigating evidence, which, under the current Supreme Court jurisprudence, procedurally bars a claim of ineffective assistance of counsel.

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3. See Robin M. Maher, The ABA and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 Hofstra L. Rev. 763, 771–72 (2008) (“Developing mitigation evidence and making a case for the life of their client is one of the most important tasks defense lawyers must handle.”); see also Ho, supra note 1, at 724 (explaining right to present mitigating evidence “represents a defendant’s last line of defense against the imposition of the death penalty”); Leading Cases, Sixth Amendment—Ineffective Assistance of Counsel: Schriro v. Landrigan, 121 Harv. L. Rev. 255, 263 (2007) [hereinafter Leading Cases] (“Mitigating evidence is one of the most important checks ensuring that the state imposes the death penalty only when it ‘has adequate assurance that the punishment is justified.’”) (citation omitted).

4. See Kamela Nelan, Restricting Waivers of the Presentation of Mitigating Evidence by Incompetent Death Penalty “Volunteers”, 27 Dev. Mental Health L. 24, 24 (2008) (“An equally significant means by which a defendant can achieve execution is to forgo presenting mitigating evidence during the sentencing phase of the trial, making the imposition of a death sentence a virtual certainty.”); see also Cooley, supra note 2, at 33 (“Typically, one’s life will only be spared when sufficient mitigating evidence is presented to outweigh the State’s aggravating evidence.”).

5. Leading Cases, supra note 3, at 255 (“Capital defendants are not always cooperative or repentant, even at sentencing hearings determinative of their fates. Some death penalty defendants may refuse to aid in investigation of mitigating evidence, or they may actively obstruct presentation of it during the sentencing phase.”).

6. See Cooley, supra note 2, at 24 (“[M]any capital defendants get no meaningful support at the sentencing phase . . . for this reason, claims of . . . ineffectiveness at the penalty phase are among the most common issues raised in habeas corpus petitions by inmates on death row.”) (alterations in original) (quoting Ira Mickenberg, Ineffective Counsel, Nat’l L.J., Aug. 4, 2003, at S9).

7. For a discussion regarding the history of the development of the ineffective assistance of counsel claim see infra notes 27–50 and the accompanying text.

8. See Ho, supra note 1, at 724 (explaining that once it is determined that defendant waived right to present mitigating evidence, claim for ineffective assistance of counsel is procedurally barred).
Recently, in Schriro v. Landrigan,9 the Supreme Court addressed the impact of an uncooperative defendant’s actions on the presentation of mitigating evidence during capital sentencing and alluded to what may constitute a defendant’s waiver of the right to present mitigating evidence.10 Numerous commentators have argued that the majority’s decision was a major setback for defendants’ rights because it implies that a defendant could waive the right to present mitigating evidence without fully knowing or understanding the consequences of the decision.11 Schriro left lower courts in a difficult position; they now must carefully navigate the determination of whether a defendant waived the right to present mitigating evidence while balancing the need to protect defendants’ rights in capital cases.12

The United States Court of Appeals for the Third Circuit limited the potentially dangerous consequences of the Supreme Court’s precedent by narrowly interpreting Schriro, confining its applicability to its specific set of facts.13 The Third Circuit’s approach affords uncooperative defendants substantial leeway before finding a valid waiver of the right to present mitigating evidence.14 Further, the Third Circuit’s approach requires defense counsel to exercise heightened caution in deciding how to proceed in the sentencing phase of a capital case.15

This Casebrief will not delve into the contentious issues surrounding the efficacy and morality of the death penalty, nor will it deal with the first

10. See id. at 472–73 (explaining issues that Supreme Court would consider for this case).
11. See Ho, supra note 1, at 725 (“The Court’s failure in [Schriro] to apply a similar standard where a capital defendant ‘waives’ his right to present mitigating evidence is incongruous with well-established waiver doctrine, and creates an unacceptable risk of error in capital sentencing.”); Leading Cases, supra note 3, at 255, 264–65 (2007) (explaining that Schriro represents departure from prior trend towards protecting right to present mitigating evidence and warns that if Schriro’s decision is continued to be adhered to or expanded it ‘will have deplorable consequences for the rights of capital defendants’).
12. See Ho, supra note 1, at 760 (“In absence of a clear ruling from the Supreme Court, however, the lower courts have issued widely varying rulings on this particular issue and have applied inconsistent standards in determining when the right to mitigation has been validly waived.”).
13. See generally Blystone v. Horn, 664 F.3d 425 (3d Cir. 2011); Thomas v. Horn, 570 F.3d 105 (3d Cir. 2009); Taylor v. Horn, 504 F.3d 416 (3d Cir. 2007). For a detailed discussion on the development and current state of the Third Circuit’s jurisprudence regarding mitigating evidence, see infra notes 53–91 and accompanying text.
14. For a discussion of the Third Circuit’s approach to handling uncooperative defendants during the penalty phase of a capital case who subsequently file a claim for ineffective representation, see infra notes 95–129 and accompanying text.
15. For a discussion of the Third Circuit’s approach to the actions of the defense counsel during sentencing in a capital case, see infra notes 118–29 and accompanying text.
phase of a capital case, the guilt phase.\textsuperscript{16} Instead, through an analysis of the recent case \textit{Blystone v. Horn},\textsuperscript{17} this brief will focus on the Third Circuit’s interpretation of the effect of a recalcitrant defendant during a capital case in two respects: the effect that uncooperative actions have on waiving a defendant’s rights to present mitigating evidence, and the responsibilities of the defense counsel regarding mitigating evidence when representing an uncooperative defendant.\textsuperscript{18}

Part II of this brief traces the history of the effective representation requirement and the impact of a recalcitrant defendant on capital cases through the related Supreme Court jurisprudence.\textsuperscript{19} Part III evaluates and explains the decision in \textit{Blystone v. Horn} and related Third Circuit cases in light of the Supreme Court’s recent guidance.\textsuperscript{20} Part IV explains the implications for a practitioner in the Third Circuit.\textsuperscript{21} Finally, Part V argues that the Third Circuit’s approach to handling questions of waiver and effective representation of counsel during the sentencing phase of a capital case is necessary to protect defendants.\textsuperscript{22}

\begin{footnotes}
\footnotetext[16]{See Cooley, supra note 2, at 24–25 (discussing increased awareness of capital punishment by American public attributable to flaws in system). It should be noted that there are two distinct phases in a capital case: the guilt phase and penalty phase. See Nelan, supra note 4, at 28 (explaining that capital trials can be broken down into two components: guilt phase, where defendant’s innocence or guilt is determined, and penalty phase, where appropriate penalty is determined). It is worth noting that capital punishment remains a prominent public issue with commentators illustrating many of the problems associated with the death penalty system. See, e.g., Steven F. Shatz, \textit{The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study}, 59 FLA. L. REV. 719, 768 (2007) (“Overbroad definitions of death-eligibility can be seen as the root cause of most of the problems with the death penalty.”).}

\footnotetext[17]{664 F.3d 425 (3d Cir. 2011).}

\footnotetext[18]{For a discussion of the Third Circuit’s approach to waiving the right to present mitigating evidence, see infra notes 95–117 and accompanying text. For a discussion of the requirements of defense counsel during the mitigating phase of a capital case in the Third Circuit, see infra notes 118–29 and accompanying text.}

\footnotetext[19]{For a discussion of the development of the Supreme Court’s effective representation and mitigating evidence jurisprudence, see infra notes 23–50 and accompanying text.}

\footnotetext[20]{For an explanation and analysis of the Third Circuit’s decisions in \textit{Taylor, Thomas}, and \textit{Blystone}, see infra notes 51–91 and accompanying text.}

\footnotetext[21]{For a discussion of the practical ramifications for practitioners, including an explanation of the requirements to satisfy the effective representation threshold in the Third Circuit, see infra notes 92–129 and accompanying text.}

\footnotetext[22]{For the argument that the Third Circuit applies a proper approach to protect defendants’ rights during the sentencing phase, see infra notes 130–37 and accompanying text. For a recommendation that the Third Circuit take a further step in protecting defendants’ rights by adopting a “knowing and voluntary” requirement to waiver of mitigating evidence at capital sentencing, see infra notes 138–44 and accompanying text.}
\end{footnotes}
II. BACKGROUND

This section provides a general overview of the development and subsequent implementation of the right to effective assistance of counsel.23 First, this section briefly reviews the establishment of the right to effective assistance of counsel.24 Second, this section examines the Supreme Court’s application of the right to effective assistance of counsel in the mitigating evidence phase.25 Finally, the focus of this section turns to a survey of the Supreme Court’s approach to the right of effective assistance of counsel when a defendant acts in an uncooperative manner.26

A. Establishment of Right to Effective Assistance of Counsel

The Sixth Amendment guarantees the right to effective assistance of counsel.27 In 1984, the Supreme Court addressed the standard for evaluating ineffective representation claims in Strickland v. Washington.28 In Strickland, the respondent confessed to three murders and was sentenced to death.29 Following the sentence, the “respondent sought collateral relief,” claiming, among other grounds, that his counsel provided ineffective assistance during the sentencing phase.30

23. For a general overview of the right to effective assistance of counsel and the subsequent implications, see infra notes 27–50 and the accompanying text.

24. For a brief history of the establishment of the right to effective assistance of counsel, see infra notes 27–35 and the accompanying text.

25. For an overview of the Supreme Court’s application of the right to effective assistance of counsel in the mitigating evidence phase, see infra notes 36–39 and accompanying text.

26. For an overview of the Supreme Court’s approach to a recalcitrant defendant’s right to effective assistance of counsel, see infra notes 40–50 and accompanying text.

27. See Cooley, supra note 2, at 70 (explaining historical development and recognition of right to assistance of counsel under Sixth Amendment).

28. 466 U.S. 668, 683 (1984) (acknowledging that this case represents Supreme Court’s first review of attorney’s ineffective assistance of representation claim). The right to effective assistance of counsel assumes the constitutional right to counsel that has been established through a long line of Supreme Court cases dating back to 1932. See, e.g., Gideon v. Wainwright, 372 U.S. 335, 340–41 (1963) (explaining that right to counsel is afforded in state proceeding through incorporation of Sixth Amendment through Fourteenth Amendment); Johnson v. Zerbst, 304 U.S. 458, 467–69 (1938) (determining that only legitimate waiver of counsel can vitiate right to counsel); Powell v. Alabama, 287 U.S. 45, 71 (1932) (holding that trial judge must appoint counsel for defendants when they cannot employ counsel).

29. See Strickland, 466 U.S. at 671–75 (reviewing facts of case). As part of an overall strategy, respondent’s attorney chose not to look for certain evidentiary items and limited the evidence presented at sentencing to a plea colloquy between the respondent and the trial judge. See id. at 673 (reviewing facts of case).

30. See id. at 675 (explaining that respondent sought relief for ineffective assistance of counsel because his attorney “failed to move for a continuance to prepare for sentencing, to request a psychiatric report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner’s reports or cross-examine the medical experts”). The claim eventually made
For the first time, the Supreme Court granted certiorari to address squarely the issue of ineffective assistance of counsel. The Court established a two-prong test to evaluate ineffective assistance of counsel claims: a defendant must prove (1) "deficient" performance by the attorney, and (2) that the deficient performance "prejudiced the defense." A counsel's performance is "deficient" when the attorney fails to represent a client in a reasonable manner. Even if an attorney's representation is unreasonable, however, this will not warrant "setting aside the judgment of a criminal proceeding" unless the unreasonable representation also prejudiced the ultimate result. Therefore, once a defendant proves that the defense counsel did not satisfy the reasonableness standard in the first prong of the Strickland test, the defendant must then demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

B. Supreme Court Applies Strickland Reasonableness Prong to Mitigating Evidence

Mitigating evidence serves a vital role in capital cases, theoretically ensuring that the death sentence is reserved for the absolute worst...
In Gregg v. Georgia, the Supreme Court held that mitigating evidence is a foundational requirement for death penalty statutes to be constitutional. Since Gregg, the Supreme Court has provided guidance on a case-by-case basis regarding what constitutes a reasonable investigation and presentation of mitigating evidence.

C. Schriro v. Landrigan: Effect of Recalcitrant Defendant on Attorney’s Duty to Investigate and Present Mitigating Evidence

The Strickland standard is more difficult to apply when unpredictable variables, such as an uncooperative defendant, are added to a capital case. In the 2007 case Schriro, the Supreme Court revisited mitigating evidence in a capital case, and for the first time, the Court addressed the issue of an effective investigation and presentation of mitigating evidence when a client obstructs the investigation or advises defense counsel not to.

36. See Ho, supra note 1, at 725 (explaining that components of death penalty cases must be structured to reserve capital punishment for worst offenders); Maher, supra note 3, at 768 (“Mitigation evidence took center stage in death penalty cases as potentially the only way defense counsel could humanize their client and save his life.”); Nelan, supra note 4, at 49 (explaining vital role mitigating evidence serves in capital cases).


38. See id. at 193, 206–07 (emphasizing key role of mitigation in new death penalty statutes that Court found constitutional); see also Hughes, supra note 1, at 582 (“A capital jury’s opportunity to consider mitigating evidence is one of the critical procedures the Supreme Court has endorsed to alleviate arbitrariness in the jury’s decision of whether a defendant deserves to die.”). Interestingly, commentators have argued that mitigating evidence actually does little to rid capital cases of arbitrary results. See id. at 587 (explaining that because of the lack of uniformity in mitigating evidence investigation, arbitrariness remains in capital sentencing decisions); see also Jesse Cheng, Frontloading Mitigation: The “Legal” and the “Human” in Death Penalty Defense, 35 L. & SOC. INQUIRY 39, 44 (2010) (“[A]nalysts have observed that for all the ado about proceduralizing the death penalty, the judiciary’s uneven regulation of capital punishment has done little to alter the reality of arbitrary decision making.”).

39. See, e.g., Rompilla v. Beard, 545 U.S. 374, 377 (2005) (holding that under reasonableness prong of Strickland test, defense counsel must not rely on defendant and defendant’s family’s claims that no mitigating evidence exists, and must conduct review of evidence that prosecutor is likely to use “as evidence of aggravation at the trial’s sentencing phase”); Wiggins v. Smith, 539 U.S. 510, 522–27 (2003) (finding ineffective assistance of counsel when counsel chose not to present mitigating evidence because that decision was unreasonable and could not have been strategic in light of counsel’s deficient investigation into available mitigating evidence); Williams v. Taylor, 529 U.S. 362, 395–96 (2000) (concluding that defense counsel’s failure to present evidence that defendant was “‘borderline mentally retarded,’” and that defendant assisted law enforcement while in prison, and failure to use witnesses which would cast defendant in favorable terms, amounted to unreasonable conduct and ultimately did not meet Strickland standard of effective representation) (citation omitted).

present mitigating evidence at sentencing.\textsuperscript{41} In \textit{Schriro}, the respondent escaped from prison, committed a homicide, and was convicted of first-degree murder.\textsuperscript{42} At the respondent’s request, his ex-wife and birth mother did not testify during the sentencing phase, and the defense counsel did not present any other mitigating evidence.\textsuperscript{43}

In a 5–4 decision, the Supreme Court focused primarily on the prejudice prong of the \textit{Strickland} test and held that any failure in the investigation by the defense attorney did not prejudice the respondent.\textsuperscript{44} The respondent’s specific requests to not have his birth mother or ex-wife testify and his colloquy with the trial judge made clear that he did not intend or want to present any mitigating evidence.\textsuperscript{45} Thus, any failure by his attorney could not have prejudiced his case under the second \textit{Strickland} prong.\textsuperscript{46}

According to the dissent, however, it was uncontroversial that the defense counsel’s investigation into possible mitigating evidence was insufficient and failed the reasonableness prong of the \textit{Strickland} test.\textsuperscript{47} Further, the dissenters focused on whether the respondent produced a “knowing, intelligent, and voluntary” waiver of his right to present mitigating evidence.\textsuperscript{48} The dissent argued that this informed and knowing standard exists for a valid waiver of all constitutionally protected rights, even if the Court has not specifically and affirmatively applied the standard to the right to present mitigating evidence.\textsuperscript{49} Thus, because the defendant did not know that he was waiving his right to present mitigating evidence, he

\begin{itemize}
\item \textsuperscript{41} See \textit{id.} (explaining that Supreme Court has never addressed case “in which a client interferes with counsel’s efforts to present mitigating evidence to a sentencing court”).
\item \textsuperscript{42} See \textit{id.} at 469–71 (reviewing facts of case).
\item \textsuperscript{43} See \textit{id.} (reviewing facts of case and specifically recounting respondent’s actions at sentencing hearing).
\item \textsuperscript{44} See \textit{id.} at 473 (remanding case for evidentiary hearing regarding ineffective representation claim). Before the case reached the Supreme Court, the Ninth Circuit delivered an en banc decision concluding that the respondent produced a “colorable claim” that he was provided with ineffective assistance of counsel during the sentencing phase of his capital case. See \textit{id.} at 472 (reviewing procedural history of case).
\item \textsuperscript{45} See \textit{id.} at 469–70 (describing defendant’s refusal to allow his birth mother and ex-wife to testify, and recounting colloquy between trial judge and defendant regarding defendant’s wish not to present this type of mitigating evidence).
\item \textsuperscript{46} See \textit{id.} at 480–81 ( concluding that defendant “could not establish prejudice”).
\item \textsuperscript{47} See \textit{id.} at 482 (Stevens, J., dissenting) (“Significant mitigating evidence—evidence that may well have explained respondent’s criminal conduct and unruly behavior at his capital sentencing hearing—was unknown at the time of sentencing.”).
\item \textsuperscript{48} See \textit{id.} at 484 (explaining that constitutional right can only be waived in the limited circumstances when defendant makes “knowing, intelligent, and voluntary” decision).
\item \textsuperscript{49} See \textit{id.} at 486 (acknowledging Court had never specifically applied informed and knowing standard to defendant’s right to produce mitigating evidence).
\end{itemize}
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did not forfeit his protections or claim for ineffective assistance of counsel.50

III. TAYLOR V. HORN,51 THOMAS V. HORN,52 AND BLYSTONE: THE THIRD CIRCUIT BROADLY SAFEGUARDS A DEFENDANT’S RIGHT TO PRESENT MITIGATING EVIDENCE

Since the 2007 Supreme Court ruling in Schriro, the Third Circuit has decided three cases involving the effect of a recalcitrant defendant who interferes with a defense counsel’s efforts to investigate and present mitigating evidence.53 Through an examination of these cases, this section tracks the development of the Third Circuit’s approach to the ability of recalcitrant clients to waive their right to present mitigating evidence.54 Although the Third Circuit could have interpreted Schriro’s holding broadly and significantly restricted the protection offered to defendants in capital cases, the court instead chose to limit Schriro’s application to cases where defendants undeniably waive their rights.55

A. Taylor and Thomas Establish Foundation for Third Circuit’s Approach

In 2007, the Third Circuit heard Taylor v. Horn, where the defendant pleaded guilty to murdering his wife, two children, mother-in-law, and his mother-in-law’s child.56 Pursuant to the defendant’s wishes, the defense attorney did not present any mitigating evidence beyond merely mentioning that the defendant had no prior criminal record.57 The defendant was sentenced to death, and after a lengthy appeals process, the case reached the Third Circuit.58

50. See id. at 486–87, 491–92 (concluding that defendant could not have waived his right to present mitigating evidence because he did not understand or know implications of his decisions).
51. 504 F.3d 416 (3d Cir. 2007).
52. 570 F.3d 105 (3d Cir. 2009).
53. See Blystone v. Horn, 664 F.3d 425, 425 (3d Cir. 2011) (representing most recent case since Schriro to examine effect of recalcitrant defendant on right to present mitigating evidence); Thomas, 570 F.3d at 105 (representing second case since Schriro to examine effect of recalcitrant defendant on right to present mitigating evidence); Taylor, 504 F.3d 416 (representing first case since Schriro to examine effect of recalcitrant defendant on right to present mitigating evidence).
54. For a discussion of the Third Circuit’s approach to the ability of recalcitrant clients to waive their right to present mitigating evidence, see infra notes 95–116 and accompanying text.
55. See Bradley A. MacLean, Effective Capital Defense Representation and the Difficult Client, 76 TENN. L. REV. 661, 671 (2009) (“Justice Thomas’s opinion in Landrigan threatens to give lower courts justification to take a myopic view of the scope and nature of capital defense counsel’s duties.”).
56. See Taylor, 504 F.3d at 420 (explaining facts of case).
57. See id. at 422 (detailing facts regarding defendant’s decisions during sentencing hearing).
58. See id. at 422–25 (outlining procedural history of case following trial judge’s imposition of death sentence).
Relying on Schriro, the court concluded that based on the defendant’s actions during sentencing, he had waived his right to present mitigating evidence, effectively barring his post-sentencing claim of ineffective assistance of counsel. In reaching this conclusion, the court highlighted that the defendant (1) wrote in a confession letter that he wanted “the maximum sentence,” (2) instructed his attorney “not to contact any witnesses or medical personnel” that he had spoken to, (3) affirmed that he understood that the likely result of not presenting mitigating evidence would be the “imposition of the death penalty,” and (4) declined to present any mitigating evidence at the sentencing hearing. Further, the court held that the defendant was informed and knowing when he waived his right to present mitigating evidence.

In 2009, the Third Circuit revisited the issue in Thomas v. Horn, and held that no valid waiver existed when the defendant exhibited a lower degree of recalcitrant behavior than the defendants in Taylor and Schriro. During trial, the defendant was found guilty of murder, rape, involuntary deviate sexual intercourse, and burglary. The defendant refused to present evidence in the form of witness testimony and refused to stipulate to uncontroverted facts such as his age. Unlike in Taylor, however, the court determined that the defendant did not waive his right to present mitigating evidence at sentencing and therefore was not procedurally barred from making a claim of ineffective assistance of counsel.

In Thomas, the court distinguished Taylor and Schriro based on the degree of the defendant’s recalcitrant behavior. The court focused in particular on the extent and scope of the defendant’s actions and whether the actions amounted to complete waiver of right to present mitigating evidence. The court determined that in Taylor and Schriro, the defendants’ waivers were manifestly apparent while in Thomas, it would be too great a leap to classify the defendant’s actions as qualifying as a complete waiver.

59. See id. at 455 (explaining that defendant’s decision to waive right to present mitigating evidence was clear and “informed and knowing”).

60. See id. at 421–22 (illustrating multiple factors that led court to conclude that defendant had waived his right to present mitigating evidence which, in effect, barred claim of ineffective assistance of counsel).

61. See id. at 447 (“We will therefore affirm the District Court’s decision that these waivers were knowing and voluntary.”).

62. See Thomas v. Horn, 570 F.3d 105, 122, 129 (3d Cir. 2009) (outlining issues to be considered on appeal including ineffective assistance of counsel claim and ultimately holding that defendant’s behavior did not equate to waiver of right to present mitigating evidence).

63. See id. at 112–13 (explaining procedural history of case).

64. See id. at 128–29 (detailing facts pertinent to sentencing phase of case).

65. See id. at 129 (holding that defendant’s conduct did not rise to level of waiver of right to present all mitigating evidence, which meant that possibility remained that defense counsel’s performance prejudiced case).

66. See id. at 126–27 (highlighting facts distinguishing Schriro and Taylor from Thomas). The court focused in particular on the extent and scope of the defendants’ actions and whether the actions amounted to complete waiver of right to present mitigating evidence. See id. at 127 (distinguishing behaviors of Thomas defendant from prior cases). The court determined that in Taylor and Schriro, the defendants’ waivers were manifestly apparent while in Thomas, it would be too great a leap to classify the defendant’s actions as qualifying as a complete waiver. See id. at 129 (“Therefore, we cannot conclude that Thomas’ conduct at sentencing eliminated all possibility that counsel’s performance caused him prejudice.”).
dant merely decided not to take the stand himself, rather than refuse to present any mitigating evidence like the defendants in *Taylor* and *Schriro*.67 The Third Circuit determined that the defendant’s actions only resulted in a waiver of the presentation of certain *types* of mitigating evidence but could not be reasonably construed as a complete waiver of the right to present *all* mitigating evidence.68

B. Blystone Solidifies Third Circuit’s Position on Defendant Waiver

The Third Circuit solidified its approach to handling an uncooperative defendant in *Blystone v. Horn*.69 The facts of *Blystone* represented the perfect storm—an inexperienced public defender and a defendant who was uncooperative during the sentencing phase of the capital case.70 A thorough analysis of *Blystone* reveals important facts and circumstances that illustrate the Third Circuit’s position on recalcitrant defendants and their right to waive mitigating evidence.71

1. Background Facts and Procedure

In 1983, Scott Wayne Blystone picked up Smithburger, a hitchhiker, and asked him to contribute money for gas.72 When Smithburger told Blystone that he could only contribute a few dollars, Blystone told him to get out of the car and proceeded to shoot him six times.73 At trial, Blystone was found guilty of murder.74

Blystone’s defense counsel performed a limited investigation into possible mitigating evidence, interviewing only four people.75 At sentencing,
the defense counsel explained to the court that Blystone did not want to present any mitigating evidence.\footnote{See id. at 405–06 (describing family members’ description of Blystone’s troubled past).} The judge conducted a colloquy with Blystone to ensure that Blystone understood the consequences of his decision not to bring in the mitigating evidence.\footnote{See id. at 403 (recounting facts of case). Blystone’s attorney told the court that he and Blystone previously engaged in lengthy discussions regarding the consequences of not presenting any mitigating evidence at trial. See id. (noting defense attorney’s assertion that he and Blystone discussed “the benefits of presenting a mitigation case”). Furthermore, the defense counsel expressed a strong desire to put Blystone’s parents on the stand. See id. (describing facts from record).}

After the court sentenced Blystone to death, he filed a petition under the Pennsylvania Post-Conviction Relief Act (PCRA) claiming ineffective assistance of counsel.\footnote{See Blystone, 664 F.3d at 404 (explaining procedural history of case).} At the PCRA evidentiary hearing, Blystone presented significant evidence that could have served as mitigating evidence if Blystone had the benefit of an adequate investigation and effective assistance of counsel.\footnote{See id. at 404–08 (describing evidence presented by Blystone in attempt to prove ineffective assistance of counsel during PCRA evidentiary hearing).} However, the court held that Blystone’s defense counsel’s investigation was not deficient.\footnote{See id. at 408–09 (noting PCRA court denied Blystone’s petition because sufficient evidence showed defense counsel conducted “sufficient investigation into mitigating circumstances by reviewing all of the available discovery materials”).} The Pennsylvania Supreme Court affirmed the PCRA court’s decision and further concluded that Blystone waived his right to present mitigating evidence.\footnote{See id. at 409 (‘‘The PCRA court determined that counsel conducted a proper investigation into all possible mitigating circumstances, and we find substantial support in the record to uphold [that] determination.’’) (citation omitted).} Thus, the failures of his defense counsel at trial did not cause him prejudice.\footnote{See id. at 408–09 (explaining Pennsylvania Supreme Court’s decision (citing Commonwealth v. Blystone, 725 A.2d 1197, 1206 (Pa. 1999))). Prior to the defendant seeking relief for ineffective assistance of counsel, the United States Supreme Court determined that the Pennsylvania statute mandating the death penalty where aggravating circumstances exist and no mitigating evidence is presented was constitutional and did not impermissibly limit the jury’s discretion in deciding the penalty. See id. (noting Blystone’s constitutional challenge to Pennsylvania statute (citing Blystone v. Pennsylvania, 494 U.S. 299, 305 (1990))). During the PCRA hearing, Blystone presented numerous pieces of evidence to show that “his life history was replete with potentially mitigating evidence, which [his attorney] could have uncovered through a more extensive investigation of his background.” See id. at 405 (discussing Blystone’s argument that further investigation by counsel would have revealed such evidence). Specifically, through a number of lay witnesses,
2. Analysis of Ineffective Representation Claim Under Strickland Test

On appeal, the Third Circuit delved into the Strickland analysis.\textsuperscript{83} The court worked through the two prongs of the Strickland test separately to develop the court’s stance on the interplay between effective assistance of counsel and the impact of a recalcitrant defendant on the right to present mitigating evidence.\textsuperscript{84} The court was able to harmonize prior decisions to reach its ultimate conclusion.\textsuperscript{85}

a. Strickland Reasonableness Prong

The Third Circuit quickly concluded that the investigation for mitigating circumstances failed the reasonableness prong of the Strickland test.\textsuperscript{86} In reaching its conclusion, the court specifically called attention to expert mental health testimony and institutional records, which were “readily available” to the defense counsel had he performed a proper investigation.\textsuperscript{87} Finally, the failure to conduct a thorough investigation was not part of a strategic choice that may otherwise have deserved greater deference under the Strickland standard.\textsuperscript{88}

b. Strickland Prejudice Prong

In analyzing the Strickland prejudice prong, the Third Circuit artfully distinguished Blystone from the Supreme Court ruling in Schriro.\textsuperscript{89} In so doing, the court was able to supply its own guidance on examining the interchange between an uncooperative defendant and the subsequent investigation.

Blystone presented evidence that he suffered from malnutrition as a child, abused alcohol, engaged in self-mutilation, suffered from untreated brain damage and psychiatric disorders, was abused by his father, and was discharged from the Navy for “‘[a]pathy and defective attitudes.’” See id. at 405–07 (alteration in original) (citation omitted) (detailing results from Blystone’s own investigation for potentially mitigating evidence).

83. See id. at 418 (“The Third Circuit evaluate[s] claims of ineffective assistance of counsel using the two-pronged test set forth in Strickland v. Washington”).

84. For a discussion of the Third Circuit’s application of the Strickland analysis in Blystone, see infra notes 86–91 and accompanying text.

85. For a discussion regarding the Third Circuit’s decision in Blystone, see infra notes 86–91 and the accompanying text.

86. See Blystone, 665 F.3d at 420 (“We need not delve too deeply into the question of whether Whiteko’s investigation prior to sentencing was deficient because the Commonwealth’s brief all but concedes that it was.”).

87. See id. at 420–21 (demonstrating deficiencies in defense counsel’s investigation and noting PCRA court’s determination that such investigations were adequate was “objectively unreasonable in light of the evidence presented in the proceedings before it”).

88. See id. at 423 (acknowledging that strategic choices are to be treated deferentially, yet concluding that defense counsel employed no such strategy during investigation).

89. See id. at 426 (“Despite the Commonwealth’s extensive arguments to the contrary, the facts of this case are clearly distinguishable from Schriro.”).
pact on waiving mitigating evidence.\footnote{For a discussion of the Third Circuit’s guidance on waiving the presentation of mitigating evidence, see infra notes 95–117.} The court reaffirmed \textit{Thomas}, which established that in order for a defendant to waive all rights to present mitigating evidence, the defendant must unambiguously refuse to allow the defense attorney to present \textit{any} mitigating evidence at sentencing.\footnote{See \textit{Blystone}, 664 F.3d at 425 (“[W]e could not conclude on the record before us that Thomas would have interfered with the presentation of all mitigating evidence.”).}

\section*{IV. Key Factors and Practical Implications for Third Circuit Practitioners Stemming from \textit{Blystone}}

This section explores several key points and practical implications for practitioners as a result of the Third Circuit’s recent decisions involving mitigating evidence.\footnote{For a discussion of recent Third Circuit cases on presenting mitigating evidence, see supra notes 56–86 and accompanying text.} First, this section focuses on a defendant’s ability to waive the right to present mitigating evidence.\footnote{For a discussion of the effect of \textit{Blystone} on a defendant’s waiver of the right to present mitigating evidence, see infra notes 95–117 and accompanying text.} Second, this section examines the effect of a recalcitrant defendant on the defense counsel’s obligation to investigate and present potentially mitigating evidence.\footnote{For a discussion of the practical impact of the Third Circuit’s decision in \textit{Blystone} on defense counsel’s investigation and presentation of mitigating evidence, see infra notes 118–129 and accompanying text.}

\subsection*{A. Effect of \textit{Blystone} on Defendant’s Ability to Waive Right to Present Mitigating Evidence and Resulting Prejudice Under Strickland Analysis}

To limit the potentially perilous consequences of ambiguous waivers on defendants in capital cases, the Third Circuit demonstrated that it will limit \textit{Schriro}’s application to those specific facts.\footnote{See \textit{Blystone}, 664 F.3d at 426 (limiting applicability of \textit{Schriro} by highlighting language used in Supreme Court’s decision: “‘[i]n the constellation of refusals to have mitigating evidence presented . . . [\textit{Schriro}] is surely a bright star’”) (alterations in original) (citation omitted).} For example, in \textit{Thomas} the Pennsylvania Commonwealth argued that \textit{Schriro} was controlling under the facts, the defendant’s actions constituted a waiver of his right to present mitigating evidence, and therefore, the prejudice prong of the \textit{Strickland} test could not be established.\footnote{See \textit{Thomas v. Horn}, 570 F.3d 105, 126 (3d Cir. 2009) (explaining Commonwealth’s position that even if counsel’s investigation was unreasonable, no prejudice resulted because, like in \textit{Schriro} and \textit{Taylor}, defendant had completely relinquished his right to present mitigating evidence).} Rather than accept the Commonwealth’s invitation to extend \textit{Schriro} beyond its facts, the Third Circuit explained that unless a defendant’s actions clearly manifest a desire to
wae the right to present all mitigating evidence, no valid waiver exists that would bar a defendant from presenting such evidence during sentencing.\textsuperscript{97}

\textit{Blystone} further solidified this reasoning, holding that even when the record provides room for a reasonable interpretation that the defendant tried to issue a complete waiver of the right to present mitigating evidence, a plausible alternative explanation for the defendant’s actions may be sufficient to prevent the court from imputing a waiver to the defendant.\textsuperscript{98} For example, the Third Circuit may not impute a waiver if the defendant thought that the refusal to present mitigating evidence only extended to a specific type of evidence and not to all evidence.\textsuperscript{99} As a result, unless the defendant unequivocally relinquishes the right to present miti-

\textsuperscript{97} See id. at 128–29 (explaining that case does not resemble Schriro because defendant did not make “affirmative declaration against the presentation of all mitigating evidence”) (emphasis added).

\textsuperscript{98} See Blystone, 664 F.3d at 425–26 (citing Thomas while rejecting invitation to extend Schriro’s reasoning to facts that do not contain direct affirmation of waiver of right to present any and all mitigating evidence). In \textit{Thomas}, the Third Circuit articulated the view that even if a defendant’s particular action or decision may lend credence to the argument that the defendant intended to waive the right to present mitigating evidence, if there is a plausible alternative argument that does not involve the intent to waive the right to present mitigating evidence, the Court will protect the defendant by crediting the alternative argument. See \textit{Thomas}, 570 F.3d at 128–29 (explaining plausible, alternative explanations, other than intent to establish complete waiver of right to present mitigating evidence in regards to defendant’s refusal to put on specific type of mitigating evidence). Specifically, in \textit{Thomas} the defendant refused the Commonwealth’s offer to stipulate his age and that he graduated from high school. See id. at 112 (describing facts of case). When the Third Circuit was asked to decide whether the defendant had a claim for ineffective assistance of counsel, one of the Commonwealth’s arguments that the defendant was not prejudiced was that the defendant’s refusal to stipulate to these harmless facts indicated that he intended to fully waive his right to present mitigating evidence. See id. at 127 (explaining Commonwealth’s argument). The Third Circuit acknowledged that the defendant’s actions were consistent with the Commonwealth’s argument but ultimately rejected the argument because other plausible explanations existed for the defendant’s actions:

Nor does Thomas’ refusal to stipulate to his age and education tip the scales in the Commonwealth’s favor. We agree with the Commonwealth that Thomas’ age and education are relatively innocuous facts, and Thomas’ decision not to stipulate to them is odd. We cannot agree, however, that this proves that Thomas was not prejudiced. While Thomas’ refusal to stipulate is consistent with the Commonwealth’s position, it is equally consistent with other scenarios that the record supports. . . . Thomas’ failure to stipulate could be viewed as a symptom of this fundamental misunderstanding, and not as an affirmative declaration against the presentation of all mitigating evidence.

\textit{Id.} at 128–29.

\textsuperscript{99} See \textit{Thomas}, F.3d at 128–29 (providing example of situation when refusing presentation of some evidence does not mean defendant refused to present any evidence).
gating evidence, the Third Circuit goes to great lengths to protect the defen-
dant from facing an inadvertent waiver.100

To clarify this analysis, the Third Circuit has flagged particular facts as
insufficient to supply the basis for a waiver of presentation of mitigating
evidence.101 For example, in both Thomas and Blystone, the trial judges
engaged the defendants in a colloquy during the sentencing hearing to
ensure that the defendant’s wishes regarding the presentation of mitigat-
ing evidence were satisfied.102 In Thomas, during the judge’s colloquy with
the defendant, the court posed a compound question: “And you already
told [your counsel], I would like to repeat, but it’s your decision not to
take the stand at this penalty stage of the hearing or even to present any
evidence. Is that your independent and voluntary decision?”103 Although
the defendant responded in the affirmative, the court dismissed the Com-
monwealth’s argument that this exchange provided sufficient grounds to
support a complete waiver of the presentation of all mitigating evi-
dence.104 Instead, the court demonstrated that practitioners must focus
on the entire context in which the compound question was asked.105 Spec-
cifically, the inquiry should focus on whether it is plausible that the defen-

100. See Blystone, 664 F.3d at 426 (rejecting argument that because defendant
 chose not to testify or to allow two of his family members to testify that that neces-
sarily meant he would have rejected defense counsel’s attempts to present other
pieces of mitigating evidence); Thomas, 570 F.3d at 129 (explaining that defen-
dant’s rejection of option to testify and to have other witnesses testify did not mean
that defendant would have rejected other forms of mitigating evidence). The
Third Circuit’s approach was not evident following the ruling in Schriro, which left
commentators warning that Schriro left open the possibility that a defendant’s re-
jection of certain pieces of mitigating evidence could be wrongly treated as a com-
plete waiver to present all mitigating evidence. See Leading Cases, supra note 3, at
R255 (advocating against lower courts interpreting limited refusal to present some
mitigating evidence as complete refusal to use any type of mitigating evidence).
Additionally, the article advises against interpreting recalcitrant behavior as the
basis for concluding that the defendant intended to completely waive the right to
present mitigating evidence. See id. at 256 (advocating against courts equating re-
calcitrant behavior with intention to waive right to present all mitigating
 evidence).

101. For a discussion of the key facts that the Third Circuit has deemed insuf-
icient to constitute a complete waiver, see infra notes 102–10 and accompanying
text.

102. See Blystone, 664 F.3d at 403 (examining defendant’s colloquy with court
during sentencing hearing); Thomas, 570 F.3d at 128 (same).

103. Thomas, 570 F.3d at 128 (emphasis added) (reviewing transcript during
sentencing hearing).

104. See id. (“Thomas’ terse answer to this inquiry does not display an intent
to interfere with the presentation of mitigating evidence that is strong enough to
preclude a showing of prejudice.”).

105. See id. (determining that defendant’s colloquy was “focused narrowly on
whether he wanted to take the stand himself,” and that compound question did
not rise to level of waiver of right to present all mitigating evidence).
Dant intended only to waive the right to testify and not to waive the right to present all other mitigating evidence.106

In *Blystone*, the trial judge asked the defendant a similar compound question, “Do you wish to testify yourself or to have your parents testify or to offer any other evidence in this case?”107 Because the defendant responded in the negative to this broader question concerning any other evidence in this case, the Third Circuit could have reasonably interpreted the response as the defendant’s intent to completely waive his right to present mitigating evidence.108 However, the court carefully unpacked the questions and determined that at most, the defendant intended to waive his right to “all lay witness testimony,” but not his complete right to present any mitigating information.109 Together, the colloquies in *Thomas* and *Blystone* demonstrate that if there is any reasonable alternative explanation, the Third Circuit will err on the side of caution and find that the defendant did not intend to expand the waiver beyond the most limited reasonable interpretation.110

Further, the Third Circuit acknowledges the Supreme Court’s position that no “informed and knowing” requirement exists to waive the right to present mitigating evidence.111 However, the Third Circuit makes it clear that an informed and knowing decision is still relevant to the inquiry.112 Specifically, the court has referenced a defense counsel’s responsibility to keep the defendant informed about decisions regarding the presentation of mitigating evidence.113

106. *See id.* (demonstrating court’s broad view of circumstances surrounding defendant’s purported waiver to determine scope of relinquishment of rights to present evidence).
107. *See Blystone*, 664 F.3d at 403 (examining colloquy between defendant and trial court during sentencing phase of case).
108. *See id.* (describing colloquy and specifically highlighting defendant’s response to questions from trial judge regarding extent of defendant’s desire not to present certain type of mitigating evidence).
109. *See id.* at 426 (“We believe it not only incorrect, but also unreasonable, to infer from the colloquy that Blystone would have prevented counsel from presenting any mitigating evidence, regardless of the form that it took.”).
110. *See id.* (explaining that colloquy must be interpreted in its complete context and exchange not expanded to mean more than is necessarily inferred).
111. *See Thomas*, 570 F.3d at 129 n.9 (“As a result, we offer no opinion on whether a waiver of the right to present mitigating evidence must be 'informed and knowing.'”) (citation omitted).
112. *See Blystone*, 664 F.3d at 424 (explaining that *Schriro* and *Taylor* do not control in case at hand by highlighting that defendants in both cases made it obvious that they understood consequence of their decisions not to present mitigating evidence); *Taylor v. Horn*, 504 F.3d 416, 455–56 (3d Cir. 2007) (“We are also satisfied that Taylor’s decision not to present mitigating evidence was informed and knowing.”).
113. *See Blystone*, 664 F.3d at 422 n.21 (“After all, counsel also has a duty to provide advice upon which his client can make an informed decision not to present evidence in mitigation.”).
Finally, for a defendant to completely waive the right to present mitigating evidence, the Third Circuit requires an affirmative declaration indicating a complete waiver. As discussed above, if a defendant rejects the presentation of a particular piece of evidence, the court will not interpret that action to mean that the defendant has offered a complete waiver. The defendant’s statement in Taylor, “I want the maximum sentence,” illustrates an affirmative declaration sufficient to constitute a complete waiver. Practitioners should assume that nothing short of this type of affirmative declaration is sufficient to establish a waiver.

B. Effect of Possible Waiver on Counsel’s Investigatory Responsibility

In the Third Circuit, the duty to conduct an investigation for mitigating evidence exists independent of the duty to present mitigating evidence. By distinguishing between the investigation into mitigating evidence and the eventual presentation of the evidence, the Third Circuit addressed an issue left open by the Supreme Court in Schriro. Specifically, in Schriro the defendant said, “I think if you want to give me the death penalty, just bring it right on. I’m ready for it.” Schriro v. Landrigan, 550 U.S. 465, 470 (2007).


114. See id. at 424–26 (explaining that Schriro and Taylor were not controlling in Blystone in part because defendants in those cases made clear affirmative declarations that they did not want to present any mitigating evidence and that they were willing to face capital punishment). Specifically, in Schriro the defendant said, “I think if you want to give me the death penalty, just bring it right on. I’m ready for it.” Schriro v. Landrigan, 550 U.S. 465, 470 (2007).

115. See Blystone, 664 F.3d at 426 (explaining that it would not be reasonable to extend defendant’s limited waiver into complete waiver of right to present mitigating evidence); Thomas, 570 F.3d at 128 (“To us, the only thing that Thomas clearly disclaimed at his colloquy was a desire to testify on his own behalf.”).

116. See Blystone, 664 F.3d at 424 (explaining that defendant’s actions in Taylor were sufficient and clear enough to determine that defendant intended to completely waive his right to present mitigating evidence).

117. Compare Taylor, 504 F.3d at 435 (determining that affirmative declaration that defendant wanted maximum sentence was enough for court to impute waiver), with Blystone, 664 F.3d at 426 (indicating that defendant’s actions, specifically in regards to colloquy with judge, were not enough to constitute affirmative declaration of complete waiver of right to present mitigating evidence), and Thomas, 570 F.3d at 128–29 (explaining that defendant’s colloquy rejecting certain type of mitigating evidence was not enough to serve as “an affirmative declaration against the presentation of all mitigating evidence”).

118. See Blystone, 664 F.3d at 420 (explaining that duty to perform investigation exists independently from duty to present mitigating evidence at sentencing hearing). The Third Circuit further explained that the duty to perform an investigation is necessary to consider what could or should be presented. See id. (“In fact, the former is a necessary predicate to the latter: if counsel has failed to conduct a reasonable investigation to prepare for sentencing, then he cannot possibly be said to have made a reasonable decision as to what to present at sentencing.”).

119. See Nelan, supra note 4, at 34 (“The difference between the reasoning of the Court and the Ninth Circuit seemed to be that the Court treated the investigation and presentation of mitigating evidence as one right, whereas the Ninth Circuit saw them as two independent rights that could each give rise to a claim of ineffective assistance.”).
sult of this policy, requests by the defendant will not affect the defense counsel’s duty to investigate mitigating evidence.\textsuperscript{120} Although beyond the scope of this brief, it is helpful to note where practitioners may find the basic requirements for a reasonable investigation and presentation of mitigating evidence.\textsuperscript{121} The American Bar Association (ABA) produced a set of guidelines for capital cases that shape the contours of what constitutes a reasonable investigation for mitigating evidence.\textsuperscript{122} Notably, the Supreme Court has referred to the ABA Guidelines in multiple instances to illustrate the scope of a reasonable investigation.\textsuperscript{123} Further, some commentators argue that the Guidelines have all but “taken on the force of law.”\textsuperscript{124} Thus, the ABA Guidelines provide a comprehensive, practical guide to conducting a reasonable investigation for mitigating evidence, and as such, they should be the first reference point for defense teams in capital cases.\textsuperscript{125}

\textsuperscript{120.} See MacLean, supra note 55, at 666 (“The duty to investigate exists regardless of the expressed desires of a client.”).
\textsuperscript{121.} For an overview of general guidelines supplied by the American Bar Association regarding proper mitigating evidence investigation, see infra notes 122–25 and the accompanying text.
\textsuperscript{122.} See Hughes, supra note 1, at 616 (“The [ABA] Guidelines and Supplementary [ABA] Guidelines have had a tremendous impact on developing norms for the profession of mitigation specialists in the short time since their publication.”).
\textsuperscript{123.} See Cheng, supra note 38, at 49 (“Text from both the [ABA] rules and the commentary has been cited in US Supreme Court opinions.”).
\textsuperscript{124.} See id. at 49–50 (examining Supreme Court’s adoption and approval of certain sections of ABA guidelines especially in Wiggins v. Smith, Florida v. Nixon, and Rompilla v. Beard). Perhaps the clearest example of the Supreme Court’s affirmation of the importance of abiding by the ABA guidelines came in Wiggins. See Wiggins v. Smith, 539 U.S. 510, 524 (2003) (“[W]e long have referred [to the ABA Standards] as ‘guides to determining what is reasonable.’”) (citation omitted); see also John H. Blume & Stacey D. Neumann, “It’s Like Deja Vu All over Again”: Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel, 34 AM. J. CRIM. L. 127, 147 (2007) (“The jurisprudential shift is now evident and established. Lower courts must consider the ABA Guidelines and other national standards to determine the reasonableness of counsel’s behavior in light of prevailing professional norms as part of the ineffective assistance of counsel analysis.”).
\textsuperscript{125.} See Cheng, supra note 38, at 50 (“Leading defense advocates insist that the Constitution’s guarantee of competent counsel requires adherence to the minimum requirements established in the standards.”). As a result of the ABA Guidelines’ rise in significance, the importance of capital mitigation specialists has increased dramatically over the past decade. See Emily Hughes, Mitigating Death, 18 CORNELL J.L. & PUB. POL’Y 337, 339 (2009) (“In the past eight years, the United States Supreme Court has been vocal about the importance of capital mitigation specialists in death penalty defense.”). In fact, the ABA Guidelines require that a defense team retain mitigation specialists. See Maher, supra note 3, at 770 (“[The ABA Guidelines] made clear the absolute requirement that capital defenders retain the assistance of a mitigation specialist as an essential member of any defense team.”). Mitigation specialists are experts at investigating mitigating evidence. See Cooley, supra note 2, at 59 (“In general, mitigation specialists are those ‘qualified by knowledge, skill, experience, or training as a mental health or sociology professional to investigate, evaluate, and present psychosocial and other mitigating evi-
Additionally, practitioners must take care to distinguish between a defendant’s refusal to present all mitigating evidence versus refusal to present certain types of mitigating evidence. This distinction is critical because unlike a blanket refusal to present mitigating evidence, a partial refusal of certain types will not eliminate the possibility of an ineffective assistance of counsel claim. Based on the language and decision in Schriro, the Third Circuit’s interpretation in favor of protecting the right to present mitigating evidence in the face of a defendant’s seemingly contrary actions was not a clear or easy approach for an appellate court to adopt. In effect, the conclusions produced by Thomas and Blystone serve as reminders for practitioners that the duty to conduct a thorough investigation of mitigating evidence persists irrespective of a defendant’s wishes or actions with respect to the presentation of the evidence.

The ABA Guidelines require that a mitigation specialist be appointed to the defense team to help in the massive task of uncovering information from every facet of the defendant’s life, including potentially critical factors spanning the range of poverty and childhood abuse. See Hughes, supra note 1, at 591–601 (explaining requirement of mitigation specialist on defense team and type and scope of investigation in which mitigation specialists are expected to engage). Importantly, the ABA Guidelines note that the ultimate responsibility of any presentation of mitigating evidence rests on the defense counsel and not on the mitigation specialist. See Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 Hofstra L. Rev. 677, 688 (2008) (“Counsel decides how mitigation will be presented.”).

126. See Blystone v. Horn, 664 F.3d 397, 426 (3d Cir. 2011). The fact that Blystone chose to forego the presentation of his own testimony and that of the two family members, which counsel was prepared to put on the stand, simply does not permit the inference that, had counsel competently investigated and developed expert mental health evidence and institutional records, Blystone would have also declined their presentation.

Id.; see also Thomas v. Horn, 570 F.3d 105, 128–29 (3d Cir. 2009) (explaining that defendant’s refusal to present some evidence does not justify Commonwealth’s argument that defendant would have refused to present all mitigating evidence).

127. See Thomas, 570 F.3d at 128–29 (explaining that defendant’s refusal to present some evidence does not negate the right to present other evidence); see also Blystone, 664 F.3d at 426 (parroting argument expressed by court in Thomas).

128. See Leading Cases, supra note 3, at 264. The article explains that because of likely appellate court interpretations of Schriro, which the Third Circuit rejected, defendants face powerful pressures to allow their counsel to present all possible mitigating evidence—including evidence they do not want presented in a public court such as sexual abuse by family members—lest they be deemed to have excused their counsel from any obligation to discover other potentially mitigating evidence.

Id.

129. See Blystone, 664 F.3d at 420 (“As such, “our principal concern in deciding whether [counsel] exercised “reasonable professional judgment” is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel’s decision not to introduce mitigating evidence of [the defendant’s] background was itself reasonable.”) (alterations in original) (citation omitted).
V. THE THIRD CIRCUIT’S APPROACH APPROPRIATELY PROTECTS CAPITAL DEFENDANTS’ RIGHTS

Not all circuits follow the Third Circuit in employing a significantly limited approach to the application of the Supreme Court’s decision in Schriro.130 Considering that a life hangs in the balance during the penalty phase of a capital case and that it has been shown that poor representation correlates with the imposition of the death penalty, the Third Circuit’s approach appropriately takes significant precautions to ensure that the defendant’s right to present mitigating evidence is vigorously protected.131 Still, the Third Circuit has the opportunity to expand these protections even further.132

A. The Third Circuit Takes Step to Affirmatively Protect a Defendant’s Right to Present Mitigating Evidence

By employing a strong presumption against waiver, the Third Circuit properly protects defendants who may be inhibiting a defense counsel’s ability to investigate or present mitigating evidence because of the defendant’s particularly vulnerable position.133 Often defendants in capital cases suffer from mental illnesses that may affect their capability to advise

130. See Ho, supra note 1, at 751 (“Indeed, several lower courts have already cited [Schriro] for the proposition that, where a defendant interferes with counsel’s presentation of mitigating evidence in some way, that defendant has waived any subsequent claim to ineffective assistance based on deficient performance at sentencing.”); see also Newland v. Hall, 527 F.3d 1162, 1205, 1214 n.80 (11th Cir. 2008) (determining that client’s instruction to defense counsel not to reach out to family members as part of investigation for mitigating evidence was enough to bring case within scope of Schriro). In evaluating the client’s cooperation in the process of compiling mitigating evidence and whether the client’s actions eliminated an ineffective representation claim by nullifying the Strickland prejudice prong, the Eleventh Circuit focused on whether the client’s actions were passive or active, not on whether the client clearly rejected, or would have rejected, any and all mitigating evidence at sentencing. See id. at 1205 (“While petitioner’s conduct in this case is not as extreme as the defendant’s conduct in Schriro, we follow the Court in drawing a distinction between a defendant’s passive non-cooperation and his active instruction to counsel not to engage in certain conduct.”).

131. See Hughes, supra note 1, at 585 (explaining that based on study of thirty capital defense attorneys conducted by Welsh S. White, “the worse the attorney’s skills, the more certain a defendant will be sentenced to death”); see also Ho, supra note 1, at 751 (explaining that certain interpretation of Schriro “presents an intolerable risk that defendants will be sentenced to death based on an incomplete record”); Leading Cases, supra note 3, at 263 (“It is unreasonable for a court to allow a defendant to waive the right to present mitigating evidence unless the waiver expressly and unambiguously extends to all potential mitigating evidence.”).

132. For a discussion of the Third Circuit’s possible expansion of the protections afforded to defendants with respect to waiving their right to present mitigating evidence, see infra notes 138–44 and accompanying text.

133. See MacLean, supra note 55, at 670 (“Experienced capital defense attorneys commonly encounter clients who, at one point or another, object to the investigation or presentation of mitigation evidence.”).
their attorneys in a prudent manner. In other cases, a defendant’s judgment may be impaired from the debilitating effects of other underlying issues such as poverty and sexual abuse. It is worth now reiterating the importance of mitigating evidence because if no mitigating evidence is presented, administration of the death penalty is all but a foregone conclusion. Although the Third Circuit has properly implemented an approach in favor of protecting defendants’ rights, the court could take this protection even further while still remaining within the bounds of Supreme Court precedent.

B. The Third Circuit Should Take the Next Step to Protect a Defendant’s Right to Present Mitigating Evidence

At least one commentator disagrees with the majority’s ruling in Schriro because it failed to adhere to the well-established convention that a waiver of many constitutionally protected rights must be “knowing and voluntary.” The Third Circuit uses the knowing and voluntary standard as a factor in evaluating whether recalcitrant defendants have waived their right to present mitigating evidence; however, the court of appeals has refrained from establishing an official position on whether the knowing and voluntary standard is required for a valid waiver. Although the Supreme Court ruling in Schriro noted that the knowing and voluntary standard has never been used in the context of waiving the right to present mitigating evidence, the decision did not foreclose lower courts from

134. See Nelan, supra note 4, at 28 (“[T]he evidence seems relatively clear that the thinking of many death row volunteers and in particular defendants who are waiving their right to present mitigating evidence at a capital sentencing hearing is influenced by a mental disorder and these individuals may be incompetent to make such a decision.”); Leading Cases, supra note 3, at 256–62 (highlighting that defendants facing death penalty may exhibit abnormal behavior attributable to mental health condition).

135. See Leading Cases, supra note 3, at 261 (explaining that large percentage of defendants are poor and many have suffered from physical and sexual abuse).

136. See Nelan, supra note 4, at 24 (explaining that defendants who choose not to present mitigating evidence will, in all likelihood, face death sentence).

137. For a discussion of how the Third Circuit can take their current line of reasoning to the next logical level, see infra notes 138–44 and accompanying text.

138. See Schriro v. Landrigan, 550 U.S. 465, 484 (2007) (Stevens, J., dissenting) (“It is well established that a citizen’s waiver of a constitutional right must be knowing, intelligent, and voluntary.”); Ho, supra note 1, at 792 (explaining that Supreme Court has consistently ruled that defendant’s waiver of certain constitutionally protected trial rights such as right to a jury trial is invalid unless decision was made knowingly and voluntarily).

139. See Thomas v. Horn, 570 F.3d 105, 129 n.9 (3d Cir. 2009) (acknowledging Supreme Court has not affirmatively declared whether waiver of mitigating evidence must be knowing and voluntary and, “as a result, we offer no opinion on whether a waiver of the right to present mitigating evidence must be ‘informed and knowing’”).
adopting the standard as a prerequisite to a valid waiver.\footnote{It is well-settled that when waiving other constitutional rights, defendants are afforded the protection of the knowing and voluntary standard.\footnote{See Schriro, 550 U.S. at 484 (Stevens, J., dissenting) (noting that “knowing, intelligent, and voluntary” standard are staples in Supreme Court’s waiver jurisprudence). “As far back as Johnson v. Zerbst, we held that courts must ‘indulge every reasonable presumption against waiver’ of fundamental constitutional rights.” Id.; see also Ho, supra note 1, at 732–33 (listing examples of constitutional rights that defendants may waive but emphasizing that this type of “waiver is permitted only if it is knowing, intelligent, and voluntary”).}}

Since the decision in Schriro, lower courts have been hesitant to embrace the knowing and voluntary standard as a requirement to waive the right to present mitigating evidence. However, given the Supreme Court’s jurisprudence requiring the knowing and voluntary standard to waive other constitutional rights, and considering Schriro’s open-ended language permitting such an interpretation, the Third Circuit should use its discretionary power to establish the knowing and voluntary standard as a mandatory requirement for a defendant to waive the right to present mitigating evidence.\footnote{See id. at 760–62 (arguing that Supreme Court should affirmatively adopt “knowing and voluntary” standard for waivers of right to present mitigating evidence, but until Supreme Court issues this ruling, lower courts should take it upon themselves to adopt such standard).}

Finally, it should be noted that the “knowing, intelligent, and voluntary” standard would not be unfamiliar in the Third Circuit because prior to Schriro, courts within the Third Circuit employed this very standard in this context.\footnote{See, e.g., Commonwealth v. Davido, 868 A.2d 431, 443 (Pa. 2005) (“Rather, in Pennsylvania, a capital defendant may waive the right to present mitigating evidence, so long as the waiver was knowing, intelligent, and voluntary.”); Commonwealth v. Randolph, 873 A.2d 1277, 1282 (Pa. 2005) (“[A] capital defendant may waive the right to present mitigating evidence, so long as the waiver was knowing, intelligent, and voluntary.”) (citation omitted).}

VI. Conclusion

In sum, the Third Circuit correctly rejected the Supreme Court’s invitation to significantly expand the scope of a defendant’s waiver of the right to present mitigating evidence.\footnote{The Third Circuit’s decision to limit Schriro’s application fits within the Supreme Court guidance because Schriro left the requirements of}
mary concerns in the 1970s when deciding the constitutionality of the
death penalty statutes was whether the death penalty would be adminis-
tered in an arbitrary manner.\footnote{146} Because of the many variables affecting a
defendant during the sentencing phase (e.g., mental illness, prior abuse,
and poverty), the Third Circuit recognized that expanding a defendant’s
limited rejection to presenting certain evidence into a complete waiver
would add to the arbitrariness that commentators argue already plagues
the system.\footnote{147}

lower courts open-ended, allowing discretion in deciding when a defendant com-
pletely waives a right to present mitigating evidence.  \emph{See id.} at 262–63 (explaining
that court left open issue of whether waiver needs to be knowing and informed:
“The majority thus sidestepped the well-established principle that courts are sup-
posed to ‘indulge every reasonable presumption against waiver’ of fundamental
constitutional rights.”) \footnote{146. See \textit{Furman} v. \textit{Georgia}, 408 U.S. 238, 274 (1972) (“[T]he State must not
arbitrarily inflict a severe punishment.”). Prior to \textit{Gregg}, the Supreme Court invali-
dated death penalty statutes for a failure to control unbridled discretion that al-
lowed for arbitrary uses of capital punishment, as the arbitrary nature of the
penalty ran afoul of the Eighth Amendment’s prohibition of cruel and unusual
punishment. \textit{See id.} at 241–44 (explaining that historical underpinnings of Eighth
Amendment such as English Bill of Rights of 1689 were focused on disallowing
“arbitrary and discriminatory penalties of a severe nature”).}

\footnote{147. \textit{See} Leading Cases, \textit{supra} note 3, at 261–62.}

Defendants in capital cases commonly suffer from a variety of mental vul-
nerabilities.  Many defendants are poor and a large percentage are vic-
tims of physical and sexual abuse.  Capital defendants who opt to forego
appeals or not to present mitigating evidence are especially likely to suf-
fer from severe mental illness.  These death penalty “volunteers” often
change their minds about their course of action.  As a consequence,
courts must be extremely careful to consider the context of a defendant’s
recalcitrant or obstructive behavior or apparent willingness to be put to
death before deciding that it constitutes an informed and competent de-
cision to waive the right to present mitigating evidence.

\emph{Id.}
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