INTRODUCTION

The fundamental rights to own and protect property are staples of the American dream. However, as countless industrial facilities continue to develop, air pollution increasingly infringes on citizens’ rights to enjoy their private properties. In response to increased litigation arising from...
such pollution, energy companies have increasingly argued that federal environmental laws preempt related state laws.4

In the context of air pollution suits, polluters argue their compliance with comprehensive federal regulations under the Clean Air Act (CAA) shields them from liability under state law.5 This preemption defense is problematic in light of the limited right of recovery afforded to property owners under the CAA.6 Under the CAA, property owners are unable to seek damages if air pollution adversely impacts their property.7 The preservation of state common law claims is thus necessary to arm landowners with a means to protect their property interests.8 Accordingly, an analysis of whether the CAA preempts state common law is significant because state common law is the primary means by which plaintiffs may seek redress from polluters.9


5. See, e.g., Bell v. Cheswick Generating Station, 734 F.3d 188, 189 (3d Cir. 2013) (stating defendant’s contention that “because the Plant was subject to comprehensive regulation under the [CAA], it owed no extra duty to the [plaintiffs] under state tort law”).

6. See 42 U.S.C. § 7604(a), (e) (2012) (providing right to citizen suit enforcement but no right to compensatory damages except through common law); see also J J England, Saving Preemption in the Clean Air Act: Climate Change, State Common Law, and Plaintiffs Without a Remedy, 43 ENVTL. L. 701, 703 (2013) (noting that CAA “provides no means for an aggrieved party to seek compensatory damages from a polluter under any circumstances except through its savings clause”). Furthermore, England characterizes this CAA shortcoming as “a significant hole currently left unaddressed by Congress.” Id. (attributing CAA’s lack of remedial measure to Congressional silence).


8. See Roth, supra note 7, at 401–03 (discussing importance of preserving common law claims to ensure plaintiffs are afforded mode of redress).

9. See id. at 401, 420–22 (explaining that common law has traditionally been used to protect property owners and illustrating inadequacy of alternative remedies); see also England, supra note 6, at 703–04 (describing common law and its ability to provide relief: “it is foundational that courts have the ability to prevent harm from occurring through exercise of equitable powers and further ability to provide relief to aggrieved parties through their powers at law.”); Scott Gallisdorfer, Clean Air Act Preemption of State Common Law: Greenhouse Gas Nuisance Claims After AEP v. Connecticut, 99 VA. L. REV. 131, 163–65 (2013) (stating one argument in favor of preserving common law nuisance actions: such remedies act as “flexible
This Casebrief asserts that the Third Circuit, in a case of first impression, correctly preserved common law remedies to protect private property interests by holding that the CAA does not preempt state common law. Part II of this Casebrief provides an overview of the CAA and its structure, including the model of cooperative federalism it employs and the two savings clauses it features. Part III explains and evaluates the Third Circuit’s decision in *Bell v. Cheswick Generating Station* and discusses other related circuit cases in light of Supreme Court precedent. Part IV analyzes the implications of the Cheswick holding for Third Circuit practitioners. Finally, Part V argues that the Third Circuit’s preemption ruling properly preserves landowners’ rights to recover damages caused by air pollution.

### II. Background

This section provides a general overview of the CAA and the preemption issues associated with its implementation. First, this section discusses the mechanics of the CAA. Second, it explains the preemption doctrine and the inconsistent applications various circuit courts have adopted. Finally, this section examines the preemption jurisprudence arising in the context of the CAA.

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10. For a further discussion of the Third Circuit’s adoption of the proper approach to preemption in a CAA case, see infra notes 95–106, 151–54 and accompanying text.

11. For a further discussion of the CAA and the preemption doctrine, see infra notes 16–84 and accompanying text.

12. 734 F.3d 188 (3d Cir. 2013).

13. For a further discussion of the Third Circuit’s analysis and holding in *Cheswick*, see infra notes 85–138 and accompanying text.

14. For a further discussion of the practical ramifications for practitioners, including an explanation of the ramifications of the Third Circuit’s holding, see infra notes 139–57 and accompanying text.

15. For the argument that the Third Circuit applies a proper approach to protect property owners’ rights to seek redress from air pollution, see infra notes 158–61 and accompanying text.

16. For a general overview of the CAA and associated issues, see infra notes 17–84 and accompanying text.

17. For a brief overview of the CAA’s structure, see infra notes 20–43 and accompanying text.

18. For an overview of the preemption doctrine generally and its inconsistent application, see infra notes 44–67 and accompanying text.

19. For an overview of preemption jurisprudence in the context of the CAA, see infra notes 68–84 and accompanying text.
A. Pollution Solution: The Clean Air Act

Air pollution recognizes neither geographical nor political boundaries; thus, a joint effort by state and federal governments is necessary to regulate its adverse effects.20 Although the CAA is a federal law, its cooperative federalism structure and savings clauses safeguard states’ rights.21 Moreover, these distinct structural mechanisms reflect Congress’s intent to preserve state law remedies.

1. Two Halves of a Whole: The CAA’s Cooperative Federalism Structure

The twentieth century was marked by the rise of industry and urbanization of American cities.22 Industrialization generated unprecedented levels of air pollution and eventually spurred congressional action to protect public health.23 By 1963, Congress enacted the CAA, a comprehensive federal law that regulates air emissions and delegates its implementation to the Environmental Protection Agency (EPA).24 The CAA’s goal is “to protect . . . air resources . . . to promote the public health and welfare . . . .”25

20. For a further discussion of the CAA’s cooperative federalism structure, see infra notes 21–32 and accompanying text.

21. For a further discussion of the CAA’s savings clauses, see infra notes 33–43 and accompanying text.

22. See Caroline Wick, Note, Bell v. Cheswick Generating Station: Preserving the Cooperative Federalism Structure of the Clean Air Act, 27 TUL. ENVTL. L.J. 107, 109 (2013) (explaining that scientists, public, and government officials began to worry about air pollution in 1950s and 1960s); see also FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW, ch. 2, § 2.03 (Matthew Bender) (explaining increasing air pollution following World War II); England, supra note 6, at 703 (describing air pollution and climate change as causes for concern and using native village of Kivalina for illustration).

23. See 42 U.S.C. § 7401(a)(2) (2012) (explaining Congress’s finding “that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development . . . has resulted in mounting dangers to the public health and welfare, including . . . the deterioration of property, and hazards to air and ground transportation”); see also Cary Coglianese, Social Movements, Law, and Society: The Institutionalization of the Environmental Movement, 150 U. PA. L. REV. 85, 90 (2001) (recounting history of environmental movement).


25. 42 U.S.C. § 7401(b)(1) (declaring purposes of CAA). The stated purposes of the CAA include:

(1) to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population;
Under the CAA, state and local governments are responsible for pollution prevention and control, but the Act recognizes federal financial assistance and leadership as essential components to accomplishing these objectives. Through this cooperative federalism structure, the federal government develops baseline standards for states to individually implement and enforce. The EPA, on the other hand, is tasked with creating National Ambient Air Quality Standards (NAAQS) to create a uniform level of air quality across the county. After establishing such standards, the EPA delegates responsibility and authority for achieving NAAQS “attainment” to the states.

Specifically, states are required to create and submit to the EPA a State Implementation Plan (SIP), which details a plan for attainment, maintenance, and enforcement of NAAQS within the state. As such,

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;
(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and
(4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

Id. § 7401(b) (listing CAA’s objectives).

26. See id. § 7401(a)(3)–(4) (recognizing federal financial support as “essential” to success of CAA).

27. See id. § 7410 (describing CAA’s implementation system); see also Bell v. Cheswick Generating Station, 734 F.3d 188, 190 (3d Cir. 2013) (discussing CAA’s “cooperative federalism” structure); Michigan v. EPA, 268 F.3d 1075, 1083 (D.C. Cir. 2001) (describing CAA as “experiment in cooperative federalism”); England, supra note 6, at 713–14 (explaining that “[b]ecause pollutants do not respect political boundaries,” CAA “contains several additional authorities that allow for cooperative interstate, regional, and international regulatory programs”).

28. See 42 U.S.C. § 7409(b)(1) (describing purpose of NAAQS). The CAA splits the country into various “air quality control regions” to facilitate compliance with the NAAQS. See id. § 7407(b) (describing air control regions). An air quality control region is considered to be in “attainment” if it satisfies the NAAQS for a given pollutant. See id. § 7409(b) (explaining when region satisfies NAAQS); see also Am. Lung Ass’n v. EPA, 134 F.3d 388, 389 (D.C. Cir. 1998) (“NAAQS must protect not only average healthy individuals, but also ‘sensitive citizens’—children, . . . people with asthma, emphysema, or other conditions rendering them particularly vulnerable to air pollution.” (quoting S. Rpt. No. 91-1196, at 10 (1970))); England, supra note 6, at 707 (“[T]he EPA Administrator [must] add pollutants to this list and promulgate [NAAQS] upon a finding that such pollutants ‘endanger [the] public health or welfare.’” (third alteration in original) (quoting 42 U.S.C. § 7408(a))).

29. See 42 U.S.C. § 7409 (explaining that air quality control region is considered to be in “attainment” if it satisfies the NAAQS for a given pollutant); see also id. § 7410 (detailing states’ responsibilities); John P. Dwyer, The Practice of Federalism Under the Clean Air Act, 54 Mo. L. Rev. 1183, 1193 (1995) (discussing authority delegated to states).

30. See 42 U.S.C. § 7410(a)(1) (explaining that decisions regarding how to meet NAAQS are left to individual states). All SIPs must be submitted to the EPA for approval, and once a SIP is approved, “its requirements become federal law and are fully enforceable in federal court.” Her Majesty The Queen in Right of the Province of Ont. v. City of Detroit, 874 F.2d 332, 335 (6th Cir. 1989) (citing 42
states are given the freedom to set standards more stringent than those specified by federal requirements. To enforce their standards, states require sources—facilities that emit pollution—to obtain a state-issued permit that limits the types and amounts of emissions that each permit holder is allowed to discharge.

2. *The Savings Clauses*

The CAA features two savings clauses that preserve the rights of citizens to bring civil actions and states to set their own emissions standards. First, the “citizen suit” provision permits the filing of civil suits “against any person . . . who is alleged to have violated . . . or to be in violation of . . . an emission standard or limitation” or “an order issued by the Administrator or a State with respect to such a standard or limitation . . . .” In short, this savings clause enables property owners to bring suit if their property is adversely affected by air pollution.

While the citizen suit provision authorizes private enforcement of the CAA, its remedies are limited to injunctive relief and recovery of litigation costs and attorney’s fees. Notably, the citizen suit provision does not
provide for recovery of damages.\textsuperscript{37} In fact, there is no provision within the CAA that allows an individual to seek compensation for actual harm caused by air pollution.\textsuperscript{38} Unfortunately, property owners who suffer extensive damage from air pollution find little relief by recovering litigation costs and attorney’s fees.\textsuperscript{39}

The other savings clause, entitled “Retention of State authority” (states’ rights savings clause), focuses on the rights of states.\textsuperscript{40} The provision specifies that “nothing in this chapter shall preclude or deny the right of any State . . . to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution . . . .”\textsuperscript{41} As a result, this savings clause preserves a state’s right to impose its own standards and illustrates the CAA’s cooperative federalism structure.\textsuperscript{42} In light of this provision, it is clear that Congress intended the CAA to impose minimum standards for emissions—a “regulatory floor, not a ceiling” on state emissions standards.\textsuperscript{43}

B. Preemption: A Constitutional Doctrine Obscured by Hazy Application

1. Preemption Generally

Preemption, a doctrine based on the Supremacy Clause of the Constitution, holds that certain matters are of such national character that federal laws governing those matters take precedence over conflicting state laws.\textsuperscript{44} Thus, if a state passes a law that is inconsistent with federal law, the doctrine of preemption is triggered: federal law trumps and invalidates the conflicting state law.\textsuperscript{45} Congressional intent, however, is the threshold inquiry for every preemption issue.\textsuperscript{46} Preemption analyses begin with the

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\item \textsuperscript{37} See id. \S 7604. For a brief overview of the CAA’s silence on damages, see infra notes 38–39 and accompanying text.
\item \textsuperscript{38} See 42 U.S.C. \S 7604(e) (lacking provision to allow for recovery of damages).
\item \textsuperscript{39} See Roth, supra note 7, at 420 (explaining denial of common law nuisance claims “will also leave individual landowners without adequate remedies for harm caused by the polluter”).
\item \textsuperscript{40} See 42 U.S.C. \S 7416 (preserving state authority).
\item \textsuperscript{41} Id. (preserving states’ authority to set emissions standards).
\item \textsuperscript{42} See England, supra note 6, at 715 (stating legislative history of savings clause illustrates “it was intended to preserve traditional common law claims for pollution damages”).
\item \textsuperscript{43} See Bell v. Cheswick Generating Station, 734 F.3d 188, 198 (3d Cir. 2013) (concluding that federal regulations set minimum standards and states are free to impose stricter standards).
\item \textsuperscript{44} See U.S. CONST. art. VI, \S 1, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . .”).
\item \textsuperscript{45} See generally Alan Untereiner, The Defense of Preemption: A View from the Trenches, 84 Tul. L. Rev. 1257, 1258–61 (2010) (providing overview of preemption doctrine); see also England, supra note 6, at 724 (illustrating supremacy clauses and explaining in detail two types of preemption: express and implied).
\item \textsuperscript{46} See Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (asserting Congressional purpose is “‘ultimate touchstone’ in every pre-emption case” (quoting Retail
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assumption that the states’ historic police powers are not to be preempted by federal law absent a “clear and manifest” congressional intent.47

While the preemption doctrine appears straightforward, it has been described as “notoriously fuzzy” in its application.48 Indeed, “if there is any fixed principle in preemption doctrine, it is that courts will only grudgingly read preemptive intent into a federal statute.”49 Accordingly, Supreme Court tests for determining if state law is preempted are inconsistent and “open-ended” and therefore susceptible to varied interpretations by district court judges.50

In 1987, the Supreme Court addressed whether the Clean Water Act (CWA) preempted state law in International Paper Co. v. Ouellette.51 In Ouellette, a Vermont resident sued the owner of a paper mill located across Lake Champlain in New York, alleging that the plant’s discharges were a nuisance.52 The plaintiff brought a state common law claim under the laws of Vermont, the affected state, despite the fact that the polluting plant was in New York.53 The Court explained that “[a]lthough Congress intended to dominate the field of pollution regulation, the [CWA’s] saving clause negates the inference that Congress ‘left no room’ for state causes of action.”54 Underscoring the importance of the savings clause, the Court reasoned, “nothing in the [CWA] bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the source State.”55 The Ouellette Court definitively held that the CWA did not preempt a state common law nuisance suit, positioning its decision on the existence of the


47. See Gallisdorfer, supra note 9, at 140–41 (“[T]he presumption against congressional intent to preempt state law has ‘particular force when Congress has legislated in a field traditionally occupied by the States.’ . . . [A] court will read a statute that is ambiguous as to preemptive intent not to invoke preemption, particularly where any preemptive effect would disrupt the traditional balance between state and federal power.” (footnote omitted) (quoting Altria Grp. v. Good, 555 U.S. 70, 77 (2008))).

48. See England, supra note 6, at 723 (describing preemption doctrine).

49. Gallisdorfer, supra note 9, at 140 (describing standard of review for preemption).

50. See England, supra note 6, at 729 (“[T]he foundation of the Court’s preemption jurisprudence is on uncertain footing.”). England attributes the uncertainty of preemption jurisprudence to the Court’s case-by-case analysis. See id. at 730–33 (providing in-depth discussion of Supreme Court’s uncertain stance on preemption).


52. See id. at 484 (stating facts); see also Restatement (Second) of Torts § 822 (1979) (listing elements of nuisance claim).

53. See Ouellette, 479 U.S. at 483 (stating plaintiff’s claim).

54. Id. at 492.

55. Id. at 497 (concluding that CWA does not prevent plaintiffs from bringing action under source state’s law).
CWA’s two savings clauses that preserve a citizen’s right to bring claims under common law or any other statute.56 Since 2000, the Supreme Court’s stance on preemption issues has been inconsistent.57 For example, in *Williamson v. Mazda Motor of America, Inc.*,58 the Court held that the Federal Motor Vehicle Safety Standard, which limits auto manufacturers’ choice of seatbelts to two options, does not preempt state tort suits.59 On the other hand, in *PLIVA, Inc. v. Mensing*,60 the Court held that federal statutes and regulations promulgated under the Food and Drug Act do preempt state laws imposing the duty to change a drug’s label upon generic drug manufacturers.61 In *Bruesewitz v. Wyeth LLC*,62 the Court held that the National Childhood Vaccine Injury Act preempts all state-law design-defect claims against vaccine manufacturers brought by plaintiffs seeking compensation for injury or death caused by a vaccine’s side effects.63 The Court, in *AT&T Mobility LLC v. Concepcion*,64 issued a holding that the Federal Arbitration Act preempts a California Supreme Court decision because it impeded “the accomplishment and execution of the full purposes and objectives of Congress.”65 Finally, in *Chamber of Commerce of the United States v. Whiting*,66 the Supreme Court established that that the Federal Immigration Reform and Control Act of 1986 (IRCA) does not preempt Arizona’s unauthorized alien employment law because it “fits within the confines of IRCA’s savings clause and does not conflict with federal immigration law . . . .”67

2. Preemption and the CAA

Co., the Court held that federal common law is fully displaced by the CAA.\textsuperscript{69} The Court expressly reserved the question of whether the CAA similarly preempts state common law claims.\textsuperscript{70} Yet, despite having issued six preemption opinions, the Court’s stance on preemption remains uncertain.\textsuperscript{71}

Inconsistent treatment of CAA preemption has not been limited to the Supreme Court.\textsuperscript{72} Not surprisingly, courts have struggled to rule consistently on preemption cases.\textsuperscript{73} In 1989, the Sixth Circuit held that the CAA did not preempt plaintiffs from suing the City of Detroit under the Michigan Environmental Protection Act (MEPA).\textsuperscript{74} In \textit{Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit}, the plaintiffs initiated a suit against the City of Detroit under the MEPA over the proposed construction of a city-owned incinerator.\textsuperscript{75} In holding that the CAA did not preempt the state law, the court emphasized that the CAA’s savings clause, like those of the CWA, expressly preserves an ongoing role for the states in regulating air pollution.\textsuperscript{77}

More recently, in 2010, the Fourth Circuit held in \textit{North Carolina ex rel. Cooper v. Tennessee Valley Authority}\textsuperscript{78} that the CAA preempts state-law tort claims.\textsuperscript{79} The state of North Carolina brought a state-law public nuisance suit against the Tennessee Valley Authority (TVA), a federal agency that owned and operated coal-fired power plants in Tennessee, Alabama, and Kentucky.\textsuperscript{80} The district court issued an injunction against four TVA plants, which imposed emissions standards that were stricter than those required by the CAA.\textsuperscript{81}

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  \item[69.] \textit{Id.} at 2531 (holding that CAA preempts federal common law).
  \item[70.] \textit{See id.} at 2540; \textit{see also England, supra note 6, at 723} (stating that district courts faced with CAA preemption issues have arrived at different results, “spanning the entire range from full preemption to non-preemption”).
  \item[71.] \textit{See England, supra note 6, at 729–30} (describing lack of Supreme Court consistency in its 2011 preemption opinions).
  \item[72.] \textit{Compare} Bell v. Cheswick Generating Station, 734 F.3d 188, 190 (3d Cir. 2013) (holding CAA does not preempt state law), \textit{and Her Majesty the Queen in Right of the Province of Ont. v. City of Detroit, 874 F.2d 332, 334} (6th Cir. 1989) (holding CAA did not preempt state law), \textit{with North Carolina ex rel. Cooper v. Tenn. Valley Auth., 615 F.3d 291, 296} (4th Cir. 2010) (holding CAA preempts state law).
  \item[73.] For cases illustrating inconsistent circuit court preemption opinions, see \textit{infra} notes 120–30 and accompanying text.
  \item[74.] \textit{See Her Majesty the Queen, 874 F.2d at 342} (finding that CAA “displaces state law only to the extent that state law is not as strict as emission limitations established in the federal statute”).
  \item[75.] 874 F.2d 332 (6th Cir. 1989).
  \item[76.] \textit{See id.} at 333–34 (providing facts of case).
  \item[77.] \textit{See id.} at 342–43 (noting that plain language of CAA’s savings clause “clearly indicates that Congress did not wish to abolish state control”).
  \item[78.] 615 F.3d 291 (4th Cir. 2010).
  \item[79.] \textit{See id.} at 311–12 (holding CAA preempts state tort claims).
  \item[80.] \textit{See id.} at 296 (providing facts of case).
  \item[81.] \textit{See id.} (providing facts of case).
\end{itemize}
On appeal, the Fourth Circuit reversed, noting that the district court misapplied *Ouellette*, and held that the CAA preempts state law. Moreover, the court concluded that *Ouellette’s* holding regarding the CWA is applicable in a CAA action, particularly because of the striking similarities between the two acts. Subsequently, in 2013, the Third Circuit was given the opportunity to formulate its own approach to state preemption, “a matter of first impression” for the court.

III. *Bell v. Cheswick Generating Station*: The Third Circuit Protects Property Owners’ Rights to Seek Redress from Air Pollution

The Third Circuit took a decisive stance in the preemption debate by holding that the CAA did not preempt state law. The unanimous ruling had the effect of preserving state-law tort claims and with it the rights of citizens to seek compensation for property damage caused by a facility’s pollution.

A. Narrative Analysis

In a matter of first impression for the Third Circuit, the *Cheswick* court correctly relied on Supreme Court precedent to give full effect to the CAA’s states rights’ savings clause.

1. Background: Facts and Procedure

In 2012, two women led a 1,500-member class action lawsuit against Cheswick Generating Station, GenOn Power Midwest, L.P. (GenOn), the owner of a 570-megawatt coal-fired power plant (Plant). The plaintiffs claimed that the Plant’s operation caused ash and other contaminants to settle on their property and sought to recover compensatory and punitive damages under three common law tort actions: nuisance, negligence and...
recklessness, and trespass. They argued that despite GenOn’s claims of operating within the law, the Plant was violating its permit, which prohibits it from emitting visible, or otherwise perceptible, contaminants outside of its own boundaries. In response, “GenOn argued that because the Plant was subject to comprehensive regulation under the [CAA], it owed no extra duty to the [property owners] under state tort law.”

Agreeing with GenOn, the district court granted its motion to dismiss on the grounds that the plaintiffs’ tort claims “impermissibly encroach[ed] on and interfere[d] with [the federal] regulatory scheme” and were thus preempted by the CAA. On appeal, the Third Circuit’s main issue was whether the CAA preempts state-law tort claims brought by private property owners against a source of pollution located in the same state as the property. Based on the plain language of the CAA’s savings clauses and U.S. Supreme Court precedent, the Third Circuit Court of Appeals reversed the district court’s judgment, holding that the CAA does not preempt state-law tort claims.

2. CAA Preemption Analysis

The Third Circuit acknowledged that the Plant was extensively regulated and comprehensively overseen by both state and federal authorities under the CAA and that the facility’s permit specifically addresses odor and combustion residuals emissions. Consequently, the Third Circuit did not determine that the permit was controlling on the issue. Rather, the court looked to the states’ rights savings clause within the permit itself.

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89. See Bell v. Cheswick Generating Station, 903 F. Supp. 2d 314, 315 (W.D. Pa. 2012) (detailing plaintiffs’ complaint: “property damage, the invasion by and inhalation of . . . odors, and the deposit of . . . particulate coal dust, including fly ash and particulates formed by gases and chemicals emitted by [the Plant]”); see also Cheswick, 734 F.3d at 192 (listing common law tort theories under which plaintiffs sought damages). The plaintiffs also sought injunctive relief on the nuisance and trespass counts but admitted that such relief would only force GenOn to remove the debris and particulate that continuously falls upon the plaintiffs’ properties. Id. at 192–93.

90. See Cheswick, 734 F.3d at 191–92 (detailing specifics of GenOn’s Sub-chapter V permit for its Cheswick plant).

91. Id. at 189 (describing defendant’s argument).

92. Cheswick, 903 F. Supp. 2d at 322 (ruling CAA preempted state law claims).


94. See Cheswick, 734 F.3d at 198 (“We see nothing in the [CAA] to indicate that Congress intended to preempt source state common law tort claims. . . . We will reverse the decision . . . .”). Contra Cheswick, 903 F. Supp. 2d at 322 (“[T]o permit the common law claims would be inconsistent with the dictates of the [CAA].”)

95. See Cheswick, 734 F.3d at 191–92 (discussing regulation at Cheswick plant).

96. See id.
that preserved all rights and remedies under equity, common law, and statutory law.97

The Third Circuit, acknowledging that it was addressing preemption in the context of the CAA for the first time, based its reasoning on the Supreme Court’s holding in Ouellette.98 The court explained that the CAA includes savings clauses similar to the CWA that provide the statutory basis to preserve the plaintiffs’ state common law claims.99 Further, the court emphasized the consistency with which other circuits have examined this issue and failed to find any meaningful distinction between the CWA and the CAA.100

In terms of policy considerations, the court refrained from addressing whether its ruling would open the floodgates to nuisance claims against facilities that may otherwise be in compliance with established state and federal emissions standards.101 The court also did not discuss whether its decision could result in a patchwork of inconsistent requirements.102 Instead, the Third Circuit emphasized that states have the ability to apply more stringent standards to pollution emitting facilities located within their jurisdiction.103 The court also approved state tort law as an acceptable means for imposing higher standards on an in-state facility.104

Lastly, the court rejected GenOn’s contention that the CAA’s comprehensive regulatory structure would be undermined if juries and courts set

97. See id. (focusing on savings clause in permit).
98. See id. at 195 (citing Ouellette, 479 U.S. at 481).
99. See id. (comparing CWA and CAA and finding no material difference between their savings clauses and preemptive reach and thus holding that Ouellette controlled outcome); see also City of Milwaukee v. Illinois & Michigan, 451 U.S. 304, 328–29 (1981) (holding that CWA savings clauses are essentially identical to CAA counterparts).
100. See Cheswick, 734 F.3d at 195–96 (discussing other circuit courts’ failure to meaningfully distinguish between two acts and rejecting defendant’s attempt to distinguish CWA and CAA). The Third Circuit concluded that “GenOn’s argument hinges on its expansive reading of the [CWA]’s states’ rights savings clause, . . .”. Id. at 195 (analyzing defendant’s argument).
101. See id. at 197 (lacking discussion concerning effects of holding on increased litigation).
102. See id. (acknowledging possible tension between state nuisance laws and permit system but countering with argument that state nuisance laws are “relatively predictable” (quoting Ouellette, 479 U.S. at 498–99)); see also Roth, supra note 7, at 423 (recognizing “need to balance the interests of private citizens with industry’s need for predictable liability”); Mark Delaquil & Richard Raile, Third Circuit Decision Finding No CAA Preemption of State Law Nuisance Creates Apparent Split with Fourth Circuit, BAKERHOSTETLER (Sept. 27, 2013), http://www.environmentallawstrategy.com/2013/09/third-circuit-decision-finding-no-caa-preemption-of-state-law-nuisance-creates-apparent-split-with-fourth-circuit/ (“[T]he balancing of societal interests inherent in deciding nuisance claims may well preclude the certainty necessary for regulated entities to make business investments.”).
103. See Cheswick, 734 F.3d at 197–98 (emphasizing that CAA’s savings clause allows states to impose standards higher than those required by federal law).
104. See id. (concluding that state tort law is legitimate means to impose state standards).
emissions standards. The Third Circuit went on to note that the requirements of the CAA “served as a regulatory floor, not a ceiling,” and that states remain free to impose higher standards, enforceable under state tort law, on their own sources of pollution.

B. Critical Analysis

The Third Circuit’s reliance on *Ouellette*, a case that analyzed the CWA, shows the court’s willingness to use the Supreme Court’s analysis of the CWA to inform its analysis of the CAA. On the other hand, courts like the Fourth Circuit have failed to recognize and apply *Ouellette* to cases involving the CAA. Ultimately, in *Cheswick*, the Third Circuit reserved its judicial discretion to determine CAA preemption issues on a case-by-case basis.

1. Sister Acts: The CWA/CAA Analogy and Supreme Court Precedent

The *Cheswick* court properly relied on the Supreme Court’s analysis of preemption under the CWA in *Ouellette* to analyze preemption under the CAA. Indeed, the similarities between the CAA and CWA have led to the acts being called “sibling acts.” Both acts were passed in the 1970s, are “command-and-control” statutes, and are seminal environmental laws in the United States. Most importantly, both acts feature a cooperative

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105. See id. at 197 (rejecting defendant’s argument by way of analogy: “'[the] Supreme Court addressed this precise problem’ in *Ouellette* . . . and rejected the very same concerns that [defendants] now raise.” (first alteration in original) (citation omitted) (quoting North Carolina ex rel. Cooper v. Tenn. Valley Auth., 615 F.3d 291, 301 (2010))).

106. See id. at 197–98 (rejecting GenOn’s argument that court’s holding may undermine regulatory scheme of CAA and explaining that CAA standards and requirements serve as baseline for emissions standards).

107. For a further discussion of the CWA/CAA analogy, see infra notes 110–19 and accompanying text.

108. For a further discussion of the Fourth Circuit’s approach, see infra notes 120–30 and accompanying text.

109. For a further discussion of the impact of the *Cheswick* decision, see infra notes 131–38 and accompanying text.


111. See Robert W. Adler, *Integrated Approaches to Water Pollution: Lessons from the Clean Air Act*, 23 HARV. ENVTL. L. REV. 203, 206 (1999) (noting that both acts were “largely written by the same pivotal members of Congress”); England, supra note 6, at 725 (describing CWA and CAA as “sibling acts”).

112. See England, supra note 6, at 726 (describing similarities between CWA and CAA); see also Adler, supra note 111, at 206 (examining similarities and differences between CWA and CAA). Adler asserts the statutes have differed significantly in their implementation. See id. at 207 (detailing differences in implementation methods). Command and control regulations directly regulate an
federalism structure and delegate significant authority and discretion to states to implement the statutes. Moreover, when Congress amended the CAA in 1990, it borrowed significant ideas from the CWA. Therefore, the Ouellette Court’s conclusion that “nothing in the [CWA] bars aggrieved individuals from bringing a nuisance claim pursuant to the laws of the source State” bears heavily in determining whether the CAA preempts state laws.

A textual comparison of the two savings clauses in the CAA and CWA reveals that the CWA’s states’ rights savings clause includes additional language: that nothing in the CWA shall “be construed as impairing or in any industry or activity by legislation that defines what is permitted and what is illegal, e.g. harmful pollution. See Adam Babich, A New Era in Environmental Law, 20 COLO. LAW 435, 435 (1991) (describing command and control regulations). The term “command and control” describes a regulatory structure that “impos[es] rigid standards of conduct . . . backed up by sanctions designed to assure full compliance with such standards . . . .” Jodi L. Short, The Paranoid Style in Regulatory Reform, 63 HASTINGS L.J. 633, 659 (2012) (alterations in original) (quoting James E. Krier & Richard B. Stewart, Using Economic Analysis in Teaching Environmental Law: The Example of Common Law Rules, 1 UCLA J. ENVTL. L. & POL’Y 13, 15 n.3 (1980)) (internal quotation marks omitted) (providing early definition of term). In the context of air pollution, command and control regulations “focus[ on preventing environmental problems by specifying how a company will manage a pollution-generating process.” Sophia Hamilton, When Scientific Palmers Make Policy: The Impact and Future of Cap-and-Trade in the United States, 4 J. BUS. ENTREPRENEURSHIP & L. 269, 313 (2011) (internal quotation marks omitted) (describing how command and control regulations function in context of air pollution control); see also Gallisdorfer, supra note 9, at 152 (stating that both acts “feature nearly identical savings clauses contemplating preservation of independent forms of state regulation,” but also providing basis on which to distinguish two acts). The CWA’s primary savings clause contains additional language stating that nothing in the Act should “be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States.” 33 U.S.C. § 1370 (2012). As Gallisdorfer points out, some commentators have suggested that the phrase “of such States” acts as a qualifier and limits the coverage of the savings clause to a state’s regulation of its own waters, thus driving the source and affected state law distinction articulated by the Supreme Court in Ouellette. See Gallisdorfer, supra note 9, at 152–53. “The [CAA], by contrast, lacks any such qualifier, perhaps indicating that this same distinction should not apply there.” Id. at 153.


114. See Adler, supra note 111, at 207–08 (illustrating close nexus between two acts).

115. Cheswick, 734 F.3d at 194–95 (quoting Ouellette, 479 U.S. at 497) (internal quotation marks omitted) (relying heavily on Ouellette’s CWA preemption analysis to inform its analysis); see also England, supra note 6, at 715 n.106 (arguing that legislative history of CWA supports inference that Congress intended to preserve traditional common law claims for pollution damages). The Senate Report for the CWA demonstrates Congress intended for the savings clauses to “specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages.” See id. (quoting S. REP. No. 92-414 (1972)) (internal quotation marks omitted), reprinted in 1972 U.S.C.C.A.N. 3668, 3746–47.
manner affecting any right or jurisdiction of the States with respect to the
waters (including boundary waters) of such States.”116 The Third Circuit
explained that the CAA lacked analogous language because “there are no
such jurisdictional boundaries or rights which apply to the air.”117 The
court reasoned that, “[i]f anything, the absence of any language regarding state
boundaries” in the CAA’s states’ rights savings clause is indicative of Con-
gress’s intent to afford more rights to the states.118 Moreover, Congress’s
“failure even to hint at” its intention to eliminate private causes of action
under state law belies any argument for preemption of state law.119

2. Parting Ways with the Fourth Circuit

The Third Circuit’s vision of preemption under the CAA, however,
differs dramatically from the Fourth Circuit’s understanding of preemp-
tion.120 In North Carolina ex rel. Cooper v. Tennessee Valley Authority, the
Fourth Circuit held that a facility’s CAA permit preempts a state nuisance
claim under North Carolina law.121 The Fourth Circuit suggested that
subjecting permittees to a state-by-state “patchwork” of ambiguous nui-
sance laws is incompatible with the comprehensive regulatory framework
of the CAA.122

The Fourth Circuit strategically characterized the CAA as a delicate
regulatory system carefully crafted by “decades of thought by legislative
bodies and agencies.”123 With this in mind, the court appointed itself as
the defender of the CAA against “the vagaries of public nuisance doctrine”
that threaten to “scuttle the extensive system of anti-pollution mandates
that promote clean air in this country.”124

116. 33 U.S.C. § 1370 (preserving states’ rights and jurisdiction with respect
to waters of states); see also Cheswick, 734 F.3d at 195 (noting additional language
in CWA’s states’ rights savings clause).
117. Cheswick, 734 F.3d at 195 (providing explanation for CWA’s additional
language).
118. Id. (interpreting omitted language as indication that Congress intended
to reserve state authority).
119. Id. at 198 (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996))
(internal quotation marks omitted).
120. Compare id. (holding CAA does not preempt state law), with North Caro-
lina ex rel. Cooper v. Tenn. Valley Auth., 615 F.3d 291, 306 (4th Cir. 2010) (holding
CAA preempts state law).
121. See Cooper, 615 F.3d at 310–12 (holding CAA preempts North Carolina
state law).
122. See id. at 302 (asserting state specific nuisance laws are incompatible with
CAA).
123. Id. at 298 (describing efforts that created CAA).
124. Id. (explaining policy consideration in holding that CAA preempted
state law). Moreover, the court characterizes North Carolina’s suit in one short,
but poignant statement: “Litigation that amounts to ‘nothing more than a collat-
eral attack’ on the system, however, risks results that lack both clarity and legiti-

macy.” Id. at 301 (quoting Palumbo v. Waste Techs. Indus., 989 F.2d 156, 159 (4th Cir.
1993)) (characterizing plaintiff’s argument as attack on CAA). The court
noted that “[i]t ill behooves the judiciary to set aside a congressionally sanctioned
The Third Circuit, on the other hand, adopted a “fundamentally different” approach. Two practitioners have noted that the Fourth Circuit adopted “a broader view of Ouellette’s holding, finding that nuisance law was an ‘ill-defined omnibus tort of last resort,’ and North Carolina’s lawsuit was an attempt ‘to replace’ the carefully crafted CAA regime with nuisance law’s ‘vague and indeterminate’ standards.” However, the Fourth Circuit’s shortcoming is more conspicuous: it ignores the Supreme Court’s assertion that nothing in the CWA—the CAA’s sister act—bars injured individuals from bringing a nuisance claim under state law.

Ultimately, the court’s holding in Cheswick is limited to the Third Circuit, and the issue is far from settled. Other federal courts of appeals have not had the occasion to address whether the CAA preempts private state-law tort claims. Moreover, “the Third Circuit’s opinion is subject to discretionary appeal to the U.S. Supreme Court.”

3. Impact of Cheswick on the Third Circuit

The Third Circuit looked to the states’ rights savings clause contained in GenOn’s permit to preserve all rights and remedies under equity, common law, and statutory law. As such, the decision reserves judicial discretion to determine, on a case-by-case basis, whether a facility’s permit preempts state tort claims. Additionally, just one month before the Third Circuit issued its Cheswick decision, the court issued another anti-scheme of many years’ duration . . . that reflects the extensive application of scientific expertise . . . .” Id. (explaining policy concerns).

125. See Delaquil & Raile, supra note 102 (explaining import of Third Circuit decision in context of liability).

126. Id. (quoting Cooper, 615 F.3d at 302) (asserting Fourth Circuit took broader approach to Ouellette than Third Circuit).

127. See Cooper, 615 F.3d at 301–04 (discussing Ouellette but lacking any mention of its recognition that CWA does not bar state-law nuisance claims).


129. See id. (noting Seventh Circuit, for example, has never addressed this state preemption issue).

130. Id. (emphasizing possibility of appeal).

131. See Bell v. Cheswick Generating Station, 734 F.3d 188, 192 (3d Cir. 2013) (focusing on savings clause in permit).

polluter decision. In *GenOn REMA, LLC v. EPA*, GenOn’s Pennsylvania facility was generating high levels of sulfur dioxide emissions that traveled just across the Delaware River, a mere 500 feet away, to New Jersey. New Jersey filed a claim with the EPA, which issued a ruling requiring GenOn to decrease its emissions. GenOn argued that the EPA’s ruling was invalid because the ruling was arbitrary and capricious and the EPA lacked the authority to issue the ruling; however, the Third Circuit rejected both these claims. Given the Third Circuit’s pattern of issuing pro-plaintiff decisions, it appears “polluters will have a hard time arguing their way out of their dirty business . . . .”

IV. PRACTICAL IMPLICATIONS FOR THIRD CIRCUIT PRACTITIONERS 
AFTER *CHESWICK*

This section explores several key points and practical implications for practitioners as a result of *Cheswick*. First, this section explains that CAA compliance alone will not shield polluters from liability, because *Cheswick* preserves state-law tort claims. Second, it recommends valuable litigation tips for regulated entities.

A. CAA Compliance Alone Will Not Shield Against Liability

The Third Circuit’s decision is significant for regulated entities because it questions the degree to which CAA compliance will shield them against liability for state common law violations. In light of *Cheswick*,


134. 722 F.3d 513 (3d Cir. 2013).

135. See id. at 515–16 (providing facts of case).

136. See id. at 516 (stating details of EPA’s ruling). The CAA “allows downwind states to petition the EPA for a finding that a source in an upwind state affects the petitioning state’s attainment or maintenance of NAAQS due to air pollution emanating from the source in the upwind state.” *Id.* (citing 42 U.S.C. § 7426(b) (2012)) (describing circumstances that allow states to petition EPA).

137. *Id.* at 526 (“[W]e hold that the EPA’s action of promulgating the Portland Rule was neither an abuse of discretion nor arbitrary or capricious.”).


139. For a further discussion of practical implications of the *Cheswick* decision, see *infra* notes 140–57 and accompanying text.

140. For a further discussion of what *Cheswick* means for companies that own and operate pollution emitting sources, see *infra* notes 142–47 and accompanying text.

141. For suggestions and litigation tips, see *infra* notes 148–57 and accompanying text.

142. See Delaquil & Raile, *supra* note 102 (explaining importance of Third Circuit decision in context of liability).
facilities with pollution-emitting sources may not shield themselves from civil liability by simply complying with federal law.\textsuperscript{143}

The Third Circuit’s assurance that its decision is unlikely to trigger increased litigation is questionable; \textit{Cheswick} allows landowners to pursue state claims against power plants despite their compliance with state and federal regulations.\textsuperscript{144} Commentators note that because the Third Circuit is the first circuit to explicitly extend \textit{Ouellette} to private nuisance claims for air pollution, it may cause facilities to “become targets of a new wave of state tort actions from newly-emboldened neighbors.”\textsuperscript{145} Of particular note, just days after the \textit{Cheswick} decision, the “prevailing plaintiffs’ attorney filed a similar suit involving a different public utility in the same federal district.”\textsuperscript{146} Moreover, increased litigation is a palpable concern given America’s reputation as the most litigious country in the world.\textsuperscript{147}

B. Litigation Tips for Regulated Entities

Owners and operators of facilities within the Third Circuit—particularly electric, oil, and gas companies—should be cognizant of the potential increase in tort actions brought under local state law.\textsuperscript{148} Regulated entities should emphasize the significance of their “[CAA] compliance to a favorable merits determination.”\textsuperscript{149} At the very minimum, facilities

\textsuperscript{143} See Sudhir Lay Burgaard, \textit{Third Circuit Finds the Clean Air Act Does Not Preempt State Common Law Claims}, MorRIS POliCi & PurD LLP (Oct. 7, 2013), http://www.mpplaw.com/files/Publication/987a9ef1-88b7-4361-8cb5-42c0ff1f2045/Presentation/PublicationAttachment/8e542b00-d59e-46ba-9700-f692f09b86ba/8_Vol5_Third-Circuit-Finds%20CAA-Does-Not-Preempt%20%20SLB.pdf; see also Belcher, supra note 132 (explaining that facilities may be complying with their permit but that it will not “insulate them against environmental challenge”). But see Brown v. Scioto Cnty. Bd. of Comm’rs, 622 N.E.2d 1153, 1159 (Ohio Ct. App. 1993) (holding that compliance with pollution permit issued under comprehensive regulatory scheme barred common law nuisance actions).


\textsuperscript{145} \textit{Clean Air Act Does Not Preempt Property Owners’ State Law Tort Claims, Says Third Circuit in Case of First Impression}, CROWELL & MORING LLP (Sept. 23, 2013) [hereinafter \textit{Case of First Impression}], http://www.crowell.com/NewsEvents/All/Clean-Air-Act-Does-Not-Preempt-Property-Owners-State-Law-Tort-Claims-Says-Third-Circuit-in-Case-of-First-Impression; see also Green, supra note 144 (discussing possibility of increased litigation resulting from \textit{Cheswick}).

\textsuperscript{146} \textit{Case of First Impression}, supra note 145.


\textsuperscript{148} See Belcher, supra note 132 (warning owners of pollution-emitting facilities to be aware of possible increase in litigation).

\textsuperscript{149} Martel, supra note 110 (noting importance of CAA compliance).
should negotiate their permits to include language that acknowledges the CAA permit shield provision, in order to protect from additional requirements where the facility is in compliance with permitted limits.\textsuperscript{150}

The Cheswick ruling abolished the defense that CAA regulation and compliance shield facilities from incurring liability under state law.\textsuperscript{151} Despite the decision, however, other preemption-related defenses are available.\textsuperscript{152} For example, facilities could argue that state laws that regulate air emissions preempt common law tort claims, such as nuisance.\textsuperscript{153} Additionally, defendants may assert “fact-specific administrative law arguments, such as the plaintiffs’ failure to exhaust available administrative review remedies for seeking more stringent emission limitations in the underlying permit.”\textsuperscript{154}

Public relations efforts are also critical to proactively preventing an onslaught of litigation.\textsuperscript{155} Specifically, permit holders should consider strategies for reaching out to landowners in the vicinity of emissions-releasing facilities, because those owners are most likely to be impacted by emissions and therefore most likely to bring future tort claims.\textsuperscript{156} Reaching out to potential plaintiffs and resolving issues out of court may prevent costly litigation, for both parties.\textsuperscript{157}

V. CONCLUSION: THE THIRD CIRCUIT’S APPROACH APPROPRIATELY PROTECTS PROPERTY OWNERS’ RIGHTS TO SEEK REDRESS

Considering that common law claims have traditionally been the means to address legislative shortcomings, the Third Circuit’s approach in Cheswick appropriately takes steps to preserve property owners’ rights to recover damages caused by air pollution.\textsuperscript{158} If the Third Circuit had upheld the district court’s preemption finding, then it would have effectively barred attempts by property owners to assert their common law rights.\textsuperscript{159} One commentator notes that allowing defendants in CAA actions to in-

\textsuperscript{150} Belcher, supra note 132 (explaining what companies should negotiate in permit).
\textsuperscript{151} See Bell v. Cheswick Generating Station, 734 F.3d 188, 198 (3d Cir. 2013) (remanding case for further proceedings).
\textsuperscript{152} See Harrington, Kemp & Poland, supra note 128 (discussing importance of public relations as well).
\textsuperscript{153} See id. (suggesting alternative defense).
\textsuperscript{154} Id. (suggesting administrative law arguments for defense).
\textsuperscript{155} See id. (describing importance of public relations efforts).
\textsuperscript{156} See id. (discussing target audience for public relations efforts).
\textsuperscript{157} See id. (suggesting reaching out to potential plaintiffs).
\textsuperscript{158} See England, supra note 6, at 746 (explaining negative effect of allowing federal laws to preempt state laws).
\textsuperscript{159} See CAA Does Not Preempt Toxic Tort, supra note 4 (explaining significance of Third Circuit’s holding); see also Roth, supra note 7, at 404–07 (discussing permit shield provisions). Roth asserts that permit-shield provisions restrict individuals’ rights to protect their property interests and “create a gap in the scheme for environmental protection and unnecessarily harm private landowners.” Id. at 415 (discussing impact of permit-shield provisions).
voke a preemption defense "may deprive plaintiffs of a remedy needed to right a wrong, and it may further erode centuries-old precedent allowing common law air pollution claims involving traditional air pollutants to move forward—claims expressly preserved by CAA." In sum, the Third Circuit correctly held that the CAA does not preempt state common law actions, because its decision preserves the historic federal-state partnership that addresses "one of the most notorious types of public nuisance in modern experience." 160 161

160. England, supra note 6, at 746 (explaining potential effect of upholding defendant’s preemption defense).

CLASS IS IN SESSION: THE THIRD CIRCUIT HEIGHTENS ASCERTAINABILITY WITH RIGOR IN CARRERA v. BAYER CORP.

STEPHANIE HAAS*

“If Carrera is any indication of things to come, the viability of consumer class actions is in question.”1

I. INTRODUCTION

At any given time, millions of Americans are trying to lose weight.2 Many, like Gabriel Carrera, seek help from over-the-counter products, such as diet pills.3 The diet industry is a massive financial market, and pharmaceutical companies are constantly striving to seize a slice of the pie.4 In 2002, Bayer Corporation (Bayer) began distributing One-A-Day WeightSmart (WeightSmart), a product marketed as a vitamin to boost metabolism and help support weight loss.5 However, the benefits of

* J.D. Candidate, 2015, Villanova University School of Law. This Casebrief is dedicated to the memory of my grandmother, Barbara Eisenhofer, who taught me I could achieve anything with hard work and perseverance. I would like to thank my family and friends, especially Edward and Wendi Haas for their unwavering encouragement throughout my academic career, Jay Eisenhofer for inspiring my legal education, and Mike Cottone for his constant support. Lastly, I would like to thank the editors of the Villanova Law Review for their helpful guidance during the writing and editing process.


WeightSmart were ultimately deemed unsupported by scientific evidence, and, in 2007, the Federal Trade Commission filed suit against Bayer for deceptive trade practices. After Bayer paid a $3.2 million civil penalty to settle allegations of deceptive advertising, Carrera considered his own options. Carrera wanted his money back.

As a solo plaintiff, Carrera would have had to expend a considerable amount of time and expense to litigate his case against Bayer. To overcome this obstacle, the Federal Rules of Civil Procedure provide the class action mechanism, by which plaintiffs with similar grievances may join together in prosecution of their claims. Carrera believed other consumers who had purchased WeightSmart with the same false hope should share in his recovery and, accordingly, sought class certification, a necessary prerequisite to bring a class action.

Because so few class actions go to trial, the “real battle” in class action litigation takes place during the certification stage. Plaintiffs view the denial of class certification as the “death knell” for their claims because of the impracticability of individual suits. Alternatively, courts and com-

6. See id. (noting imposition of civil penalty for deceptive advertising).
8. See Carrera, 727 F.3d at 304 (providing WeightSmart was sold for $8.99).
10. See generally Fed. R. Civ. P. 23 (providing procedure and requirements for class actions).
11. See Carrera, 727 F.3d at 304 (describing Carrera’s initial intention to bring nationwide class action representing all WeightSmart purchasers).
12. See Andrew J. Trask, Wal-Mart v. Dukes: Class Actions and Legal Strategy, 2011 CATO SUP. CT. REV. 319, 322 (2011) (describing class action litigation as high-stakes game encouraging plaintiffs to use creative strategies to obtain certification); see also Richard Marcus, Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification, 79 GEO. WASH. L. REV. 324, 325 (2011) (describing class certification as “preeminently important”). The Rule 23 drafters recognized the crucial nature of class certification in amending Rule 23 to allow interlocutory appeal of certification decisions. See Fed. R. Civ. P. 23(f) advisory committee’s note to 1998 amendment (expressing concern about deferring certification appeal until plaintiffs have proceeded through expensive trial and encouraging defendants to settle rather than risk “potentially ruinous liability” after court grants certification).
13. See Death Knell and Injunction Exceptions, 92 HARV. L. REV. 232, 233 (1978) (explaining death knell doctrine allowed interlocutory appeal of class certification denial where solo plaintiffs “may find it economically imprudent to pursue [their] lawsuit to a final judgment and then seek appellate review of an adverse class determination” (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 469–70 (1978))).
mentators have recognized that approving class certification may coerce defendants to settle. Considering these conflicting consequences of class certification, courts undertook the task of determining the appropriate scrutiny with which to interpret class certification requirements. In doing so, courts have set the stage for heightened certification requirements that risk precluding plaintiffs like Carrera from employing the class action mechanism.

This Casebrief discusses the declining practicability of consumer class actions in light of the Third Circuit’s recent interpretation of the ascertainability requirement in Carrera v. Bayer Corp. Part II outlines the policies underpinning the advent of the class action mechanism. Further, Part II summarizes the legal standards courts apply to determine whether to certify a class. Finally, Part II traces the development of a discrete and implicit certification requirement—ascertainability. Part III examines the Third Circuit’s opinion in Carrera and analyzes the

(internal quotation marks omitted). See generally Martin H. Redish, The Pragmatic Approach to Appealability in the Federal Courts, 75 COLUM. L. REV. 89, 92 (1975) (chronicling circuit court treatment of death knell doctrine). Although the Supreme Court rejected the death knell doctrine as an improper ground for appellate jurisdiction, Rule 23(f) now provides for immediate interlocutory appeal of certification decisions. See Coopers & Lybrand, 437 U.S. at 476 (explaining death knell doctrine conflicts with exclusive statutory grant of appellate jurisdiction over final orders); see also FED. R. CIV. P. 23(f) (authorizing interlocutory appeal for orders granting or denying certification).

14. See In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1299 (7th Cir. 1995) (emphasizing need to balance coercive pressure on defendants to settle with benefits of class actions); Charles Silver, “We’re Scared to Death”: Class Certification and Blackmail, 78 N.Y.U. L. REV. 1357, 1429–30 (2003) (recognizing “excessive pressure” after class certification “resulting in decisions to settle made under duress”). But see In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 145 (2d Cir. 2001) (acknowledging plaintiffs’ increased settlement leverage after certification is “fact of life” for defendants that cannot preclude “otherwise proper certification”).


17. 727 F.3d 300 (3d Cir. 2013). For an analysis of Carrera’s effect on consumer class actions, see infra notes 125–65 and accompanying text.

18. For a discussion of the policies and procedures governing the class action mechanism, see infra notes 24–43 and accompanying text.

19. For a discussion of how courts determine whether plaintiffs have satisfied class action requirements, see infra notes 44–70 and accompanying text.

20. For a discussion of the development of the ascertainability requirement, see infra notes 71–86 and accompanying text.
court’s reasoning.21 Part IV discusses Carrera’s implications for practitioners seeking or challenging class certification.22 Part V concludes by assessing Carrera’s overall impact on consumer class actions within the Third Circuit.23

II. PREPARING FOR CLASS: THE MOTION FOR CLASS CERTIFICATION

Rule 23 of the Federal Rules of Civil Procedure governs the process for class actions and sets forth the requirements for class certification.24 The class action mechanism was primarily established to allow plaintiffs to aggregate their claims and seek mass justice in cases where their individual claims would be too small to litigate independently.25 Class actions have served the vital roles of deterring mass misconduct, compensating wronged parties no matter how small their claim may be, and promoting efficient resolution of similar claims.26 Further, the Supreme Court articulated the crucial role of class actions: “The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.”27 To ensure appropriate use of the class action mechanism, the explicit Rule 23 requirements limit the applicabil-

21. For an examination of the Third Circuit’s holding and reasoning in Carrera, see infra notes 87–124 and accompanying text.
22. For a discussion of Carrera’s impact on Third Circuit practitioners, see infra notes 125–56 and accompanying text.
23. For a discussion of the diminished viability of consumer class actions following Carrera, see infra notes 157–63 and accompanying text.
24. See Fed. R. Civ. P. 23 (detailing requirements for class certification and other procedures including appeals, settlement, appointing counsel, and conducting the action). For a discussion of the class certification requirements, see infra notes 33–43 and accompanying text.
25. See Myriam Gilles, Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions, 59 DEPAUL L. REV. 305, 305 (2010) (“[S]mall claims of a dispersed group of consumers injured by a broad range of marketplace abuses were undoubtedly in the minds of the drafters . . . .”); Klonoff, supra note 15, at 731 (asserting class action mechanism was “once considered a ‘revolutionary’ vehicle for achieving mass justice” (citing Owen W. Fiss, The Political Theory of the Class Action, 53 WASH. & LEE L. REV. 21, 25 (1996))); Miller, supra note 16, at 315 (arguing 1966 revision to Rule 23 was intended to increase value of class action as procedural device, particularly in context of low-value financial claims such as civil rights and consumer actions).
26. See Klonoff, supra note 15, at 735 (identifying compensation, deterrence, and efficiency as main functions of class action device); Miller, supra note 16, at 316 (explaining class actions overcome inefficiencies small-claims plaintiffs often encounter when seeking recovery through governmental and administrative agencies).
27. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)) (internal quotation marks omitted) (explaining class actions solve problem “by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor”).
ity of class actions to cases that further the mechanism’s policy goals. Yet, courts have also developed an implicit Rule 23 requirement that threatens to undermine these goals.

A. The ABCs of Class Certification Under Rule 23

Because class certification is typically the defining moment of class actions, Rule 23 sets forth certification requirements intended to filter out improper uses of the class action device. These requirements include numerosity, commonality, typicality, adequacy, adherence to another prerequisite depending on the type of relief sought, and an adequate class definition. In determining whether the proposed class meets these requirements, courts have applied varying degrees of scrutiny.

1. The Six Classroom Rules

Lead plaintiffs must affirmatively establish that the proposed class complies with the requirements of Rule 23 to obtain certification. The proposed class must meet four threshold requirements. First, the class must be “so numerous that joinder of all members is impracticable” (numerosity). Second, there must be “questions of law or fact common to the class” (commonality). Third, “the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class” (typicality). Fourth, the named parties must “fairly and adequately protect the interests of the class” (adequacy).

In addition to these threshold requirements, the proposed class must satisfy one of three additional prerequisites. First, the plaintiffs may show that actions by individual class members could result in inconsistent

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28. For a discussion of the Rule 23 requirements and corresponding court interpretations, see infra notes 30–70 and accompanying text.
29. For a discussion of the development of the implicit ascertainability requirement, see infra notes 71–86 and accompanying text.
30. See Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011) (“The Rule’s four [certification] requirements . . . effectively limit the class claims to those fairly encompassed by the named plaintiff’s claims.” (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982)) (internal quotation marks omitted)).
31. For a discussion of the explicit requirements established by Rule 23, see infra notes 33–43 and accompanying text.
32. For an examination of courts’ inconsistent analyses of Rule 23 requirements, see infra notes 44–70 and accompanying text.
33. See Dukes, 131 S. Ct. at 2550–51 (explaining affirmative showing means plaintiffs must have sufficient factual support to establish each Rule 23 requirement).
34. See Fed. R. Civ. P. 23(a) (establishing prerequisites to class certification).
39. See Fed. R. Civ. P. 23(b) (categorizing class actions based on type of relief sought and effect of action on similar actions).
holdings “that would establish incompatible standards of conduct” for the defendant or adjudications relating to “individual class members . . . would be dispositive of the interests” of other class members.40 Second, the plaintiffs may establish that injunctive relief is an appropriate remedy for the entire class based on the defendant’s alleged conduct.41 The third prerequisite governs classes seeking monetary relief and imposes two additional requirements on the proposed class—plaintiffs must show that “questions of law or fact common to class members predominate over any questions affecting only individual members” (predominance) and “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy” (superiority).42 Finally, class certification requires a proper class definition that “define[s] the class and the class claims, issues, or defenses.”43

40. FED. R. CIV. P. 23(b)(1)(A)–(B) (authorizing class certification if trying similar cases individually could lead to inconsistent holdings affecting plaintiffs and defendants); see also Robert G. Bone, Walking the Class Action Maze: Toward a More Functional Rule 23, 46 U. MICH. J.L. REFORM 1097, 1108 nn.50–51 (2013) (explaining Rule 23(b)(1)(B) is more lenient than other Rule 23(b) categories).
41. See FED. R. CIV. P. 23(b)(2) (governing class actions involving injunctive relief). Plaintiffs often argue for certification as a “hybrid” class under Rule 23(b)(2) and 23(b)(3), because the (b)(3) requirements are more difficult to satisfy. See, e.g., Cooper v. S. Co., 390 F.3d 695, 703 (11th Cir. 2004) (explaining plaintiff’s attempt to obtain certification under Rule 23(b)(2) by omitting that damages diminished adequacy of plaintiff’s representation of class); see also Trask, supra note 12, at 326 (providing hybrid classes as example of creative certification strategy employed to avoid challenges of meeting Rule 23(b)(3) requirements). Rule 23(b)(2), however, was not intended as a workaround for classes properly categorized under Rule 23(b)(3); rather, the drafters of Rule 23(b)(2) intended to create an easier path to injunctive relief for civil rights plaintiffs. See Fed. R. Civ. P. 23(b)(2) advisory committee’s note to 1966 amendment (stating civil rights actions “where a party is charged with discriminating unlawfully against a class” illustrate purpose of Rule 23(b)(2)); Brandon L. Garrett, Aggregation and Constitutional Rights, 88 NOTRE DAME L. REV. 593, 603 (2012) (explaining intent of Rule 23(b)(2) to mitigate difficulties individual civil rights plaintiffs encountered before being able to aggregate claims (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954), which was tried with individual plaintiff rather than class of affected plaintiffs)). Although plaintiffs may still attempt to obtain class certification using both Rule 23(b)(2) and (b)(3) under certain circumstances, plaintiffs seeking individualized monetary damages are now foreclosed from invoking Rule 23(b)(2). See Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2560 (2011) (holding claims for monetary relief that are not incidental to injunctive relief may not be certified under Rule 23(b)(2)).
42. See Fed. R. Civ. P. 23(b)(3) (listing four factors relevant to predominance and superiority requirements). Most class actions are brought under this subsection. See Klonoff, supra note 15, at 792 (discussing heightened scrutiny of Rule 23(b)(3) requirements).
43. See Fed. R. Civ. P. 23(c)(1)(B) (providing requirements for certification order). The class definition requirement, not initially included in Rule 23, was added in 2003. See Klonoff, supra note 15, at 761 (discussing evolution of class definition requirement, beginning as case law requirement on which few cases turned).
2. Checking Your Homework: Compliance with Rule 23

Despite, or perhaps because of, plaintiffs’ frequent reliance on the class action mechanism across a broad spectrum of cases, courts have gradually heightened the scrutiny with which they assess Rule 23 compliance, thereby creating barriers to class certification.44 The level of scrutiny courts apply depends on whether district courts should consider the merits during the class certification stage.45 After the Supreme Court failed to define the proper scope of merits inquiries at the certification stage, circuit courts shaped certification jurisprudence in accordance with their own policy objectives.46 The Supreme Court eventually clarified the appropriate level of scrutiny, which both endorsed and heightened the scrutiny lower courts had applied.47

a. The Supreme Court Delivers Dueling Standards

The Supreme Court articulated conflicting views on the appropriate level of scrutiny to assess Rule 23 compliance.48 The Supreme Court’s reasoning in Eisen v. Carlisle & Jacqueline49 first shaped the requisite certification analysis.50 In rejecting the district court’s consideration of the merits to determine whether the plaintiff was likely to prevail, the Court

44. See Klonoff, supra note 15, at 737 (acknowledging numerous multi-billion dollar settlements in 1980s and 1990s led to heightening certification requirements); Miller, supra note 16, at 316–17 (discussing use of Rule 23 in “ever-widening range of substantive contexts”—such as antitrust, securities litigation, civil rights, and consumer actions—as precursor to courts’ eventual tightening of certification requirements to contain use of class action).


46. For an examination of the Supreme Court’s initially inconsistent holdings, see infra notes 48–54 and accompanying text. For a discussion of the circuit courts’ inconsistent approaches to determining Rule 23 compliance, see infra notes 55–62 and accompanying text.

47. For a discussion of the Supreme Court’s decision resolving the inconsistencies plaguing the lower courts, see infra notes 63–70 and accompanying text.

48. See Klonoff, supra note 15, at 748 (describing two opinions on class certification “point[ing] in . . . different direction[s]”); Husband & Williams, supra note 45, at 54 (explaining Supreme Court jurisprudence had been “torn between” opposing standards prior to 2011).


50. See id. at 177 (interpreting history of Rule 23); see also Steig D. Olson, “Chipping Away”: The Misguided Trend Toward Resolving Merits Disputes as Part of the Class Certification Calculus, 43 U.S.F. L. REV. 935, 943–44 (2009) (suggesting Eisen disconnected all merits inquiries from certification decision despite narrow facts of case). But see Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2552 n.6 (dedicating footnote to dismissing prior misunderstanding of Eisen as prohibition on all merits
explained “nothing in either the language or history of Rule 23” authorized preliminary merits inquiries “to determine whether it may be maintained as a class action.”51 Eight years later, without addressing Eisen, the Supreme Court subsequently announced a conflicting and more demanding approach to assess compliance with Rule 23 in General Telephone Co. of Southwest v. Falcon.52 The Court stated the certification process “generally involves considerations that are enmeshed in the [plaintiff’s] factual and legal issues . . . .”53 Thus, the Court reversed class certification, holding that trial courts must conduct a rigorous analysis and “probe behind the pleadings” to ensure plaintiffs comply with Rule 23 before certifying a class.54

b. Circuit Courts Reconcile Eisen and Falcon

Lower courts have struggled to reconcile the contradiction between Falcon’s rigorous analysis and Eisen’s instructions to ignore the merits during class certification.55 Most courts initially relied on Eisen to support the premise that merits inquiries were prohibited during class certification and dodged the rigorous analysis standard.56 Circuits generally applied a


51. See Eisen, 417 U.S. at 177 (holding Rule 23 does not permit courts to consider whether plaintiff is likely to prevail on merits in order to shift class notice costs to defendant).

52. 457 U.S. 147 (1982).

53. Id. at 160 (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978)) (internal quotation marks omitted) (noting wide gap between individual’s discriminatory claim and actually proving entire class was affected by same injury).

54. See id. at 160–61 (signaling shift to more exacting scrutiny of Rule 23 requirements after expressing concern defendants will be unable to defend against suit without sufficient factual information).

55. See Klonoff, supra note 15, at 748–49 (describing evolving circuit court approaches to Eisen/Falcon conflict); Marcus, supra note 12, at 326 (describing federal judges’ reluctance to consider merits based on Eisen despite importance of class certification); Miller, supra note 16, at 314 & n.107 (discussing diverging viewpoints regarding consideration of merits during class certification stage and arguing “judicial scrutiny of class certification requests has expanded dramatically”); Whitbeck, supra note 45, at 495 (summarizing varying circuit court interpretations of Eisen and Falcon).

56. See, e.g., Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 291 (2d Cir. 1999) ("[A] motion for class certification is not an occasion for examination of the merits of the case.") overruled by In re Initial Pub. Offerings Sec. Litig., 471 F.3d 24 (2d Cir. 2006); see also Marcus, supra note 12, at 350 (explaining Eisen was regularly cited to support position against considering merits to decide class certification). A minority of circuit courts, however, raised concerns with Eisen and integrated language from Falcon to heighten class certification scrutiny. See, e.g., Castano v. Am. Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996) (stating “[a] district court certainly may look past the pleadings to determine whether the requirements of [R]ule 23 have been met” and reversing certification based on lower court’s misinterpretation of Eisen); see also Whitbeck, supra note 45, at 493, 505–06 (explaining minority holdings created circuit court split and placed “much greater hurdle” on plaintiffs during class certification stage).
lenient standard that only required plaintiffs to sufficiently show the certification requirements were met, which can be attributed to the policy concerns courts expressed during that time.\footnote{See Caridad, 191 F.3d at 292 (explaining “class certification would not be warranted absent some showing” that plaintiff met Rule 23 requirements); Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 473 (5th Cir. 1986) (expressing need to “rethink the alternatives and priorities by the current volume of litigation and more frequent mass disasters”); Blackie v. Barrack, 524 F.2d 891, 901 (9th Cir. 1975) (stating extensive evidentiary showing not required during certification stage, requiring instead only “sufficient” showing); Kahan v. Rosenstiel, 424 F.2d 161, 168 (3d Cir. 1970) (finding alleged facts in plaintiff’s complaint sufficient to illustrate compliance with Rule 23).} For example, the Third Circuit reasoned the “interests of justice” mandate that uncertain cases be decided in favor of certification.\footnote{See Kahan, 424 F.2d at 169 (explaining effectiveness of securities laws hinges upon use of class action device). Despite the Third Circuit’s prior friendliness toward certifying doubtful classes in the context of securities laws, the national tide in this area has shifted against plaintiffs. See Renzo Comolli & Svetlana Starykh, Recent Trends in Securities Class Action Litigation: 2013 Full-Year Review, NERA Econ. Consulting 19 (2014), available at http://www.nera.com/67_8394.htm (explaining recent Supreme Court decisions are likely to decrease certification in securities class actions). The Third Circuit has similarly upheld class certification despite noting serious concerns with the class’s ability to satisfy Rule 23 in an asbestos case. See In re Sch. Asbestos Litig., 789 F.2d 996, 1011 (3d Cir. 1986) (certifying class after recognizing “manageability is a serious concern” and “likelihood that” commonality requirement will not be met).}

The Seventh Circuit brought an end to this plaintiff-friendly standard by attributing a refusal to consider the merits when deciding certification to a misreading of \textit{Eisen}.\footnote{See Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 677 (7th Cir. 2001) (finding plaintiff’s allegations should not be accepted as true during certification stage); see also In re Initial Pub. Offerings, 471 F.3d at 34 (explaining \textit{Eisen}’s statement cautioning against merits inquiries “has sometimes been taken out of context and applied in cases where a merits inquiry either concerns a Rule 23 requirement or overlaps with such a requirement”).} Thereafter, most courts, including the Third Circuit, fully embraced \textit{Falcon}’s rigorous analysis standard and relied on both policy concerns and amendments to Rule 23 to justify this interpretive shift.\footnote{See In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 321 (3d Cir. 2008) (analyzing policy concerns underlying class actions); In re Initial Pub. Offerings, 471 F.3d at 39–40 (discussing significance of amendments to Rule 23 and explaining lower court’s “some showing” standard did not comply with rigorous analysis requirement); Whitbeck, supra note 45, at 493–94 (collecting cases accepting \textit{Falcon}’s rigorous analysis). The Third Circuit in \textit{In re Hydrogen Peroxide} highlighted two Rule 23 amendments justifying its transition to a more stringent certification standard. See \textit{In re Hydrogen Peroxide}, 552 F.3d at 318 (“Support for our analysis is drawn from amendments to Rule 23 that took effect in 2003.”).} Although the Third Circuit previously weighed policy con-
cerns in favor of certification, the court changed its focus to protecting defendants from the coercive effect of certification.\textsuperscript{61} Thus, most courts abandoned the plaintiff-friendly standard in favor of a stringent, rigorous analysis, awaiting Supreme Court review to resolve these inconsistencies.\textsuperscript{62}

c. The Supreme Court Speaks Again

The Supreme Court revisited the scrutiny issue in \textit{Wal-Mart Stores, Inc. v. Dukes}\textsuperscript{63} and approved probing merits inquiries that significantly burden plaintiffs seeking class certification.\textsuperscript{64} Resolving the circuit courts’ fluctuating jurisprudence, the Court dismissed \textit{Eisen}’s prohibition on merits inquiries as the “purest dictum.”\textsuperscript{65} After adopting \textit{Falcon}’s rigorous analysis as the proper standard to determine certification, the Court clarified that

\textit{In re Hydrogen Peroxide}, 552 F.3d at 321 (explaining Rule 23 can no longer be understood to encourage certification in doubtful cases, in contrast to Third Circuit’s previous holdings). Thus, the Third Circuit concluded that these changes require a more careful consideration of the evidence before deciding certification. See id. at 320 (“[A] district court errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the [certification] requirements.”).

\textsuperscript{61} See \textit{In re Hydrogen Peroxide}, 552 F.3d at 310 (recognizing “unwarranted settlement pressure” as factor to consider when deciding certification (quoting Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 250 F.3d 154, 168 n.8 (3d Cir. 2001))).

\textsuperscript{62} See Whitbeck, supra note 45, at 499–500 (explaining inconsistencies regarding requisite level of proof remained even after most circuits followed \textit{Szabo}.

\textsuperscript{63} See Husband & Williams, supra note 45, at 54–55 (arguing \textit{Dukes} “completes an evolution toward a more searching class certification inquiry”); Trask, supra note 12, at 348 (asserting \textit{Dukes} Court’s language forces, as opposed to permits, district courts to conduct probing rigorous analyses); Suzette Malveaux et al., \textit{A Death Blow to Class Action?}, N.Y. TIMES (June 21, 2011, 12:21 PM), http://www.nytimes.com/roomfordebate/2011/06/20/a-death-blow-to-class-action/money matters (presenting various practitioners’ and scholars’ reactions to \textit{Dukes}, with most expressing concern that claimant animus encouraged stricter holding than necessary).

\textsuperscript{65} See \textit{Dukes}, 131 S. Ct. at 2552 n.6 (explaining statement from \textit{Eisen} “is sometimes mistakenly cited to the contrary”); see also Miller, supra note 50, at 65 (positing that before \textit{Dukes}, preliminary merits inquiries to determine class certification were not necessarily inconsistent with \textit{Eisen}). Before the Supreme Court decided \textit{Dukes}, scholars questioned whether \textit{Eisen}’s narrow issue could give rise to a broad prohibition on merits inquiries in deciding the certification question. See Robert G. Bone & David S. Evans, \textit{Class Certification and the Substantive Merits}, 51 Duke L.J. 1251, 1252, 1276 (2002) (asserting merits should be considered during class certification decision because “liberal” \textit{Eisen} standard risks “erroneous certification grants that cannot be corrected”); Bartlett H. McGuire, \textit{The Death Knell for Eisen: Why the Class Action Analysis Should Include an Assessment of the Merits}, 168 F.R.D. 366, 375, 377–78, 380–81 (1996) (arguing \textit{Eisen} dictum precluding merits inquiries was misinterpretation of Rule 23 and chronicling courts’ eventual disregard of \textit{Eisen}).
plaintiffs must show “there are in fact sufficiently numerous parties, common questions of law or fact, etc.”

Equipped with these standards, the Court heightened the proof necessary to establish commonality, crafting a new analysis that could preclude certification. Lower courts continued the trend toward evaluating evidence at the certification stage with magnified scrutiny. Like commonality, numerosity “rarely posed a roadblock to class certification;” however, courts have relied on Dukes to justify increasing the evidence necessary to satisfy this requirement as well. Taken together, these changes indicate that plaintiffs face greater hurdles in certifying their proposed classes, which is partially inconsistent with the impetus to the class action device—providing small-claims plaintiffs with an efficient avenue for recovery.

66. See Dukes, 131 S. Ct. at 2551 (“Frequently that ‘rigorous analysis’ will entail some overlap with the merits of the plaintiff’s underlying claim. That cannot be helped.” (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160 (1982))).

67. See id. at 2550–51 (stating “[t]he crux of this case is commonality” before asserting “[t]hat language is easy to misread, since [a]ny competently crafted class complaint literally raises common questions” (third alteration in original) (quoting Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 131–32 (2009)) (internal quotation marks omitted)). See generally A. Benjamin Spencer, Class Actions, Heightened Commonality, and Declining Access to Justice, 93 B.U. L. Rev. 441, 450 (2013) (chronicling antecedents and evolution of Rule 23 commonality requirement; arguing “the Dukes majority attempts to resurrect concepts that . . . have been long abandoned”). Before Dukes, commonality was considered an easily met requirement. See Klonoff, supra note 15, at 773 (explaining commonality “was rarely an impediment to class certification” before Dukes); Spencer, supra note 67, at 443–45, 463 (describing commonality as “easy to satisfy” with “minimal” necessary showing of evidence prior to Dukes and suggesting “[n]othing in the language or history of Rule 23(a)(2) supports the Dukes majority’s interpretation”).

68. See, e.g., Kottaras v. Whole Foods Mkt., Inc., 281 F.R.D. 16, 22 (D.D.C. 2012) (explaining D.C. Circuit’s previously “low hurdle” required to show compliance with Rule 23 was no longer an accepted method following Dukes); see also M.D. ex rel. Stukenberg v. Perry, 675 F.3d 832, 838 (5th Cir. 2012) (vacating class certification order after finding district court failed to conduct rigorous analysis of commonality required by Dukes).

69. See Klonoff, supra note 15, at 768–69 (chronicling harsher treatment of numerosity requirement in wake of Dukes decision and noting defendants previously stipulated to this requirement); see, e.g., Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 588, 595–96 (3d Cir. 2012) (finding plaintiffs did not satisfy numerosity despite showing half million customers purchased allegedly defective product because number of these customers within geographically defined class was “mere speculation”).

70. See Recent Case, Civil Procedure—Class Actions—Fifth Circuit Holds That District Court Failed to Conduct Rigorous Class Certification Analysis in Light of Wal-Mart Stores, Inc. v. Dukes.—M.D. ex rel. Stukenberg v. Perry, 675 F.3d 832 (5th Cir. 2012), 126 Harv. L. Rev. 1130, 1134 (2013) [hereinafter Rigorous Class Certification] (“[T]he Court rendered it more expensive and difficult for a class to be certified, decreasing the viability of the class action as a vehicle for structural change.”); see also Klonoff, supra note 15, at 745–46 (concluding areas in which federal courts have applied rigorous analysis make it more difficult for plaintiffs to bring viable class actions); Miller, supra note 16, at 321–22 (concluding development of strin-
B. The New Kid in Class: The Implicit Ascertainability Requirement

Independent from the development of the rigorous analysis standard, courts and commentators established another barrier to class certification—the doctrine of ascertainability.71 Rule 23 makes no mention of ascertainability, yet courts have described the requirement as “[going] to the heart of the question of class certification . . . .”72 Nonetheless, the requirement is seldom discussed by scholars and often overlooked by practitioners.73

1. Pop Quiz: Defining Ascertainability

Because ascertainability is not a statutory requirement, courts have not consistently defined the concept.74 Commentators list three key factors to establish an ascertainable class: (1) including members who can be identified using objective criteria; (2) capturing all members necessary to resolve the action in a single proceeding; and (3) describing the main claims and defenses that apply to the class.75 Furnished only with this mal-gent certification requirements “undermin[es] the utility of one of today’s most basic and important joinder mechanisms . . . for handling relatively modest claims”).

71. See, e.g., Alliance to End Repression v. Rochford, 565 F.2d 975, 977 (7th Cir. 1977) (recognizing lack of explicit language in Rule 23 regarding ascertainability but explaining “many courts have held that there is a ‘definiteness’ requirement implied in Rule 23(a)’); see also Jason Steed, On “Ascertainability” as a Bar to Class Certification, 23 APP. ADVOC. 626, 626 (2011) (explaining most courts have acknowledged implicit ascertainability requirement).


73. See Gilles, supra note 25, at 329 (describing article as “first scholarly effort to examine the ascertainability doctrine”); Steed, supra note 71, at 626 (stating many litigators do not know courts have acknowledged ascertainability requirement). For a discussion of ascertainability’s development as a requirement distinct from Rule 23 requirements, see infra notes 79–86 and accompanying text.


75. See, e.g., COMPLEX LITIGATION, supra note 74, § 21.222 (warning of common pitfalls in defining ascertainable class, including defining class using subjective standards such as state of mind or legal conclusions).
leable definition, courts rarely focused their class certification inquiries on ascertainability and never denied certification based solely on an unascertainable class.76 Rather, courts regularly helped plaintiffs revise their class definitions to satisfy the ascertainability requirement.77 Thus, ascertainability continued to develop in uncertain terms and was typically referenced within other explicit Rule 23 requirements.78

2. Ascertainability to the Front of the Class

While a majority of circuit courts have now acknowledged the ascertainability requirement in some context, courts did not initially identify ascertainability as a separate certification requirement.79 The Seventh Circuit first noted the importance of identifying class members, reasoning that courts must be able to both identify the scope of the class to determine whether a class action was the appropriate adjudicative device and ensure only the individuals actually harmed by the defendant’s conduct received compensation.80 Citing the Seventh Circuit’s first concern, some courts evaluated ascertainability within Rule 23’s explicit manageability requirement and explained the difficulty of identifying class members indicated the class action was unmanageable.81 Based on the Seventh

76. See Klonoff, supra note 15, at 762 (acknowledging “few cases turned on the adequacy of the class definition” until 2000); Steed, supra note 71, at 628 (collecting cases recognizing ascertainability, but stating no case has denied certification based solely on unascertainability); 7A CHARLES ALAN WRIGHT ET AL., FED. PRACTICE AND PROCEDURE § 1760 (3d ed. 2011) (“If the general outlines of the membership of the class are determinable at the outset of the litigation, a class will be deemed to exist.” (footnote omitted)).

77. See, e.g., Messner v. Northshore Univ. Healthsystem, 669 F.3d 802, 825 (7th Cir. 2012) (asserting problems with class definition “can and often should be solved by refining the class definition rather than by flatly denying class certification on that basis” (citing Campbell v. First Am. Title Ins. Co., 269 F.R.D. 68, 73–74 (D. Me. 2010) (aiding plaintiff in adjusting class definition rather than denying certification))).

78. See Gilles, supra note 25, at 310–11 (presenting various contexts in which ascertainability issues previously arose); Steed, supra note 71, at 627–28 (assessing whether ascertainability is another hurdle to certification based on variety of definitions and policies courts have addressed when determining ascertainability).

79. See, e.g., Simer v. Rios, 661 F.2d 655, 670 (7th Cir. 1981) (couching discussion of ascertainability in terms of identification); see also Gilles, supra note 25, at 310–11 (introducing early approaches to ascertainability); Steed, supra note 71, at 627 (discussing early cases that analyzed then-unnamed ascertainability requirement).

80. See Simer, 661 F.2d at 670 (describing policies furthered by class member identification without articulating ascertainability requirement); see also DeBremaecker v. Short, 433 F.2d 733, 734 (5th Cir. 1970) (noting difficulties identifying class members).

81. See, e.g., In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 214 F.R.D. 614, 616 (W.D. Wash. 2003) (explaining manageability “encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit” (quoting Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 164 (1974)) (internal quotation marks omitted))); see also Fed. R. Civ. P. 23(b)(3)(D) (asking courts to consider “likely difficulties in managing a class action” before
Circuit’s second concern, other courts encompassed ascertainability within their discussion of predominance and superiority, focusing on the reduced utility of class actions where class members could not be easily identified.\(^{82}\n\nDespite this inconsistent precedent, courts eventually labeled their discussion of class member identification in terms of ascertainability.\(^{83}\n\nEven after courts articulated a discrete ascertainability requirement, it remained unclear whether a lack of ascertainability was sufficient to deny class certification if the class satisfied all other certification requirements.\(^{84}\n\nAlthough courts initially deemed an ascertainable class definition an easily met requirement, courts soon began evaluating ascertainability through a more exacting lens.\(^{85}\n\nIt was not until the Third Circuit denied class certification based solely on the ascertainability requirement that its potential ramifications for consumer class actions became clear.\(^{86}\n
III. THE THIRD CIRCUIT’S LESSON IN CARRERA V. BAYER CORP.

In Carrera, the Third Circuit became the first circuit court to determine ascertainability using the rigorous analysis standard and deny class certification based solely on the plaintiff’s failure to identify an ascertainable class); Carrera v. Bayer Corp., No. 08-4716 (JLL), 2011 WL 5878376, at *3 (D.N.J. Nov. 22, 2011) (couching ascertainability issues in terms of difficulties managing class action).

\(^{82}\) See, e.g., Oshana v. Coca-Cola Co., 472 F.3d 506, 513 (7th Cir. 2006) (raising concerns that unidentifiable class undermines superiority of class action device); see also Fed. R. Civ. P. 23(b)(3) (requiring courts find common issues of law and fact predominate over individual claims and class action is superior to other methods of adjudication).

\(^{83}\) See In re Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 30, 44–45 (2d Cir. 2006) (noting that identifying class members would be significant undertaking and describing ascertainability as issue distinct from predominance); Holmes v. Pension Plan of Bethlehem Steel Corp., 213 F.3d 124, 136 (3d Cir. 2000) (identifying ascertainability as requirement separate from Rule 23).

\(^{84}\) See, e.g., In re Initial Pub. Offerings, 471 F.3d at 45 (explaining problems ascertaining proposed class but denying certification on other grounds without deciding whether ascertainability provides independent basis for denying certification); In re PolyMedica Corp. Sec. Litig., 432 F.3d 1, 19 n.22 (1st Cir. 2005) (acknowledging ascertainability problems but denying certification on other grounds).

\(^{85}\) See Gilles, supra note 25, at 307–08 (suggesting “new barriers have arisen across a variety of contexts where formerly class certification had seemed automatic” (quoting John C. Coffee Jr. & Stefan Paulovic, Class Certification: Developments over the Last Five Years 2002-2007, 8 CLASS ACTION LITIG. REP. (BNA) S-787, at S-787 (Oct. 26, 2007)) (internal quotation marks omitted)); Steed, supra note 71, at 629–30 (highlighting types of class definitions courts have been reluctant to find satisfactory); Beisner, Miller & Schwartz, supra note 72, at 6 (explaining increasing number of cases turning on ascertainability).

\(^{86}\) For an examination of the Third Circuit’s reasoning in heightening the ascertainability requirement, see infra notes 101–24 and accompanying text.
ble class. Although the district court accepted Carrera’s proposed methods for ascertaining class members without addressing their likelihood of success, the Third Circuit found the methods lacking. In so doing, the court demonstrated a marked shift against small-claims consumer class actions.

A. History Class: Factual and Procedural Background

Gabriel Carrera suffered from diabetes and obesity and purchased Bayer’s WeightSmart multivitamin in an attempt to lose weight. Among its many promised health benefits, the WeightSmart packaging and advertisements promised to enhance users’ metabolism with a green tea extract and boost weight loss. After finding the company’s claims were based on unsubstantiated scientific evidence, the Federal Trade Commission forced Bayer to cease its false advertising, thereby causing Bayer to terminate WeightSmart production. Thereafter, Carrera filed suit against Bayer under Florida’s Deceptive and Unfair Trade Practices Act to recover the small sum he expended on WeightSmart. Carrera sought to include all customers who purchased WeightSmart in the state of Florida within the class definition.

The district court began its analysis with the predominance requirement. To challenge predominance, Bayer focused on the difficulties of

87. Compare Steed, supra note 71, at 628 (collecting cases acknowledging ascertainability requirement but noting no circuit court has used ascertainability as “independent basis for denying class certification”), with Carrera v. Bayer Corp., 727 F.3d 300, 312 (3d Cir. 2013) (denying certification when all other certification requirements were satisfied).

88. For a discussion of the district court’s reasoning and holding in Carrera, see infra notes 90–100 and accompanying text. For an analysis of the Third Circuit’s reasoning on appeal, see infra notes 101–24 and accompanying text.

89. For an examination of the policy concerns the Third Circuit expressed in Carrera, see infra notes 105–08 and accompanying text.


91. See id. at *1 (detailing WeightSmart’s promises).

92. See id. (noting Bayer stopped selling WeightSmart in January 2007); FTC Press Release, supra note 5, at 4–5 (summarizing Bayer’s unsubstantiated claims which resulted in $3.2 million civil penalty from FTC and ban on product as advertised).

93. See Carrera, 2011 WL 5878376, at *1 (“Plaintiff characterizes this as a ‘consumer protection case [arising] from the uniform deceptive marketing of WeightSmart . . . .’” (first alteration in original)); see also Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201–501.213 (2013) [hereinafter FDUTPA] (making “deceptive, or unfair acts or practices in the conduct of any trade or commerce” unlawful “[t]o protect the consuming public”).

94. See Carrera, 2011 WL 5878376, at *1 (explaining Carrera’s motion for class certification based on nationwide class of consumers had been previously rejected).

95. See id. at *2 (restating legal standards to assess Rule 23 requirements and noting court began analysis with predominance and superiority because those re-
managing a class action that arose from an unascertainable class. Specifically, Bayer asserted Carrera would be unable to identify class members due to a lack of physical evidence of their WeightSmart purchase in the form of product packaging or receipts.

Although Carrera conceded identifying class members “[would] not be easy,” the district court found the ascertainability hurdles were not insurmountable. Thus, the district court concluded that Carrera satisfied the predominance requirement despite probable manageability complications with ascertainability. Following its predominance analysis, the district court found Carrera’s claim met the numerosity, commonality, typicality, and adequacy requirements and accordingly certified the proposed class.

B. The Third Circuit Takes Roll and Attempts to Ascertain

On appeal to the Third Circuit, Bayer challenged only the class’s ascertainability. The court first addressed its recent holding in Marcus v. requirements are more difficult to meet than numerosity, commonality, typicality, and adequacy (citing Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011); In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320 (3d Cir. 2008)).

96. See id. at *3 (citing FED. R. CIV. P. 23(b)(3)) (synopsizing defendant’s arguments against ascertainability).

97. See id. (“In light of the fact that Bayer stopped selling WeightSmart in January of 2007, a potential class-member would have had to keep such a proof of purchase for many years.”). The defendant argued “purchasers often forget details of minor purchases, such as vitamins.” Id. (discussing defendant’s argument).

98. See id. at *4 (presenting plaintiff’s proposed method to ascertain class members using records from store loyalty cards and online purchases). The district court relied on an Eleventh Circuit case for the proposition that the manageability of a proposed class “will rarely, if ever, be in itself sufficient to prevent certification of a class.” See id. (quoting Klay v. Humana, Inc., 382 F.3d 1241, 1272–73 (11th Cir. 2004)) (internal quotation marks omitted). In Klay, the Eleventh Circuit emphasized that “[c]ourts are generally reluctant to deny class certification based on speculative problems with case management.” Klay, 382 F.3d at 1272–73 (quoting In re Managed Care Litig., 209 F.R.D. 678, 692 (S.D. Fla. 2002)) (internal quotation marks omitted) (discussing typical treatment of speculative problems).

99. See Carrera, 2011 WL 5878376, at *4 (finding plaintiff met predominance requirement and dismissing defendant’s argument that damages would depend on each individual purchaser’s reasons for buying WeightSmart).

100. See id. at *7–9 (evaluating each of Rule 23(a)’s requirements). Although Carrera did not provide an exact number of class members, Bayer did not challenge numerosity. See id. at *7 (finding numerosity satisfied). Further, Carrera’s claim satisfied commonality because the central legal and factual issue would revolve around Bayer’s alleged deceptive practices. See id. (rejecting Bayer’s argument that purchasers’ differing motives for using WeightSmart undermined commonality). The court also rejected Bayer’s argument that Carrera’s health issues diminished typicality because not all class members would suffer from the same issues. See id. at *8 (“[A]ny single plaintiff’s health issues, lifestyle or weight loss, is irrelevant.”). Finally, the parties did not dispute the adequacy requirement. See id. at *9 (granting class certification).

101. See Carrera v. Bayer Corp., 727 F.3d 300, 303 (3d Cir. 2013) (“The sole issue on appeal is whether the class members are ascertainable.”).
BMW of North America, LLC, which was decided after the district court’s opinion in Carrera but before Bayer’s appeal reached the Third Circuit. In Marcus, the court identified ascertainability as a separate, preliminary matter that must be resolved before considering the Rule 23(a) certification requirements.

Although the ascertainability requirement does not appear in Rule 23, the court emphasized three vital objectives that the requirement serves. First, the court reasoned ascertainability “eliminates serious administrative burdens . . . by insisting on the easy identification of class members.” Second, the court explained ascertainability “protects absent class members by facilitating the best notice practicable” to allow members to opt-out of a class. Third, the court emphasized ascertainability protects defendants’ due process rights to challenge individual class membership.

102. 687 F.3d 583 (3d Cir. 2012).
103. See id. at 583 (stating opinion was filed August 7, 2012); see also Carrera, 727 F.3d at 300 (stating case was argued on April 16, 2013); Carrera, 2011 WL 5878376, at *1 (stating district court opinion was filed November 22, 2011).
104. See Marcus, 687 F.3d at 591 (recognizing “preliminary matters” should be considered before turning to explicit requirements of Rule 23).
105. See id. at 591–92 (surveying important role of ascertainability in furthering policy goals of class actions generally).
106. Carrera, 727 F.3d at 305 (quoting Marcus, 687 F.3d at 593) (internal quotation marks omitted) (explaining justifications underpinning ascertainability); see also Brief Amicus Curiae of Public Citizen, Inc. in Support of Petition for Rehearing or Rehearing En Banc at 11–12, Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2013) (No. 12-2621) [hereinafter Brief of Public Citizen, Inc.] (citing MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.66 (2004) (stating “increasing one claimant’s benefits will reduce another’s recovery” and small claims may require “claim forms by oath or affirmation”)), available at http://www.citizen.org/documents/Carrera-v-Bayer-Amicus-Brief-in-Support-of-Petition-for-Rehearing.pdf (arguing concern for efficiently identifying class members is unwarranted without evidence that fraudulent claims harm deserving class members).
107. See Carrera, 727 F.3d at 305–06 (quoting Marcus, 687 F.3d at 593) (internal quotation marks omitted) (summarizing development of ascertainability requirement); see also Brief of Public Citizen, Inc., supra note 106, at 5 (suggesting opt-out rights are “fully honored when notice is ‘reasonably calculated’ to reach the defined class” and best notice requirement costs would outweigh plaintiff’s recovery (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985))).
108. See Carrera, 727 F.3d at 306 (quoting Marcus, 687 F.3d at 593) (concluding discussion of policies underpinning ascertainability requirement); see also Brief of Public Citizen, Inc., supra note 106, at 10 (urging court not to prioritize defendants’ due process rights over plaintiff’s right to recovery). Specifically, Public Citizen’s brief stressed that a heightened ascertainability requirement during the class certification stage “would derail legitimate cases before the court has any idea whether fraud or inaccuracy is likely to be a problem.” See id. But see Brief of the Product Liability Advisory Council as Amicus Curiae in Support of Defendants-Appellants and Reversal of the District Court’s Ruling at 6–7, Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2013) (No. 12-2621), 2012 WL 3144216 [hereinafter Brief of Product Liability Advisory Council] (theorizing that allowing potential class members to prove membership based “on their own say-so” violates defendants’ due process rights because it provides insufficient evidence for individualized challenges).
After repeating the district court’s summary of the applicable legal standards used to assess compliance with Rule 23, the court in Carrera concluded the same standards apply to the question of ascertainability. Therefore, the court synthesized its newly declared standard for ascertainability: “a plaintiff must show, by a preponderance of the evidence, that the class is ‘currently and readily ascertainable based on objective criteria,’ and a trial court must undertake a rigorous analysis of the evidence to determine if the standard is met.” The court then posed the ascertainability question as whether the proposed class members purchased WeightSmart in Florida.

Beginning its assessment of whether Carrera could answer this question, the court further explained that the proposed method for satisfying the ascertainability requirement must be “reliable and administratively feasible.” In recounting the facts, the court highlighted that class members “are unlikely to have documentary proof of purchase, such as packaging or receipts” and that Bayer “has no list of purchasers” because it sold WeightSmart through third parties. To overcome these shortcomings, Carrera offered two potential ascertainability methods: retailer records and purchaser affidavits.

1. Retailer Records

Carrera asserted he could ascertain class members using retailer records of purchases made online or with loyalty cards. While recognizing that retailer records “may be a perfectly acceptable method of proving” ascertainability under certain circumstances, the court found the method inadequate for Carrera’s case. Notably, the court emphasized Carrera’s failure to offer evidence that these records would, in fact, iden-
tify any class members. Additionally, the court questioned whether retailers retained records covering the period while WeightSmart was on the market.

2. Affidavits

The court similarly found purchaser affidavits were a deficient method of ascertainability despite Carrera’s three contentions that the method was reliable and feasible. First, the court summarily dismissed Carrera’s argument that the low potential recovery amount would disincentivize fraudulent claims, explaining the issue is not the likelihood of fraudulent claims but rather the defendant’s ability to challenge class membership using the evidence produced. Second, the court rejected Carrera’s assertion that the number of class members was irrelevant to Bayer’s total liability, reasoning that a class composed of fraudulent purchasers would dilute true class members’ recovery, even if Bayer’s total liability would remain the same.

Finally, Carrera supported his third argument with a consulting firm’s declaration (“Prutsman Declaration”) that assured the firm’s capacity to weed out unmeritorious affidavits. Because the Prutsman Declaration lacked a screening method specific to Carrera’s case, the court reduced the Declaration to an assurance only that Carrera intended to satisfy ascertainability rather than an assurance that Carrera in fact satisfied the requirement. Although the court remanded the case specifically to give Carrera the opportunity to amend the affidavit screening method, the

305, 321 (3d Cir. 2008) (applying rigorous analysis standard and recognizing importance of all evidence in determining whether to certify proposed class).

117. See Carrera, 727 F.3d at 308–09 (stating courts must determine whether retailer records can sufficiently establish ascertainability on case-by-case basis). The court reasoned that Carrera failed to offer any evidence demonstrating that “a single purchaser of WeightSmart could be identified using records of customer membership cards or records of online sales.” See id. at 309.

118. See id. at 308 (implying stores may no longer have records for product removed from market four years prior to suit).

119. See id. at 309 (introducing Carrera’s three arguments in favor of using affidavits).

120. See id. (dismissing first argument as oblivious to “core concern of ascertainability: that a defendant must be able to challenge class membership”).

121. See id. at 310 (dismissing Carrera’s second argument, stating ascertainability protects other class members as well as defendants). Specifically, Carrera sought to diminish the importance of the number of individual class members by arguing Bayer’s liability would be based on its total WeightSmart sales in Florida, irrespective of the number of class members. See id. at 309–10 (explaining Carrera’s contention that Bayer’s $14 million worth of WeightSmart sales marked its maximum liability regardless of class size).

122. See id. at 311 (reciting Prutsman’s assurances “to identify duplicate claims, outliers, and other situations,” and to “[use] fraud prevention techniques” and filters).

123. See id. (concluding Prutsman Declaration failed to show affidavits will be reliable).
court expressed “doubt whether [an amended method] could satisfy the ascertainability requirement.”

IV. THE WRITING ON THE CHALKBOARD: ASCERTAINABILITY MATTERS

As the first circuit court to deny class certification based solely on an unascertainable class and assess the ascertainability requirement using the rigorous analysis standard, the Third Circuit has considerably narrowed the availability of the class action mechanism to small-claims plaintiffs. As a result, practitioners representing class plaintiffs will face a significant hurdle when seeking certification. Alternatively, practitioners defending against class actions now have a new strategy to challenge certification.

A. Plaintiffs’ Attorneys Stay After School to Satisfy Ascertainability

Following Carrera, class plaintiffs face a notable disadvantage when establishing ascertainability within the Third Circuit. Practitioners can no longer put forth methods of ascertaining a class without demonstrating these methods will actually be effective in identifying class members. Thus, policy arguments against the court’s analysis in Carrera may be more effective in redirecting the Third Circuit’s ascertainability analysis.

1. The Third Circuit as Ascertainability Hall Monitor

Although the Third Circuit announced a seemingly bright-line rule to determine whether class members are ascertainable, the Carrera court left unanswered the question of what evidence will sufficiently prove ascertainability. Because rigorous analyses encourage probing merits in

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124. See id. at 311–12 (vacating certification order and remanding to district court to permit modification of Prutsman Declaration).
125. See Gilles, supra note 25, at 329–30 (asserting “many (or even most) small-claims consumer cases are now uncertifiable as class actions” under heightened ascertainability requirement); Klonoff, supra note 15, at 828, 830–31 (commenting on recent holdings that interfere with use of class action device as “powerful remedy for achieving mass justice”).
126. For a discussion of how practitioners can respond to the Third Circuit’s holding, see infra notes 128–50 and accompanying text.
127. For a discussion of how defendants to consumer class actions can take advantage of the Third Circuit’s holding, see infra notes 151–56 and accompanying text.
128. See Gilles, supra note 25, at 305–07 (summarizing heightened ascertainability requirement’s negative implications for small-claims plaintiffs seeking certification).
129. For an analysis of the practical implications of the ascertainability methods rejected in Carrera, see infra notes 131–38 and accompanying text.
130. For a discussion of potential policy arguments against the Third Circuit’s reasoning in Carrera, see infra notes 139–50 and accompanying text.
131. See Carrera v. Bayer Corp., 727 F.3d 300, 308 (3d Cir. 2013) (requiring ascertainability method be “reliable and administratively feasible” to “permit[ ] a defendant to challenge the evidence used to prove class membership”). Although
quiries, the Third Circuit will now require plaintiffs to engage in extensive fact-finding before deeming a class ascertainable.132 Consequently, practitioners should conduct more discovery before moving for class certification rather than delaying discovery until the class has been certified.133 Unfortunately, Third Circuit practitioners lack the guidance necessary to focus their discovery inquiries and will likely face additional expenses before the court decides the motion that could sound the death knell for their case.134

Absent physical proof of purchase, such as receipts or packaging, it is unclear whether consumers will ever be able to satisfy the ascertainability requirement.135 Although the court did not specify under what circumstances, if any, plaintiffs could rely on affidavits, practitioners cannot rely solely on affidavits because the court has twice dismissed them as nothing

the court acknowledged Carrera’s proposed methods of ascertainability may be sufficient under different circumstances, the court did not articulate standards to determine those circumstances. See id. at 308–09 (rejecting use of retailer records in present case without discussing circumstances under which retailer records could be used).

132. See, e.g., id. at 309, 311 (remarking that both of Carrera’s proposed methods of proving ascertainability lacked sufficient detail to show class members could, in fact, be identified using those methods); see also Miller, supra note 16, at 314–15 (indicating heightened certification requirements force plaintiffs to establish aspects of case pretrial).

133. See Klonoff, supra note 15, at 755–56 (stating heightened ascertainability standard requires “significant (or even complete) merits discovery” prior to class certification motion); Rigorous Class Certification, supra note 70, at 1135 (asserting plaintiffs must conduct more discovery to provide necessary factual material for court to decide ascertainability issue, after adoption of heightened standard); Trask, supra note 12, at 352 (suggesting “more demanding requests for discovery from plaintiffs” will result from rigorous analyses).

134. See Klonoff, supra note 15, at 755 (noting recent heightened standards impose higher financial burdens on plaintiffs at certification stage); Rigorous Class Certification, supra note 70, at 1135 (positing that necessity of increased discovery will result in more expensive litigation). As practitioners accept many consumer class actions only on a contingent fee basis, the increased expense associated with collecting sufficient evidence to establish ascertainability may have the larger impact of discouraging contingent fee arrangements or small-stakes consumer actions altogether. See Brian T. Fitzpatrick, Do Class Action Lawyers Make Too Little?, 158 U. Pa. L. Rev. 2043, 2073 (2010) (emphasizing practitioners accepting small-stakes consumer class actions help to further deterrence function of class actions while risking little or no compensation); Rigorous Class Certification, supra note 70, at 1136 (arguing increased costs resulting from heightened certification scrutiny will deter litigation, particularly in context of disadvantaged plaintiffs).

135. See Carrera, 727 F.3d at 304 (stressing “class members are unlikely to have documentary proof of purchase”); Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593–94 (3d Cir. 2012) (expressing doubt as to whether class members were ascertainable based on defendant’s inability to identify customers affected by allegedly defective product); Clavell v. Midland Funding LLC, No. 10-3593, 2011 WL 2462046, at *4 (E.D. Pa. June 21, 2011) (holding ascertainability fails automatically when nothing in defendant company’s databases can identify appropriate class members); see also Gilles, supra note 25, at 312 (“This proof requirement presents daunting problems in most small-claims consumer class actions. Who, after all, has proof that they purchased peanut butter, pineapples, or aspirin?”).
more than “potential class members’ say so.” 136 Relying on defendants’ records has proven an equally uncertain ascertainability method, as courts have been reluctant to accept this method when file-by-file review is necessary, regardless of whether the plaintiff offers evidence that the record can identify class members. 137 With these significant evidentiary limitations, practitioners in the Third Circuit face an uphill battle to establish an ascertainable class. 138

2. Policy Arguments as a Practitioner’s Hall Pass

The Third Circuit’s unwillingness to find an ascertainable class despite a variety of proposed methods may best be explained by a marked shift in policy. 139 In line with the larger trend toward heightening certification requirements, scholars argue that courts devised the ascertainability requirement based on animus toward consumer class actions. 140 Accordingly, policy arguments undermining the Third Circuit’s justifications supporting a rigorous analysis of ascertainability may be more effective than attempting to formulate a viable ascertainability method. 141

136. See, e.g. Carrera, 727 F.3d at 306 (rejecting affidavits as too unreliable to accurately identify class members); Marcus, 687 F.3d at 594 (“[S]imply having potential class members submit affidavits . . . may not be ‘proper or just.’” (quoting Xavier v. Philip Morris USA Inc., 787 F. Supp. 2d 1075, 1089–90 (N.D. Cal. 2011))); see also Brief of Product Liability Advisory Council, supra note 108, at 2 (describing affidavits as “self-serving statements whose veracity [a defendant] would have no ability to challenge”).

137. See Haskins v. First Am. Title Ins. Co., No. 10-5044 (RMB/JS), 2014 WL 294654, at *9 (D.N.J. Jan. 27, 2014) (comparing compiled list of potential class members with necessity of file-by-file review to determine potential class members); see also Marcus, 687 F.3d at 593 (explaining review of defendant’s records would be too cumbersome to satisfy ascertainability requirement).

138. See Gilles, supra note 25, at 329–30 (concluding heightened ascertainability requirements render consumer classes automatically unascertainable); see also Steed, supra note 71, at 630–31 (stating uncertainty surrounding ascertainability requirement requires resolution from circuit courts or Supreme Court).

139. See Miller, supra note 16, at 358 (stating pretrial obstacles to class certification allow defendants to avoid trial on the merits); Olson, supra note 50, at 967 (theorizing recent trend toward rigorous merits inquiries can only be explained by desire to protect corporate defendants from potentially coercive pressure to settle after courts certify classes).

140. See, e.g., Gilles, supra note 25, at 307 (positing ascertainability is “foremost” among judicially crafted means to decertify consumer classes); Mac R. McCoy & D. Matthew Allen, Taming the Kraken: The Supreme Court Weighs in on Class Actions in 2011, 2012-Jan. BUS. L. TODAY 1, 3 (2012) (acknowledging view that developments heightening certification scrutiny “may eventually lead to the demise or significant curtailment of . . . consumer class actions”); Steed, supra note 71, at 630 (recognizing courts can use ascertainability to “raise the bar” of certification); see also Klonoff, supra note 15, at 729 (arguing “courts have cut back sharply on plaintiffs’ ability to bring class action lawsuits”).

141. See Carrera, 727 F.3d at 311 (expressing doubt that Carrera could use any method to satisfy ascertainability requirement); Gilles, supra note 25, at 330 (concluding “ascertainability doctrine either rises or falls on policy grounds”). In fact, policy arguments successfully persuaded the United States District Court for the
First, Third Circuit practitioners should harness the direct conflict between the defendant-centered policies underpinning ascertainability and the plaintiff-centered policies underlying class actions. A heightened ascertainability standard is irreconcilable with both the class action’s core policy of incentivizing small-claims plaintiffs to seek justice as well as the compensation and deterrence functions of the class action mechanism. Rather than promoting recovery of small claims using the class action mechanism, the Third Circuit’s ascertainability standard precludes this compensation by eliminating available methods of ascertainability.

Similarly, the Third Circuit has reduced the class action’s utility in deter-

Southern District of New York to avoid the same outcome as Carrera. See Ebin v. Kangadis Food Inc., No. 13-2311 (JSR), 2014 WL 737960, at *5 (S.D.N.Y. Feb. 25, 2014) (agreeing with plaintiff’s assessment of ascertainability standard as “not demanding” and “designed only to prevent the certification of a class whose membership is truly indeterminable” (quoting Gortat v. Capala Bros., Inc., No. 07-CV-3629 (ILG), 2010 WL 1423018, at *2 (E.D.N.Y. Apr. 9, 2010)) (internal quotation marks omitted)). Despite recognizing “formidable” difficulties with satisfying ascertainability based on the likelihood that consumers discarded the product at issue and any proof of purchase, the court accepted the proposed ascertainability methods of providing a receipt or affidavit. See id. at *4 (finding “possibility that class members will have discarded the product [does not] render the class unascertainable”). Thus, the Ebin court granted certification and explained the ascertainability requirement “should not be made into a device for defeating the action.” See id. at *5. In so holding, the court emphasized that a contrary interpretation of ascertainability “would render class actions against producers almost impossible to bring.” See id. Moreover, a strict ascertainability standard conflicts with the class action device’s “very core” purpose—to address “cases like this where a large number of consumers have been defrauded but no one consumer has suffered an injury sufficiently large as to justify bringing an individual lawsuit.” See id.

A heightened ascertainability requirement was also illustrated by Carrera, 727 F.3d at 311–12 (rejecting all proposed ascertainability methods and implying significant difficulty ascertaining consumer class without physical evidence). See also Gilles, supra note 25, at 330 (arguing heightened ascertainability requirement is inconsistent with “traditional goals of class actions—deterrence and compensation’’); Klonoff, supra note 15, at 735 (“[T]he emergence of myriad cases that cut back the ability to pursue classwide relief represents a troublesome trend that undermines the compensation, deterrence, and efficiency functions of the class action device.”).

See Gilles, supra note 25, at 315 (urging courts to consider, regardless of other concerns, that heightened ascertainability requirement will preclude certification and injured consumers will not receive any compensation). Moreover, the Carrera court forfeited compensating allegedly injured plaintiffs in favor of preventing uninjured plaintiffs from sharing in the recovery. See Carrera, 727 F.3d at 310 (“It is unfair to absent class members if there is a significant likelihood their recovery will be diluted by fraudulent or inaccurate claims.”); Gilles, supra note 25, at 314–15 (arguing compensation of uninjured parties does not affect compensa-
ring misconduct, because defendants now have another means to challenge certification, thereby escaping the potentially unfavorable effects of a large settlement or trial on the merits.\textsuperscript{145}

Moreover, the lack of reasoning supporting the Third Circuit’s decision to apply the same rigorous analysis standard to both explicit and implicit Rule 23 requirements warrants scrutiny.\textsuperscript{146} The explicit requirements sufficiently balance the interests of plaintiffs and defendants in class actions.\textsuperscript{147} These requirements were developed to prevent misuse of the class action mechanism while also ensuring plaintiffs without an alternative adjudicative remedy—due to their small claims—can have their day in court.\textsuperscript{148} Thus, the harsh rigorous analysis standard that courts apply to the explicit Rule 23 requirements renders a rigorous analysis of the implicit ascertainability requirement duplicative.\textsuperscript{149} Therefore, practitioners have strong policy arguments in their arsenal to undercut the Third

\textsuperscript{145} See Gilles, \textit{supra} note 25, at 330 (noting heightened ascertainability conflicts with deterrence function); Thomas Kayes, \textit{An Ounce of Prevention: Early Motions Attacking Class Certification}, 80 DEF. COUNS. J. 164, 174 (2013) (recommending defense counsel move to dismiss class actions based on ascertainability problems); Olson, \textit{supra} note 50, at 967 (explaining rigorous analysis conflicts with deterrence function because resolving merits disputes at certification stage “will only provide a reason to conclude that certification is not appropriate”); see also Miller, \textit{supra} note 16, at 322, 358 (arguing increased risk of noncertification “leaves public policies underenforced and large numbers of citizens uncompensated” by allowing defendants to avoid trials on merits or settle for smaller sums).

\textsuperscript{146} See Carrera, 727 F.3d at 306 (concluding without analysis “same standards apply to the question of ascertainability” as to explicit Rule 23 requirements). Further, the court cited its own precedent for the proposition that “[t]here is no reason to doubt that the rigorous analysis requirement applies with equal force to all Rule 23 requirements,” without considering that ascertainability does not appear in Rule 23. \textit{See id.} (quoting \textit{In re Hydrogen Peroxide Antitrust Litig.}, 552 F.3d 305, 309 n.5 (3d Cir. 2008)) (internal quotation marks omitted).

\textsuperscript{147} See generally Samuel Issacharoff, \textit{Class Action Conflicts}, 30 U.C. DAVIS L. REV. 805, 826 (1997) (describing Rule 23(a) requirements as “primary filter for class actions”).

\textsuperscript{148} See Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011) (explaining Rule 23(a) requirements “effectively limit the class claims to those fairly encompassed by the named plaintiff’s claims” (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982)) (internal quotation marks omitted)); Klonoff, \textit{supra} note 15, at 736, 741 (explaining Rule 23 as “bold and well-intentioned attempt to encourage more frequent use of class actions,” while interlocutory appeal of certification decisions “has served primarily as a device to protect defendants” and was promulgated over strong opposition from plaintiffs’ attorneys (quoting Charles Alan Wright, \textit{Class Actions}, 47 F.R.D. 169, 170 (1970))).

\textsuperscript{149} See Gilles, \textit{supra} note 25, at 317 (questioning purpose served by heightened ascertainability requirement); Klonoff, \textit{supra} note 15, at 746–47 (presenting areas of certification analyses in which courts have applied heightened scrutiny without evaluating effect of \textit{Carrera}).
Circuit’s decision to rigorously analyze the implicit ascertainability requirement.150

B. Defense Attorneys Dismiss Class Early

While plaintiffs’ attorneys face an additional obstacle to class certification following Carrera, defense counsel can now confidently pursue another strategy to challenge certification.151 Defense attorneys seeking to challenge ascertainability should aim to identify an overbroad class definition, which will result from a definition including all users of an allegedly defective product.152 Further, a class definition encompassing legal conclusions defeats ascertainability by deferring the certification decision until after the court has decided the merits of the case.153 Finally, as Bayer’s counsel did in Carrera, defense attorneys can dispute class definitions that would require intensive fact-finding as unascertainable.154 In addition to these three areas, the Third Circuit has broadly recognized defendants’ due process rights in the context of class actions.155 Consequently, defendants can rely on due process rights to exploit any potential weakness

150. For a discussion of effective policy arguments against the Third Circuit’s methodology in Carrera, see supra notes 139–49 and accompanying text. Policy arguments have successfully persuaded the Third Circuit in the past to grant certification despite potential difficulties satisfying Rule 23. See supra notes 57–58, 61 and accompanying text.

151. See Klonoff, supra note 15, at 762–63 (chronicling defense attorneys’ successful challenges to ascertainability); Kayes, supra note 145, at 174, 177 (instructing defense counsel to challenge ascertainability as standard practice); Beisner, Miller & Schwartz, supra note 72, at 6 (recognizing courts’ recent willingness to deny class certification based on ascertainability).

152. See, e.g., Sevidal v. Target Corp., 117 Cal. Rptr. 3d 66, 79 (Ct. App. 2010) (finding consumer class unascertainable based on overbreadth because most proposed class members did not see deceptively advertised claim); see also Steed, supra note 71, at 630 (stating classes including members without standing are overbroad); Beisner, Miller & Schwartz, supra note 72, at 2 (describing overbreadth principle and urging attorneys to challenge such class definitions).

153. See, e.g., Kirts v. Green Bullion Fin. Servs., LLC, No. 10-20312-CIV, 2010 WL 3184382, at *2 (S.D. Fla. Aug. 3, 2010) (rejecting class definition that included language “[a]ll individuals . . . were damaged because [defendant] broke its promised and advertised procedures” as legally conclusive); see also Beisner, Miller & Schwartz, supra note 72, at 5 (detailing court hostility toward definitions including legal conclusions).

154. See Carrera v. Bayer Corp., 727 F.3d 300, 304 (3d Cir. 2013) (citing Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 588, 593 (3d Cir. 2012)) (finding class certification inappropriate where individualized fact-finding would be required to identify members); Steed, supra note 71, at 630 (discussing cases finding classes unascertainable due to subjective criteria); Beisner, Miller & Schwartz, supra note 72, at 5 (identifying classes that would be “administratively burdensome” to define as potential target area for defense attorneys).

155. See Carrera, 727 F.3d at 307 (recognizing defendants’ due process rights to individually challenge class membership based on evidence from plaintiffs).
in the class definition that would preclude them from challenging an individual’s class membership.\textsuperscript{156}

V. Conclusion

Since the inception of ascertainability as a discrete class certification requirement, courts and practitioners have not viewed the requirement as a game changer for class action litigation.\textsuperscript{157} \textit{Carrera} altered the class action landscape by assessing ascertainability using the rigorous analysis standard and denying certification based solely on an unascertainable class.\textsuperscript{158} Defense attorneys have already heralded \textit{Carrera} as a success, and practitioners within the Third Circuit can rely on the court’s reasoning as reflective of a desire to protect defendants’ due process rights or as another means to challenge certification.\textsuperscript{159} On the other hand, the court has deprived consumer classes of their most feasible ascertainability methods.\textsuperscript{160} As a result, the court’s holding narrows the class action mechanism’s availability to consumer classes and conflicts with the mechanism’s purpose of incentivizing small-claims plaintiffs to seek justice.\textsuperscript{161} Thus, practitioners should challenge the conflict between heightened ascertainability require-

\textsuperscript{156} See Third Circuit Rejects Class, supra note 142, at 2 (praising Third Circuit for “appropriately recogniz[ing]” defendants’ due process rights in class actions, which “guarantees a defendant’s right to contest whether an individual is actually part of the putative class”).

\textsuperscript{157} See Steed, supra note 71, at 628 (asserting no circuit has deemed ascertainability “independent basis for denying class certification”). For an examination of the development of the ascertainability requirement, see supra notes 79–86 and accompanying text.

\textsuperscript{158} See Gilles, supra note 25, at 331 (concluding use of “ascertainability filter at the class certification stage is a recipe for making bad law”). For a discussion of the Third Circuit’s reasoning in assessing ascertainability with the rigorous analysis standard, see supra notes 101–24 and accompanying text.

\textsuperscript{159} See Richard A. Ripley & Scott Ewing, Third Circuit Raises the Bar on the Ascertainability Requirement in Class Litigation, HAYNES & BOONE, LLP (Sept. 25, 2013), https://www.haynesboone.com/third-circuit-raises-bar-on-ascertainability/ (explaining \textit{Carrera} decision “could have a profound and sweeping effect on smaller, relatively lower value claims, including many consumer claims”); Kevin Ranlett & Melissa Francis, Third Circuit Rulings Give Teeth to Ascertainability Requirement for Class Certification, MAYER BROWN CLASS DEF. BLOG (Sept. 23, 2013), http://www.classdefenseblog.com/2013/09/23/third-circuit-rulings-give-teeth-to-ascertainability-requirement-for-class-certification/ (recognizing \textit{Carrera} “provide[s] defendants with added ammunition for challenging ascertainability”); Third Circuit Rejects Class, supra note 142 (summarizing ruling as “significant win for manufacturers of consumer products, particularly disposable items (including food) for which consumers do not tend to keep receipts”).

\textsuperscript{160} See Gilles, supra note 25, at 312–13 (contemplating difficulty establishing ascertainability based on proof of purchase without relying on affidavits). For an analysis of the Third Circuit’s rejection of Carrera’s proposed ascertainability methods, see supra notes 115–24 and accompanying text.

\textsuperscript{161} See Ripley & Ewing, supra note 159 (explaining \textit{Carrera} “highlights the growing trend of narrowing the availability of the class mechanism”).
ments and the class action’s core policy.162 Until then, the Third Circuit has effectively sounded the death knell for consumer class actions by defining ascertainability in a way consumer classes will automatically fail to satisfy.163

162. For an analysis of the viable policy arguments against the Third Circuit’s holding, see supra notes 139–50 and accompanying text.

163. See Gilles, supra note 25, at 316–17 (arguing heightened ascertainability requirement undermines compensation and deterrence class action functions, “creating a test that small-claim consumer class actions—almost by definition—cannot meet”).
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WHO’S THE BULLY NOW? THE THIRD CIRCUIT GIVES NEGLIGENT SCHOOL DISTRICTS A CONSTITUTIONAL “HALL PASS” IN MORROW v. BALASKI, LEAVING BULLIED STUDENTS OUT IN THE COLD

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“No one gains from ignoring school bullying—not even the bullies themselves. The students who are bullied may suffer lasting scars in the form of an inferior education, emotional damage, and decreased self-confidence; the bullies are left to continue on a path that may lead to future violence.”1

I. BULLYING 101: AN INTRODUCTORY COURSE

For Brittany Morrow, each day at Blackhawk High School was an inescapable nightmare.2 For over eight months, Brittany was pushed down the stairs, elbowed in the throat, and verbally abused by classmate Shaquana Anderson.3 There was no reprieve when the school day ended; Anderson followed Brittany home, threatened her over the phone, and threatened her on Myspace.4 Despite being adjudicated delinquent and subjected to two no-contact orders, Anderson remained in school and continued to bully Brittany.5 When the Morrow family voiced their concern

3. See id. at 164 (chronicling harassment occurring between January and October of 2008).
4. See id. (explaining after-school harassment occurring on school bus, internet, and at school football game).
5. See id. at 164–65 (discussing court intervention and school response). Anderson was charged with simple assault, making terrorist threats, and harassment for attacking Brittany in the lunchroom on January 7, 2008. See id. at 164 (explaining nature of charges). On April 9, 2008, Anderson was given probation and was ordered not to contact Brittany. See id. (describing Anderson’s initial sentence). In September 2008, Anderson was adjudicated delinquent and another no-contact order was issued. See id. (discussing court order). School officials were furnished

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to school administrators, the school’s response was simple: find a new school for Brittany.  

Unfortunately, Brittany Morrow’s nightmare is a reality for a startling number of students in the United States. According to the National Center for Education Statistics (NCES), approximately twenty-eight percent of students ages twelve to eighteen reported that they were bullied during the 2009 school year. Bullying peaks during the middle school years, with thirty-nine percent of sixth graders, thirty-three percent of seventh graders, and thirty-two percent of eighth graders reporting that they have been bullied. According to a 2011 study conducted by the National Education Association, sixty-two percent of teachers and educational professionals reported having observed at least two incidents of bullying per month, while forty-one percent reported witnessing bullying on a weekly basis.

The statistics are especially alarming in light of empirical evidence illustrating the long-term physical and emotional harm that bullying in-

6. See id. (noting school’s response). In a September meeting, school officials told the Morrows that they “could not guarantee Brittany and [her sister] Emily’s safety.” Id. at 164. Administrators “advised the Morrows to consider another school for their children.” Id. at 165.

7. See Simone Robertson et al., Indicators of School Crime and Safety: 2011, Bureau of Justice Statistics (2012), available at http://www.bjs.gov/content/pub/pdf/iscs11.pdf (analyzing percentage of students who reported being bullied in 2009). Bullying is defined as a series of “negative acts carried out repeatedly over time” that “involves a real or perceived imbalance of power, with the more powerful child or group attacking those who are less powerful.” Nels Ericson, Addressing the Problem of Juvenile Bullying, Nat’l Criminal Justice Reference Serv. 1 (June 2001), https://www.ncjrs.gov/pdffiles1/ojjdp/fs200127.pdf. Bullying can be categorized in “three forms: physical (hitting, kicking, spitting, pushing, taking personal belongings); verbal (taunting, malicious teasing, name calling, making threats); and psychological (spreading rumors, manipulating social relationships, or engaging in social exclusion, extortion, or intimidation).” Id.

8. See Robertson et al., supra note 7, at v (analyzing data collected during 2009 school year). According to the study, nine percent of students reported being pushed, shoved, tripped, or spit on; six percent reported being threatened with harm; and six percent reported having been cyber bullied. See id. (listing most commonly reported forms of bullying).

9. See id. (providing statistics for bullying in middle school). The NCES further reports that approximately twenty-eight percent of ninth graders, twenty-seven percent of tenth graders, twenty-one percent of eleventh graders, and twenty percent of twelfth graders reported being bullied. See id. (providing statistics for bullying in high school).

A 2013 study published in the Journal of the American Medical Association found that victims of bullying exhibit higher rates of agoraphobia, generalized anxiety, panic disorder, and depression throughout their lives. This evidence is in accord with a notable long-term study that found bullying victims demonstrate higher levels of depression and diminished self-esteem in adulthood.

Despite the prevalence of bullying in schools and studies evidencing its detrimental effects, Pennsylvania law severely limits the tort remedies available to victims. Under the Pennsylvania Political Subdivision Tort Claim Act (PPSTCA), school districts and school officials acting in their

11. See Susan M. Swearer, Risk Factors for and Outcomes of Bullying and Victimization, in WHITE HOUSE CONFERENCE ON BULLYING PREVENTION, STOPBULLYING.GOV 5, 7 (Mar. 10, 2011), available at http://www.stopbullying.gov/resources-files/white-house-conference-2011-materials.pdf (analyzing psychological, biological, and academic impact bullying has on its victims). Swearer found that bullying imposes serious biological consequences on its victims, saying “[t]he stress of being bullied has been hypothesized to depress immune functioning and research has found that cortisol moderated the link between being bullied and physical health.” Id. Further, she explained that bullying has a significant psychological impact on its victims, stating that, “[i]ndividuals involved in bullying and victimization have higher levels of depression, anxiety, and externalizing behavior.” Id. (citing Clayton R. Cook et al., Variability in the Prevalence of Bullying and Victimization, in HANDBOOK OF BULLYING IN SCHOOLS: AN INTERNATIONAL PERSPECTIVE 347–62 (Shane R. Jimerson, Susan M. Swearer & Dorothy L. Espelage eds., 2009)).

12. See Recent Case, Fourteenth Amendment—Duty to Protect—Third Circuit Holds That State Has No Duty to Protect Schoolchildren from Bullying Under the Special Relationship or State-Created Danger Exceptions.—Morrow v. Balaski, 719 F.3d 160 (3d Cir. 2013) (en banc), 127 HARV. L. REV. 811, 818 n.76 (2013) [hereinafter Fourteenth Amendment—Duty to Protect] (citing William E. Copeland et al., Adult Psychiatric Outcomes of Bullying and Being Bullied by Peers in Childhood and Adolescence, 70 J. AM. MED. ASSOC. PSYCHIATRY 419, 422 (2013)) (discussing 2013 study finding that bullying victims exhibit higher rates of several psychological disorders in adulthood); see also Laura M. Bogart et al., Peer Victimization in Fifth Grade and Health in Tenth Grade, 133 PEDIATRICS 440, 440–43 (2014), available at http://pediatrics.aappublications.org/content/early/2014/02/11/peds.2013-3510.full.pdf+html (finding bullied students exhibit poor physical and mental health in comparison to non-victimized peers).

13. See Dan Olweus, Bullying or Peer Abuse at School: Facts and Intervention, 4 CURRENT DIRECTIONS IN PSYCHOL. SCI. 196, 197 (1995) (citing Dan Olweus, Victimization by Peers: Antecedents and Long-Term Outcomes, in SOCIAL WITHDRAWAL, HABITUATION, AND SHYNESS IN CHILDHOOD 315–41 (Jens B. Asendorpf & Kenneth H. Rubin eds., 1993)) (“In a follow-up study, I found that the former victims of bullying at school tended to be more depressed and had lower self-esteem at age 23 than their nonvictimized peers.”).

14. See Morrow v. Balaski, 719 F.3d 160, 176–77 (3d Cir. 2013) (en banc) (discussing ramifications of Political Subdivision Tort Claim Act). The majority notes that Pennsylvania schools are immunized from liability for the negligence of their own officials. See id. (“We realize that Pennsylvania’s courts have held that school districts are ‘the beneficiaries of immunity pursuant to the [Political Subdivision Tort Claim] Act’ . . . and are not subject to ‘tort liability . . . when students are injured in the course of the school day, even if, assuming arguendo, there was negligence on the part of the school officials.’” (first and third alterations in original) (citation omitted) (quoting Auerbach v. Council Rock Sch. Dist., 459 A.2d 1376, 1378 (Pa. Commw. Ct. 1983))).
official capacity are immunized from tort liability when an injury occurs in school.\textsuperscript{15} Therefore, bullying victims are currently unable to hold school districts and school employees accountable for their negligence in state court.\textsuperscript{16}

Accordingly, victims are left with two options: bring a tort action against the bully in state court or bring a constitutional action against the school district in federal court.\textsuperscript{17} In order to bring an action against a Pennsylvania school district in federal court, a victim must raise a constit-

\textsuperscript{15} See \textit{42 PA. CONS. STAT. § 8541} (2014) (“Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person.”). The Third Circuit has held that school districts are granted “broad immunity” under the Political Subdivision Tort Claim Act. \textit{See Sanford v. Stiles}, 456 F.3d 298, 315 (3d Cir. 2006) (“Under the PPSTCA, local agencies such as school districts are given broad tort immunity.”). Under the Act, a subdivision may be held liable in eight circumstances:

\begin{itemize}
\item \textsuperscript{1} The operation of a motor vehicle in the possession or control of a local agency;
\item \textsuperscript{2} the care, custody or control of personal property in the possession or control of a local agency;
\item \textsuperscript{3} the care, custody or control of real property;
\item \textsuperscript{4} a dangerous condition created by trees, traffic controls, or street lights;
\item \textsuperscript{5} a dangerous condition of utility service facilities;
\item \textsuperscript{6} a dangerous condition of streets;
\item \textsuperscript{7} a dangerous condition of sidewalks;
\item \textsuperscript{8} the care, custody or control of animals in the possession or control of a local agency.
\end{itemize}

\textit{Id.} at 315 n.18 (citing \textit{42 PA. CONS. STAT. § 8542}). The court in \textit{Sanford} further held that municipal employees are entitled to the same immunity except when an official acts with “actual malice” or “willful misconduct.” \textit{Id.} at 315. The Third Circuit described willful misconduct as a “demanding standard” that requires “conduct whereby the actor desired to bring about the result that followed or at least was aware that it was substantially certain to follow, so that such desire can be implied.” \textit{Id.} (quoting Renk \textit{v. City of Pittsburgh}, 641 A.2d 289, 293 (Pa. 1994)) (internal quotation marks omitted). In \textit{Sanford}, the court found that a school and its guidance counselor were immune from a state law negligence claim when a student committed suicide after a meeting with the guidance counselor. \textit{See id.} (discussing facts and holding).

\textsuperscript{16} See \textit{Morrow}, 719 F.3d at 184 (Smith, J., concurring) (“Pennsylvania, like many other states, has deliberately chosen not to make schools and other local government agencies liable for claims like the Morrows.”); \textit{see also} Auerbach, 459 A.2d at 1378 (holding school district not liable for negligent failure to protect student attacked on campus); Robson \textit{v. Penn Hills Sch. Dist.}, 437 A.2d 1275, 1275–76 (Pa. Commw. Ct. 1981) (holding school district is not liable for injury caused by pencil).

\textsuperscript{17} See \textit{Morrow}, 719 F.3d at 184 (Smith, J., concurring) (“\textit{S}tate law usually provides victims with the ability to sue and recover from bullies who assault, inflict emotional distress on, or commit other torts against fellow students and from the parents whose negligent care allow the bullies to do so.”) \textit{; see also id. at 201–02} (Fuentes, J., dissenting) (“\textit{P}erhaps students may seek redress under other federal statutes for certain instances of pervasive or race-motivated harassment.”); \textit{Condel v. Savo}, 39 A.2d 51, 53 (Pa. 1944) (holding parents may be held “liable for the torts of [their] child” if they had “knowledge . . . of the child’s mischievous and reckless disposition” and “fail[ed] to exercise the control which they have over their child”). Students may also bring a constitutional claim against the school district under \textit{42 U.S.C. § 1983} for a deprivation of a student’s liberty as the Morrow family did in \textit{Morrow}. \textit{See Morrow}, 719 F.3d at 165 (discussing procedural history).
tional claim under 42 U.S.C. § 1983, arguing that the school district deprived the student of due process by restricting the student’s liberty.\textsuperscript{18}

Although the Due Process Clause of the Fourteenth Amendment does not typically confer upon states an affirmative duty to protect individuals from third-party encroachments, the Supreme Court has carved out a narrow exception for “special relationships.”\textsuperscript{19} The Court has held that when the State holds a person against their will and subsequently restricts that person’s ability to care for himself or herself, the State creates a special relationship. Once a special relationship is formed, the State acquires an affirmative duty to protect the individual from the actions of others.\textsuperscript{20}

Additionally, the Third Circuit recognizes an alternative theory of constitutional liability, known as the “state-created danger theory.”\textsuperscript{21} The Third Circuit reasons that the State similarly deprives an individual of due process when it creates or exacerbates the danger to which the person is exposed.\textsuperscript{22}

Recently, in \textit{Morrow v. Balaski},\textsuperscript{23} the Third Circuit considered whether a school district may be held liable under the special relationship and state-created danger theories because it chose to ignore persistent bullying on school grounds.\textsuperscript{24} The Third Circuit narrowly construed the aforementioned theories, holding that, generally, a school district is not subject

\begin{itemize}
\item \textsuperscript{18} See DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs., 489 U.S. 189, 200 (1989) (“In the substantive due process analysis, it is the State’s affirmative act of restraining the individual’s freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the ‘deprivation of liberty’ triggering the protections of the Due Process Clause . . . .”).
\item \textsuperscript{19} See \textit{id.} at 196–97 (excepting general rule that states do not owe affirmative duty to protect individuals from private actors); \textit{see also} Horton v. Flenory, 889 F.2d 454, 458 (3d Cir. 1989) (recognizing special relationship exception in Third Circuit).
\item \textsuperscript{20} See \textit{DeShaney}, 489 U.S. at 199–200 (explaining special relationship exception); \textit{see also} D.R. \textit{ex rel.} I.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1369 (3d Cir. 1992) (en banc) (“However, when the state enters into a special relationship with a particular citizen, it may be held liable for failing to protect him or her from the private actions of third parties.”).
\item \textsuperscript{21} See Kneipp v. Tedder, 95 F.3d 1199, 1201 (3d Cir. 1996) (affirming viability of state-created danger theory in Third Circuit). Although the state-created danger theory is derived from dictum in \textit{DeShaney}, the Third Circuit recognizes it as a separate and alternative theory. \textit{See id.} at 1205 (“In \textit{DeShaney}, the Supreme Court left open the possibility that a constitutional violation might have occurred despite the absence of a special relationship . . . .”); \textit{see also} Morrow, 719 F.3d at 177 (explaining Kneipp).
\item \textsuperscript{22} See Kneipp, 95 F.3d at 1205 (citing \textit{DeShaney}, 489 U.S. at 200) (discussing origins of state-created danger theory); \textit{see also} Morrow, 719 F.3d at 177 (citing Kneipp, 95 F.3d at 1205) (“We confirmed that liability may attach where the state acts to \textit{create} or \textit{enhance} a danger that deprives the plaintiff of his or her Fourteenth Amendment right to substantive due process.”).
\item \textsuperscript{23} 719 F.3d 160 (3d Cir. 2013) (en banc).
\item \textsuperscript{24} \textit{See id.} at 163–66 (discussing nature of plaintiffs’ allegations).
\end{itemize}
to liability under section 1983 for its passive inaction.25 Although the Third Circuit indicated its willingness to consider whether certain schools create special relationships under unique circumstances, its narrow interpretation of the two theories leaves most Pennsylvania bullying victims unable to hold negligent school districts accountable, ultimately providing school administrators with little incentive to act.26

This Casebrief examines the Third Circuit’s evolving interpretation of the special relationship and state-created danger theories through the lens of the court’s recent decision in Morrow. Part II of this Casebrief discusses the development of the aforementioned theories in the Third Circuit.27 Part III examines the Third Circuit’s decision in Morrow, focusing on the court’s reasoning.28 Part IV concludes by assessing the overall impact of Morrow on future bullying cases in the Third Circuit, evaluating the narrow circumstances in which the court may recognize a special relationship and advocating for an amendment to the PPSTCA.29

II. A HISTORY LESSON: DUE PROCESS LIABILITY IN THE THIRD CIRCUIT

This section provides an overview illustrating the gradual development of due process liability in the Third Circuit.30 The first part of this section discusses the special relationship exception, examining its origins as well as the manner in which it has been applied in the Third Circuit.31 The second part of this section considers the development of the Third

25. See id. at 166–79 (rejecting special relationship and state-created danger theories); id. at 196 (Fuentes, J., dissenting) ("[T]he majority narrows the exception to the vanishing point by saying that school officials are free to ignore court orders and their own disciplinary code, enabling a pattern of physical abuse to persist.").

26. See id. at 171 (majority opinion) ("[W]e do not foreclose the possibility of a special relationship arising between a particular school and particular students under certain unique and narrow circumstances."); see also Fourteenth Amendment—Duty to Protect, supra note 12, at 818 (noting that “circuit courts have largely foreclosed constitutional remedies”); John P. Schultz, Morrow v. Balaski, TEMP. L. REV. 3rd CIR. BLOG (June 5, 2013), http://sites.temple.edu/templelawreviewblog/third-circuit-summaries/morrow-v-balaski/ (“[A] victim of bullying in Third Circuit jurisdiction generally may not find recourse against their public school under a special relationship or state created danger theory of constitutional liability.”).

27. For further discussion of the special relationship and state created danger theories, see infra notes 33–57 and accompanying text.

28. For further discussion of Morrow, see infra notes 58–111 and accompanying text.

29. For further discussion of the impact of the Morrow decision, see infra notes 112–48 and accompanying text.

30. For a discussion of due process liability in the Third Circuit, see infra notes 33–57 and accompanying text.

31. For a discussion of the Third Circuit’s approach to the special relationship theory, see infra notes 34–48 and accompanying text.
Circuit’s state-created danger doctrine, paying particular attention to the elements required to state a claim under the theory.\textsuperscript{32} 

\textbf{A. Origins of the Special Relationship Exception} 

In the seminal case \textit{DeShaney v. Winnebago County Department of Social Services},\textsuperscript{33} the Supreme Court reiterated that, generally, the Due Process Clause of the Fourteenth Amendment does not require states to protect citizens from private actors.\textsuperscript{34} In \textit{DeShaney}, the Court held that the Department of Social Services was not bound by an affirmative duty to protect a boy from his abusive father, despite a clear indication that abuse was ongoing.\textsuperscript{35} However, the Court went on to say that the State may acquire an affirmative duty to protect an individual from private actors when it creates a “special relationship” with that individual.\textsuperscript{36} 

The Court emphasized that a special relationship is not created simply because the State knows of a dangerous situation and fails to act, but because the State restrains the person’s freedom to care for himself or herself, depriving the individual of liberty without Due Process.\textsuperscript{37} Although the Court did not find a special relationship in this particular case, 

\textsuperscript{32} For a discussion of the state-created danger theory, see infra notes 49–57 and accompanying text. 

\textsuperscript{33} 489 U.S. 189 (1989). 

\textsuperscript{34} See id. at 196–97 (“[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid . . . . [Therefore] a State’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.”). 

\textsuperscript{35} See id. at 201 (“That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father’s custody, it placed him in no worse position than that in which he would have been had it not acted at all . . . .”). In \textit{DeShaney}, a four-year-old boy was severely and repeatedly beaten by his father. See id. at 191–94 (discussing factual background). Eventually, the boy was taken from his father and placed in the custody of the Winnebago County Department of Social Services (DSS). See id. at 192 (explaining temporary state custody). The boy was ultimately returned to his father’s custody with periodic supervision by DSS. See id. at 192–93 (describing termination of state custody). Several months later, the boy was beaten by his father once again, causing permanent brain damage. See id. at 195 (explaining relevant facts). 

\textsuperscript{36} See id. at 198 (“It is true that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals.”). 

\textsuperscript{37} See id. at 200 (“The affirmative duty to protect arises not from the State’s knowledge of the individual’s predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.”). The Court further reasoned that: 

The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. \textit{Id.} The Court explained that, when the government restrains the individual’s freedom to act “through incarceration, institutionalization, or other similar restraint of
it gave two examples where the State definitively creates a special relationship: when it imprisons someone and when it involuntarily commits someone.38

In 1992, the Third Circuit was first asked to apply the special relationship doctrine to the public school context.39 In D.R. ex rel. L.R. v. Middle Bucks Area Vocational Technical School,40 the plaintiffs argued that compulsory school attendance laws and school authority to discipline children “in loco parentis” combine to create a special relationship with students.41 However, the Third Circuit held that, because parents remain the primary caretakers of their children, public schools do not acquire an affirmative duty to protect students while school is in session.42 The Third Circuit

personal liberty,” it creates the “‘deprivation of liberty’ triggering the protections of the Due Process Clause.” Id.

38. See id. at 198–99 (fitting preceding cases into special relationship framework). The DeShaney Court discussed Estelle v. Gamble, where the Court held that the Eighth Amendment, applied to states via the Due Process Clause, requires states to “provide adequate medical care to incarcerated prisoners.” Id. at 198 (citing Estelle v. Gamble, 429 U.S. 97, 103–04 (1976)). The Court reasoned that, “because the prisoner is unable ‘by reason of the deprivation of his liberty [to] care for himself,’ it is only ‘just’ that the State be required to care for him.” Id. at 199 (alteration in original) (quoting Estelle, 429 U.S. at 103–04). The Court also discussed Youngberg v. Romeo, where it held that the Due Process Clause of the Fourteenth Amendment requires states to protect involuntarily committed mental patients from the actions of other private actors. See id. (citing Youngberg v. Romeo, 457 U.S. 307, 315, 324 (1982)) (discussing special relationship between state and involuntarily committed patients).

39. See D.R. ex rel. L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1370 (3d Cir. 1992) (en banc) (“Thus, the question presented to us is whether compulsory attendance paired with the in loco parentis authority of the school defendants resulted in such an affirmative restraint of D.R.’s liberty by the state that she was left without reasonable means of self-protection . . . .”). The court “consider[ed] this to be an open question” at the time. Id. (considering applicability of special relationship doctrine to school context).

40. 972 F.2d 1364 (3d Cir. 1992) (en banc).

41. See id. at 1370 (“Plaintiffs assert that Pennsylvania’s scheme of compulsory attendance and the school defendants’ exercise of in loco parentis authority over their pupils so restrain school children’s liberty that plaintiffs can be considered to have been in state ‘custody’ during school hours for Fourteenth Amendment purposes.”). Authority granted in loco parentis refers to the idea that school administrators act in the place of parents during the school day. See New Jersey v. T.L.O., 469 U.S. 325, 336 (1985) (“Teachers and school administrators, it is said, act in loco parentis in their dealings with students: their authority is that of the parent, not the State, and is therefore not subject to the limits of the Fourth Amendment.”). In Middle Bucks, two female students brought an action against the school district under section 1983, alleging that the school failed to protect them from other male students who sexually abused them in their graphic arts class. See Middle Bucks, 972 F.2d at 1366 (discussing facts).

42. See Middle Bucks, 972 F.2d at 1372 (“[T]he school defendants did not restrict D.R.’s freedom to the extent that she was prevented from meeting her basic needs.”). The court reasoned, “[e]ven during the school day . . . parents . . . remain a child’s primary caretakers and decisionmakers.” Id.
emphasized that parents provide for students’ basic needs when they return home each day.\textsuperscript{43}

The validity of \textit{Middle Bucks} was later cast into doubt by the Third Circuit’s decision in \textit{Nicini v. Morra}.\textsuperscript{44} In \textit{Nicini}, the court held that the New Jersey Department of Human Services (DHS) entered into a special relationship with an individual who was sexually molested while under the foster care of a family that he independently chose.\textsuperscript{45} There, the plaintiff was in the general, technical custody of the state but was physically residing and being cared for by the abusive foster family.\textsuperscript{46} The Third Circuit held that the state owed an affirmative duty to Nicini because he depended on DHS to meet his basic needs.\textsuperscript{47} Because the court recognized a special relationship when foster parents, rather than the state, acted as Nicini’s primary caregivers, the decision cast doubt upon the underlying reasoning of \textit{Middle Bucks}.\textsuperscript{48}

\textsuperscript{43.} See id. ("The state did nothing to restrict her liberty after school hours and thus did not deny her meaningful access to sources of help.").

\textsuperscript{44.} 212 F.3d 798 (3d Cir. 2000) (en banc); see also Morrow v. Balaski, 719 F.3d 160, 192 (3d Cir. 2013) (en banc) (Fuentes, J., dissenting) ("Nicini thus discredit[s] not just the ‘underlying reasoning’ of Middle Bucks, but also its reading of DeShaney.” (alteration in original) (quoting Citizens United v. Fed. Election Comm’n, 558 U.S. 310, 379 (2010) (Roberts, C.J., concurring))). In \textit{Morrow}, Judge Fuentes argues "Nicini makes clear that physical custody cannot be the lynchpin of a \textit{DeShaney} special relationship because the child there was not under the State’s control at the time the harm occurred." \textit{Id.} Further, Judge Fuentes argues that, at the time the injury occurred, the state was not the “primary caregiver.” \textit{Id.} This contradicts the reasoning underlying \textit{Middle Bucks}, where the court held that schools have no affirmative duty to protect students because parents remain the primary caregiver of students, rather than the state. \textit{See Middle Bucks}, 972 F.2d at 1372 ("Even during the school day . . . parents . . . remain a child’s primary caretakers and decisionmakers.").

\textsuperscript{45.} See \textit{Nicini}, 212 F.3d at 808–09 (holding state sufficiently curtailed Nicini’s liberty, acquiring affirmative duty to protect him).

\textsuperscript{46.} See \textit{id.} at 801–05 (stating facts of case). In \textit{Nicini}, a troubled teenager was kicked out of his home and was ultimately placed in foster care. See \textit{id.} at 801 (explaining original foster placements). Nicini was unsuccessfully assigned to several different foster families until he ran away and began living with Edward and Dolores Morra. See \textit{id.} at 801–02 (explaining how Nicini came to live with Morra family). Nicini asked the Department of Youth and Family Services (DYFS) to appoint the Morras as his foster parents. See \textit{id.} at 802 (explaining unconventional adoption process). Eventually, DYFS and the applicable Family Court judge allowed Nicini to live with the Morras, while still remaining under the “care and supervision” of DYFS. \textit{See id.} at 804. Nicini would later allege that foster parent Edward Morra, a convicted felon in New York, provided him with drugs and sexually assaulted him while under his para-foster care. \textit{See id.} (describing allegations).

\textsuperscript{47.} See \textit{id.} at 808 ("We now hold that when the state places a child in state-regulated foster care, the state has entered into a special relationship with that child which imposes upon it certain affirmative duties."). The court reasoned that foster children, including Nicini, are “substantially ‘dependent upon the state . . . to meet [their] basic needs.’” \textit{Id.} at 808–09 (first alteration in original) (quoting \textit{Middle Bucks}, 972 F.2d at 1372).

\textsuperscript{48.} See \textit{Morrow}, 719 F.3d at 192 (Fuentes, J., dissenting) (arguing that, in \textit{Nicini}, special relationship existed where individual was not in state custody and state was not his primary caregiver). Judge Fuentes argues that "the result and
B. Development of the State-Created Danger Theory

The Third Circuit recognizes an alternative theory of liability under section 1983, known as the state-created danger theory.49 Like the special relationship theory, the state-created danger theory emanates from language in DeShaney.50 In Kneipp v. Tedder,51 the Third Circuit examined dictum in DeShaney and concluded that the Supreme Court intended for an alternative source of liability to exist in the absence of a special relationship.52

In order to properly state a claim under the theory, a plaintiff must allege four essential elements.53 The plaintiff must show: first, that the harm caused by the state was direct and foreseeable; second, that a state official acted in a way that “shocks the conscience;” third, that the state maintained a relationship with the foreseeable victim; and fourth, that the danger was created as a result of the state’s affirmative action.54

reasoning in the foster care cases have thus created ‘tension [with the] public school cases’ because ‘[b]oth involve state constriction of a child’s liberty . . . yet only the former triggers DeShaney custody.’” Id. (alterations in original) (quoting Smith v. District of Columbia, 415 F.3d 86, 96 (D.C. Cir. 2005)).

49. See id. at 177 (majority opinion) (“We confirmed that liability may attach where the state acts to create or enhance a danger that deprives the plaintiff of his or her Fourteenth Amendment right to substantive due process.”); Kneipp v. Tedder, 95 F.3d 1199, 1205 (3d Cir. 1996) (“Until now, we have not, however, been presented with the appropriate factual background to support a finding that state actors created a danger which deprived an individual of her Fourteenth Amendment right to substantive due process.”).

50. See Kneipp, 95 F.3d at 1205 (“[T]he Supreme Court left open the possibility that a constitutional violation might have occurred despite the absence of a special relationship when it stated: ‘[ ] the State may have been aware of the dangers that Joshua faced in the free world, [but] it played no part in their creation, nor . . . render[ed] him any more vulnerable to them.’” (quoting DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs., 489 U.S. 189, 200 (1989))).

51. 95 F.3d 1199 (3d Cir. 1996).

52. See id. at 1205 (“In DeShaney, the Supreme Court left open the possibility that a constitutional violation might have occurred despite the absence of a special relationship . . . .”). In Kneipp, the Third Circuit held the state liable for a section 1983 violation, even though a special relationship did not exist. See id. (“[W]e agree with the district court that the special relationship required by DeShaney did not exist between Samantha and the police officers. We disagree, however, with the holding of the district court insofar as it adds a special relationship requirement to the state-created danger theory.”). The court held that police officers created a severely intoxicated woman’s danger through their affirmative action when the officers stopped her at night, told her to walk home, and told her husband to stop looking for her. See id. at 1208–09 (explaining holding).

53. See Morrow, 719 F.3d at 177 (“To prevail on this theory, the Morrows must prove the following four elements . . . .”); Bright v. Westmoreland Cnty., 443 F.3d 276, 281 (3d Cir. 2006) (“Our case law establishes the following [four] essential elements of a meritorious ‘state-created danger’ claim . . . .”)

54. See Bright, 443 F.3d at 281–83 (describing elements of state-created danger claim). The Third Circuit explained that the first element requires proof that “the harm ultimately caused was foreseeable and fairly direct.” Id. at 281 (quoting Kneipp, 95 F.3d at 1208) (internal quotation marks omitted). The second element requires proof that “a state actor acted with a degree of culpability that shocks the
In *Bright v. Westmoreland County*, the Third Circuit emphasized that a state actor’s failure to use its granted authority does not constitute an affirmative act. Further, in *Middle Bucks*, the court held that a school did not act affirmatively when it failed to stop classroom abuse, neglected to inform parents of abuse, and hired an inadequately trained student teacher.

**III. BECOMING THE BULLY: THE THIRD CIRCUIT HOLDS THAT WILLFUL IGNORANCE TO BULLYING DOES NOT GIVE RISE TO CONSTITUTIONAL LIABILITY IN MORROW v. BALASKI**

In *Morrow*, the Third Circuit was asked to determine whether schools and school administrators may be held liable under the Due Process Clause of the Fourteenth Amendment when they knowingly allow bullying to persist throughout the course of the school day. The court considered the facts set forth below and held that both the special relationship and state-created danger theories did not apply, absolving the Blackhawk School District of liability for its inaction.

**A. A Brief Narrative: Facts of Morrow v. Balaski**

In 2008, Brittany Morrow was a student at Blackhawk High School in Beaver County, Pennsylvania. From January 2008 to October 2008, Brittany was a student at Blackhawk High School in Beaver County, Pennsylvania. From January 2008 to October 2008, Brittany remained student at Blackhawk High School in Beaver County, Pennsylvania.
tany was incessantly bullied by classmate Shaquana Anderson.61 The bullying began on the evening of January 5, 2008, when Anderson threatened Brittany over the phone and on MySpace.62 Anderson’s threats materialized two days later when she attacked Brittany in the school lunchroom.63 Although Brittany was the victim of her bully’s attack, both she and Anderson were given three-day suspensions for the lunchroom incident.64 Brittany’s parents reported the attack to the local police, and Anderson was charged with simple assault, among other crimes.65 Despite police intervention, Anderson continued to bully Brittany.66

After her three-day suspension ended, Anderson attacked again.67 This time, she attempted to throw Brittany down a flight of stairs.68 Throughout the confrontation, Anderson ridiculed Brittany, calling her a “cracker,” labeling her “retarded,” and tauntingly asking her “why [she did not] learn to talk right.”69

Several months later, the court intervened.70 In April 2008, “Anderson was placed on probation” and “ordered to have no contact with Brittany Morrow.”71 In September 2008, Anderson was “adjudicated delinquent” on the simple assault charge and was again ordered to have

Blackhawk High School until October 2008, when her parents enrolled her in another school).

61. See id. (noting conflict began on January 5, 2008, and continued until Brittany left Blackhawk High School in October 2008).
62. See id. at 164 (describing Anderson’s initial threats). The court defined MySpace as “a popular social-networking website that allows its members to create online profiles, which are individual web pages on which members post photographs, videos, and information about their lives and interests.” Id. at 164 n.4 (quoting Doe v. MySpace, Inc., 474 F. Supp. 2d 843, 845 (W.D. Tex. 2007)) (internal quotation marks omitted).
63. See id. at 164 (“Two days later, Anderson physically attacked Brittany in the school’s lunch room.”).
64. See id. (noting both Shaquana Anderson and Brittany Morrow were issued three-day suspensions under school’s “No Tolerance Policy” for lunchroom altercation initiated by Anderson).
65. See id. (discussing police involvement). Anderson was charged with “simple assault, terroristic threats, and harassment.” Id. (listing charges brought against Anderson).
66. See id. (describing post-suspension bullying). Dissenting Judge Fuentes noted that “many” of the attacks occurred after Anderson and Morrow were suspended. See id. at 187 (Fuentes, J., dissenting) (discussing severity of post-suspension bullying).
67. See id. at 164 (majority opinion) (“[S]hortly after she returned to school, Anderson again attacked Brittany . . . .”).
68. See id. (describing second attack).
69. Id. The court further noted that “[d]uring that incident, Anderson allegedly called Brittany a ‘cracker,’ told her that she was ‘retarded’ and ‘had better learn to fight back,’ and asked ‘why don’t you learn to talk right?’” Id.
70. See id. (“On April 9, 2008, Anderson was placed on probation by the Court of Common Pleas of Beaver County, Juvenile Division, and ordered to have no contact with Brittany.”).
71. See id. (describing order of Beaver County Court of Common Pleas).
no contact with Brittany. Although Brittany’s parents provided administrators with both no contact orders, Anderson was allowed to return to school. Three days after being adjudicated delinquent, Shaquana Anderson executed another attack. She began by boarding Brittany’s school bus and again threatened her victim. That evening, Anderson “elbowed Brittany in the throat at a school football game.” Days later, Anderson’s friend Abbey Harris mimicked the act, striking Brittany’s sister Emily in the throat.

After the September attacks, Brittany’s parents again voiced their concerns to school officials. Despite a school policy requiring expulsion for criminal acts committed in school, the administrators told the Morrows that they would not expel Anderson. School officials said that “they could not guarantee Brittany and Emily’s safety” and “advised the Morrows to consider another school for their children.”

Accordingly, the Morrows brought an action in federal court against the Blackhawk School District and Assistant Principal Barry Balaski, under

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72. See Morrow v. Balaski, No. 10-292, 2011 WL 915863, at *2 (W.D. Pa. Mar. 16, 2011) (“On September 9, 2008, Anderson was adjudicated delinquent by a Juvenile Master of the Court of Common Pleas of Beaver County based on the simple assault charge filed by the Chippewa Township Police Department, and was ordered to have no contact, direct or indirect, with Plaintiff Brittany.”), aff’d, 719 F.3d 160 (3d Cir. 2013) (en banc).

73. See Morrow, 719 F.3d at 164 (noting Morrow family provided both no-contact orders to school and Assistant Principal Balaski).

74. See id. (describing events of September 12, 2008); Morrow, 2011 WL 915863, at *2 (stating that Anderson was adjudicated delinquent on September 9, 2008). On September 12, Anderson boarded Brittany’s bus and threatened her again. See Morrow, 719 F.3d at 164 (explaining bus incident).

75. See Morrow, 719 F.3d at 164 (“Anderson boarded Brittany’s school bus, even though that bus did not service Anderson’s home route.”).

76. See id. (“[S]he elbowed Brittany in the throat at a school football game that evening.”).

77. See id. (“A few days later, Abbey Harris, Anderson’s friend, struck Emily [Morrow] in the throat.”).

78. See id. (noting Morrow family met with school officials after September attacks).

79. See id. at 200 (Fuentes, J., dissenting) (discussing school’s response). In his dissent, Judge Fuentes quoted the school disciplinary code which states, in relevant part, that acts deemed “clearly criminal in nature” are classified as Level IV offenses, which require “immediate removal from school.” Id. (quoting Third Amended Complaint at ¶ 16, Morrow v. Balaski, 2011 WL 915863 (W.D. Pa. Mar. 16, 2011) (No. 10-292)) (internal quotation marks omitted). Because Anderson was adjudicated delinquent for simple assault, Judge Fuentes argued that Anderson performed acts that were clearly criminal in nature, requiring, under the school disciplinary code, immediate expulsion. See id. (scrutinizing school’s response).

80. Id. at 164–65 (majority opinion) (describing meeting between school officials and Morrow family).
The Morrows asserted that the Blackhawk School District established a special relationship with Brittany. They argued that compulsory school attendance laws and school disciplinary authority created a quasi-custodial relationship with all students. This relationship became fully custodial, they argued, when the school became aware of the bully’s violent propensity. Alternatively, the Morrows argued that the defendants should be held liable under the state-created danger theory because school administrators exacerbated Brittany’s danger when they disregarded school policy and allowed Anderson to return to school.

However, the United States District Court for the Western District of Pennsylvania dismissed the Morrows’ complaint with prejudice. Citing Third Circuit precedent, the district court held that school districts do not engage students in a special relationship. The family also brought a state law tort claim against Assistant Principal Barry Balaski, however, the United States District Court for the Western District of Pennsylvania “declined to exercise supplemental jurisdiction over the state law claim.”

81. See id. at 165 (“The Morrows thereafter filed this suit pursuant to 42 U.S.C. § 1983, alleging a violation of their Fourteenth Amendment substantive due process rights.”). The family also brought a state law tort claim against Assistant Principal Barry Balaski, however, the United States District Court for the Western District of Pennsylvania “declined to exercise supplemental jurisdiction over the state law claim.”

82. See id. (stating arguments raised by Morrow family).

83. See Brief and Appendix for Appellants at 14–15, Morrow v. Balaski, 719 F.3d 160 (3d Cir. 2013) (en banc) (No. 11-2000), 2011 WL 2687930 (“Students are compelled to attend, and the schools assume the status of parents while the children are in their custody. . . . [This creates a] quasi-custodial relationship that exists in all cases between a public school and its pupils . . . .”).

84. See id. at 15 (stating knowledge of bullying elevates quasi-custodial relationship to special relationship).

85. See id. at 17–19 (arguing school administrators created Brittany Morrow’s danger). The Morrows argued in their brief that the school created Brittany and Emily’s danger

By choosing to permit Anderson to return to school following her expulsion, choosing to permit her to remain in school following her conviction of a crime, allowing her to remain in school despite two court order[s] mandating that she have no contact with the Morrow children, and deciding to ignore the school’s own disciplinary code that defines criminal conduct as an offense always requiring administrative action resulting in the immediate removal from school.

Id. at 18 (third alteration in original) (internal quotation marks omitted).


87. See id. at *6 (citing Sanford v. Stiles, 456 F.3d 298, 304 n.4 (3d Cir. 2006)) (“[N]o special relationship exists between school children and the state because parents decide where to send their children to school, children remain residents of their parents’ home, and children are not physically restrained from leaving school during the school day.”). The district court further held that the school district’s knowledge of the no-contact orders did not elevate the relationship into a special relationship. See id. at *5 (citing Bennett ex. rel. Irvine v. Philadelphia, 499 F.3d 281, 288 (3d Cir. 2007)) (“The Defendants’ awareness of the state court order directed to Anderson does not create an affirmative duty to protect Minor Plaintiffs.”).
demonstrate that school administrators affirmatively created or exacerbated Brittany’s danger. 88 The Morrows subsequently appealed to the Third Circuit. 89

B. Granting a Hall Pass: The Third Circuit Limits School Liability

Although it expressed sympathy for Brittany Morrow and victims of bullying throughout the United States, the Third Circuit held that the failure of a school district to prevent further bullying does not give rise to liability under section 1983. 90 The court held that typical school authority, exercised over students during the school day, does not create a special relationship that confers an affirmative duty to protect students from private actors. 91 Further, the Third Circuit held that passively allowing persistent bullying to continue does not constitute an affirmative act giving rise to liability under the state-created danger theory. 92

1. Nothing Special: Schools Owe No Affirmative Duty to Students

The Third Circuit held that traditional school authority, “without more,” does not create a special relationship between schools and students. 93 The court reasoned that schools are inherently entitled to re-

88. See id. (“Plaintiffs have identified no action of the Defendants that utilized their authority in a way than rendered Minor Plaintiffs more vulnerable than they would have been otherwise.”).
90. See id. at 176–77, 179 (expressing sympathy for Brittany Morrow while declining to extend constitutional remedy). Despite its holding, the Third Circuit expressed concern for bullied students and their families. See id. at 176 (“Parents . . . should be able to send their children off to school with some level of comfort that those children will be safe from bullies such as Anderson and her confederate.”). However, the court held that the special relationship doctrine cannot be contorted to afford a constitutional remedy in the instant case. See id. at 177 (“[W]e cannot fashion a constitutional remedy under the special relationship theory based on the facts alleged in this case.”). Further, the court held that administrators’ abject failure to stop bullying does not give rise to constitutional liability under the state-created danger theory. See id. at 179 (“[M]erely restating the Defendants’ inaction as an affirmative failure to act does not alter the passive nature of the alleged conduct.”).
91. See id. at 170 (“[P]ublic schools, as a general matter, do not have a constitutional duty to protect students from private actors.”). The Third Circuit’s holding pertains to the disciplinary authority granted to all public schools. See id. at 171 (“[T]hat which is inherent in the discretion afforded school administrators as part of the school’s traditional in loco parentis authority or compulsory attendance laws.”).
92. See id. at 179 (“[M]erely restating the Defendants’ inaction as an affirmative failure to act does not alter the passive nature of the alleged conduct.”).
93. See id. at 168–69 (“Although the doctrine of in loco parentis certainly cloaks public schools with some authority over school children, that control, without more, is not analogous to the state’s authority over an incarcerated prisoner or an individual who has been involuntarily committed to a mental facility.” (citation omitted)).
quire uniforms, forbid behavior, monitor student social media activity, and track student movement.\textsuperscript{94} Such authority, the court noted, is “commonly accepted” and does not restrict student liberty to such a degree that a special relationship is forged.\textsuperscript{95}

In essence, the Third Circuit affirmed the validity of its decision in \textit{Middle Bucks}, reasoning that school children are not held in state custody because parents, rather than the state, remain the primary caretakers of their children during the school day.\textsuperscript{96} Recognizing that \textit{Middle Bucks} had been recently cast into doubt, the Third Circuit bolstered its argument by citing to Supreme Court dictum in which the Court declined to suggest that public schools create a custodial relationship with students.\textsuperscript{97}

Unlike \textit{Middle Bucks}, the Third Circuit emphasized that its holding in \textit{Morrow} applies only to the general relationship between public schools and students.\textsuperscript{98} Therefore, the court did not “foreclose the possibility” that a special relationship may arise in “certain unique and narrow circum-

\begin{itemize}
\item \textsuperscript{94.} See id. at 171 (discussing disciplinary authority granted to public school administrators).
\item \textsuperscript{95.} See id. at 171 (“Rather, such commonly accepted authority over student conduct is inherent in the nature of the relationship of public schools and their pupils.”). Because it is commonly accepted, the court held that this “does not suggest a special relationship at all.” \textit{Id.}
\item \textsuperscript{96.} See id. at 173 (“As we explained in \textit{Middle Bucks}, unlike children in foster care, students in public schools continue to be primarily dependent on their parents for their care and protection, not on their school.”). The Third Circuit narrowly distinguished schools from foster care, reasoning that children in foster care are forced to depend on the state in ways that school children do not. See id. (comparing school-student relationship to state-foster child relationship). The court reasoned that, despite compulsory school attendance laws and school authority to act \textit{in loco parentis}, school children may turn to their parents for support at the end of the school day. See id. (discussing role of parents).
\item \textsuperscript{97.} See id. at 169–70 (“[W]e do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional duty to protect.” (alteration in original) (quoting \textit{Vernonia Sch. Dist. 47J} v. \textit{Acton}, 515 U.S. 646, 655 (1995)) (internal quotation marks omitted)). The Third Circuit acknowledged that its holding in \textit{Middle Bucks} had been cast into doubt, citing to Judge Sloviter’s dissent in \textit{Middle Bucks} to illustrate the ongoing debate. See id. (quoting D.R. \textit{ex rel. L.R.} v. \textit{Middle Bucks Area Vocational Technical Sch.}, 972 F.2d 1364, 1372 (3d Cir. 1992) (en banc) (Sloviter, C.J., dissenting) (arguing special relationship exists in schools)). The Third Circuit reasoned that, when it decided \textit{Middle Bucks}, the Supreme Court had yet to consider whether schools forge a special relationship with students. See id. at 169 (“[W]hen we decided \textit{Middle Bucks}, the Supreme Court’s jurisprudence allowed room to debate this issue . . . .”). Ultimately, the Third Circuit held that “it is difficult to imagine a clearer or more forceful indicator of the Court’s own interpretation of \textit{DeShaney} and the special relationship exception recognized there as applied to public schools.” \textit{Id.} at 170.
\item \textsuperscript{98.} \textit{Compare id} at 171 (“In holding that public schools do not generally have a constitutional duty to protect students from private actors . . . we do not foreclose the possibility of a special relationship arising between a particular school and particular students . . . .”), with \textit{Middle Bucks}, 972 F.2d at 1371–73 (holding compulsory school attendance laws and disciplinary authority do not create special relationship between students and schools without discussing potential exceptions).
\end{itemize}
stances." For a special relationship to exist, a school must implement additional restrictive measures that exceed the scope of traditional school disciplinary authority.

In the present case, the Third Circuit held that the relationship between Brittany Morrow and the Blackhawk School District was not unique. The court reasoned that the school’s knowledge of the no-contact orders did not alter the relationship between Brittany and the school. Therefore, Brittany was merely subjected to traditional school authority, which does not confer an affirmative duty to protect students.

2. No Action Is Inaction: The State Did Not Create Brittany Morrow’s Danger

The Third Circuit further held that school districts will not be exposed to liability under the state-created danger theory for passively allowing bullying to persist. The court emphasized that a plaintiff may not redefine “clearly passive inaction as affirmative acts.” Although the court conceded that it is difficult, at times, to differentiate between action

99. Morrow, 719 F.3d at 171.

100. See id. (“[A]ny such circumstances must be so significant as to forge a different kind of relationship between a student and a school than that which is inherent in the discretion afforded school administrators as part of the school’s traditional in loco parentis authority or compulsory attendance laws.”).

101. See id. (applying facts). The Third Circuit held that Blackhawk High School did not restrict Brittany Morrow’s freedom any more than it is entitled to under traditional school authority. See id. (“[T]hese factors do not distinguish the circumstances here from those that arise in the general relationship between public schools and their students.”). Here, the conditions were “not ‘certain narrow’ circumstances at all,” rather “they [were] endemic in the relationship between public schools and their students.” Id.

102. See id. at 173 (“[T]he Defendants’ knowledge—of both the no-contact orders and Anderson’s threats and conduct—may be relevant to determining whether the Defendants’ conduct was sufficiently egregious to violate a previously existing duty to protect the Morrow children, but that knowledge cannot create a duty that did not otherwise exist.”).

103. See id. at 171 (“[T]hose factors do not distinguish the circumstances here from those that arise in the general relationship between public schools and their students.”).

104. See id. at 178–79 (holding decision not to intervene is “passive inaction” rather than affirmative act). The Third Circuit rejected the plaintiffs’ argument that the school acted affirmatively by allowing Anderson to board Brittany Morrow’s bus. See id. at 178 (“[T]he only reasonable interpretation of that allegation is that the Defendants failed to take any affirmative steps to ensure that Anderson did not board the Morrow children’s bus.”). Further, the court rejected the plaintiffs’ argument that deviating from the school disciplinary code constituted an affirmative act. See id. (“[W]e decline to hold that a school’s alleged failure to enforce a disciplinary policy is equivalent to an affirmative act under the circumstances here.”).

105. Id. Here, the court found that “the Morrows’ Complaint simply attempts to redefine clearly passive inaction as affirmative acts.” Id.; see also Sanford v. Stiles, 456 F.3d 298, 312 (5th Cir. 2006) (holding counselor’s failure to prevent student’s suicide did not constitute affirmative act).
and inaction, the Third Circuit ultimately held that a school district’s decision not to intervene constitutes mere inaction.\footnote{106. See Morrow, 719 F.3d at 177–78 (quoting D.R. ex rel. L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1374 (3d Cir. 1992) (en banc)) (explaining difference between action and inaction).}

Considering this distinction, the Third Circuit held that a school’s decision not to fully enforce its disciplinary code is, at its essence, a failure to act rather than an affirmative act.\footnote{107. See id. at 178 (“We decline to hold that a school’s alleged failure to enforce a disciplinary policy is equivalent to an affirmative act under the circumstances here.”).} The court expressed grave concern that schools would be exposed to liability for virtually all administrative decisions if it held school officials liable for their decision not to enforce a policy.\footnote{108. See id. (considering practical effects of plaintiffs’ arguments). The Third Circuit reasoned that, if a school district’s decision to deviate from disciplinary policy constituted an affirmative act, “every decision by school officials... may trigger a duty to protect.” Id. The majority further reasoned that such a holding would create a predicament in which “[a]ny and all failures to act would be transformed into an affirmative exercise of authority.” Id.}

Accordingly, the Third Circuit held that the Blackhawk School District did not expose Brittany and Emily Morrow to more danger by suspending Anderson and allowing her to return.\footnote{109. See id. (“Although the suspension was an affirmative act by school officials, we fail to see how the suspension created a new danger for the Morrow children or ‘rendered [them] more vulnerable to danger than had the state not acted at all.’” (alteration in original) (quoting Bright v. Westmoreland Cnty., 443 F.3d 276, 281 (3d. Cir. 2006))).} Further, the court held that the defendants’ failure to prevent Anderson from boarding Brittany’s bus merely constituted “passive inaction.”\footnote{110. See id. at 178–79. The court explained that “the only reasonable interpretation of that allegation is that the Defendants failed to take any affirmative steps to ensure that Anderson did not board the Morrow children’s bus.” Id. at 178. The court concluded that “the Complaint attempts to morph passive inaction into affirmative acts.” Id. at 178–79.} In sum, the Third Circuit affirmed the district court’s ruling and left the Morrows without a viable remedy against the Blackhawk School District.\footnote{111. See id. at 176 (holding no constitutional remedy exists under facts, as presented).}

\section*{IV. Studying the Current Geography: Critical Analysis—Assessing the Impact of Morrow v. Balaski on Practitioners, Schools, and Bullying Victims}

By holding that, generally, schools do not forge a special relationship with students, the Third Circuit left the majority of Pennsylvania bullying victims unable to hold school districts and school administrators accountable for their neglect.\footnote{112. For a discussion of how Morrow will impact future cases, see infra notes 115–22 and accompanying text.} However, the prognosis is not entirely grim, as the
Third Circuit indicated that it may recognize a special relationship in two particular circumstances, set forth below. Although the Third Circuit may recognize a special relationship in a future case, the Pennsylvania legislature should not wait for the court to take action and should consider amending the PPSTCA in order to provide a remedy to all victims.

A. Taking More than Just Their Lunch Money: Most Pennsylvania Victims Will Be Left Without a Remedy

In *Morrow v. Balaski*, the Third Circuit effectively absolved Pennsylvania school districts of liability in the majority of bullying cases. By holding that a school’s failure to intervene constitutes “passive inaction,” the court seemingly eliminated the possibility that school districts may be held liable for their negligence under the state-created danger theory. Additionally, the Third Circuit drastically limited the number of actions that may be brought under the special relationship theory, asserting that public schools do not typically engage students in a special relationship. Although the Third Circuit would “not foreclose” the possibility

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113. For a discussion of possible exceptions, see *infra* notes 123–40 and accompanying text.

114. For a discussion of recommended future legislative action, see *infra* notes 141–48 and accompanying text.

115. See *Morrow*, 719 F.3d at 171 (“[P]ublic schools do not generally have a constitutional duty to protect students from private actors and ... the allegations here are not sufficient ... Instead, they are endemic in the relationship between public schools and their students.”). The court held that it will only recognize a special relationship between a school and its students when school administrators implement measures that are “so significant” that they exceed the “discretion afforded school administrators as part of the school’s traditional *in loco parentis* authority ...” *Id.* Further, because of the PPSTCA, Pennsylvania public schools are immunized from liability for their negligence under state tort law. See *id.* at 176–77 (acknowledging immunity granted to Pennsylvania school districts). See generally *Fourteenth Amendment—Duty to Protect*, *supra* note 12, at 816 (stating Third Circuit largely foreclosed remedies to bullying victims).

116. See *Morrow*, 719 F.3d at 178 (holding Blackhawk School District’s failure to act was passive inaction rather than affirmative action required to state a state-created danger claim). The Third Circuit rejected the appellant’s argument that a school district’s decision not to act constituted an affirmative choice. See *id.* (“[W]e decline to hold that a school’s alleged failure to enforce a disciplinary policy is equivalent to an affirmative act under the circumstances here.”). In his dissent, Judge Fuentes argues that the majority improperly limited the scope of the state-created danger theory by narrowly construing the affirmative act requirement. See *id.* at 196 (Fuentes, J., dissenting) (“[T]he majority narrows the exception to the vanishing point by saying that school officials are free to ignore court orders and their own disciplinary code, enabling a pattern of physical abuse to persist.”).

117. See *id.* at 171 (majority opinion) (“[P]ublic schools do not generally have a constitutional duty to protect students from private actors ...”). The Third Circuit emphasized that traditional school authority to compel students to attend school and to monitor their behavior during the school day does not restrict liberty so substantially that it creates a special relationship. See *id.* (“[W]e cannot hold that a special relationship arose from compulsory school attendance laws and
that a special relationship may arise under unique circumstances, it emphasized that this will be a rare occurrence. The court explained that it would only recognize a special relationship in “certain narrow circumstances,” where a school takes restrictive measures that are “so significant” that they forge a unique relationship, exceeding the “commonly accepted authority” that schools exercise over students.

The Third Circuit appears willing to include a number of restrictive measures under the guise of “commonly accepted authority.” Specifically, the court reasoned that a school may, in the exercise of its inherent authority, require students to wear uniforms, discipline students for behaving inappropriately, and utilize technology tracking student activity in school and on social media. Therefore, the Third Circuit emphasized that it is unlikely to find a special relationship unless a school employs exceptionally restrictive measures.

B. A Glimmer of Hope: Recognizing Special Relationships on a Case-by-Case Basis

Although the Third Circuit absolved numerous school districts of liability, it suggested that it may recognize a special relationship between a school and its students under unique circumstances. The court highlighted two instances where it may recognize a special relationship in future cases, including: when a school adopts a locked-door policy and when

the concomitant *in loco parentis* authority and discretion that schools necessarily exercise over students . . . .

118. See *id.* (“[W]e do not foreclose the possibility of a special relationship arising between a particular school and particular students under certain unique and narrow circumstances.”).

119. *Id.* (“[A]ny such circumstances must be so significant as to forge a different kind of relationship between a student and a school than that which is inherent in the discretion afforded school administrators as part of the school’s traditional *in loco parentis* authority or compulsory attendance laws.”).

120. See *id.* at 170–71 (describing authority to supervise students during school day).

121. See *id.* at 171 (listing restrictive measures permitted as means of exercising “commonly accepted” authority). The Third Circuit noted that “a school can require uniforms or prescribe certain behavior while students are in school . . . .” *Id.* (citation omitted); *see also id.* (stating some authority to restrict student liberty is “inherent” in relationship between schools and students). Further, the court noted that “technology tracking student movement to ensure they are in class” and technology “monitoring . . . social media activity” are “new precautionary measures some schools have undertaken” that are not “so severely restrictive” that they change the relationship between students and schools. *Id.* at 170.

122. See *id.* at 171 (“[A]ny such circumstances must be so significant as to forge a different kind of relationship between a student and a school than that which is inherent in the discretion afforded school administrators . . . .” (emphasis added)).

123. See *id.* (“In holding that public schools do not generally have a constitutional duty to protect students from private actors . . . . we do not foreclose the possibility of a special relationship arising between a particular school and particular students under certain unique and narrow circumstances.”).
a school houses its students as part of a court-ordered residential program.124

1. Recognizing a Special Relationship in Schools with Locked-Door Policies

The Third Circuit indicated its willingness to consider whether schools with locked-door policies forge a special relationship with students.125 The court noted that “a school’s exercise of authority to lock classrooms in the wake of tragedies such as those that have occurred in Newtown, Connecticut and Columbine [sic], Colorado” could “be a relevant factor in determining whether a special relationship or state-created danger exists in those specific cases.”126 In making this observation, the court suggested that locking classroom doors may change the nature of the relationship between schools and students.127

The Morrow majority cites dissenting Judge Fuentes’s discussion of locked-door policies.128 Judge Fuentes notes that, in response to recent tragedies, public schools across the country lock classroom doors during the school day, as a matter of policy.129 The Pennsylvania House Select

124. See id. at 171, 174 (discussing two instances where special relationship may exist). For a further discussion of locked-door policies, see infra notes 125–33 and accompanying text. For a further discussion of court-ordered residential programs, see infra notes 134–40 and accompanying text.


126. Morrow, 719 F.3d at 170–71 (suggesting locked-door policies may change relationship between schools and students).

127. See id. (“[A] school’s exercise of authority to lock classrooms in the wake of tragedies such as those that have occurred in Newtown, Connecticut and Columbine [sic]. Colorado . . . may be a relevant factor in determining whether a special relationship or a state-created danger exists in those specific cases.” (citation omitted)).

128. See id. at 170 (citing id. at 195–96 (Fuentes, J., dissenting)) (discussing locked-door policies).

129. See id. at 196 (Fuentes, J., dissenting) (examining prevalence of locked-door policies in public schools).
Committee on School Safety has gone so far as to recommend that all Pennsylvania schools should adopt a locked-door policy. Judge Fuentes argues that these policies impose a significant "restriction [on] student movement" that drastically changes the relationship between schools and students.

If the Third Circuit considers such a case, the plaintiff may rely on Judge Fuentes's dissent in Morrow, arguing that locked-door policies impose an additional restriction on student liberty that exceeds the scope of traditional school authority. The plaintiff must demonstrate that locking classroom doors, as a matter of policy, is a restriction that is "so significant as to forge a different kind of relationship between a student and a school . . . ."

2. Recognizing a Special Relationship Between Boarding Schools and Court-Adjudicated Youths

The Third Circuit also indicated that a special relationship may exist between boarding schools and children compelled to attend those schools by court order. The court distinguished Brittany Morrow’s case from that of the plaintiff in Smith v. District of Columbia, where the United States Court of Appeals for the D.C. Circuit held that a special relationship existed between a boarding school and a student compelled to attend that school. The Third Circuit noted that a special relationship existed in Smith because the state “removed the juvenile from the care and custody of his parents” by court order and “required him to live under the care and

131. See Morrow, 719 F.3d at 195–96 (Fuentes, J., dissenting) (“There are now abundant examples of schools exercising greater control over students . . . [including locking classrooms] . . . in the wake of recent tragic school shootings . . . .”). Despite good intentions, locked-door policies also prevent school administrators from regularly observing classroom behavior. See, e.g., Stephen Ceasar & Howard Blume, To Lock Classroom Doors or Not?, L.A. TIMES (Jan. 13, 2013), http://articles.latimes.com/2013/jan/13/local/la-me-school-security-20130114 (discussing Los Angeles elementary school teacher who performed lewd acts on children in his locked classroom).
132. See Morrow, 719 F.3d at 195–96 (Fuentes, J., dissenting) (arguing schools exercise greater authority over children today than they did when court considered traditional school authority in Middle Bucks).
133. Id. at 171 (majority opinion). The court set a difficult standard to meet, stating, “any such circumstances must be so significant as to forge a different kind of relationship between a student and a school than that which is inherent in the discretion afforded school administrators as part of the school’s traditional in loco parentis authority or compulsory attendance laws.” Id.
134. See id. at 174 (comparing typical school setting in Morrow to independent living program in Smith).
135. 413 F.3d 86 (D.C. Cir. 2005).
136. See Morrow, 719 F.3d at 174 (citing Smith, 413 F.3d at 94) (discussing facts of Smith).
custody of the independent living program . . . .”137 The Third Circuit did not disclaim the reasoning of the D.C. Circuit, describing its holding in Smith in a manner consistent with its own reasoning in Nicini.138

In the state of Pennsylvania, several schools operate under a model very similar to the independent living program at issue in Smith.139 Accordingly, if presented with such a case, the Third Circuit may follow its sister circuit and hold that these boarding schools create a special relationship with juveniles compelled to attend the school by court order.140

C. Addition by Subtraction: Amend the PPSTCA to Eliminate Tort Immunity Granted to Schools and School Officials

In Morrow, the Third Circuit acknowledged the dire consequences of pervasive bullying but declined to fashion a constitutional remedy to solve the problem.141 As the court acknowledged, its decision, combined with the broad tort immunity granted by the PPSTCA, ultimately leaves many bullying victims in Pennsylvania unable to hold culpable schools and administrators accountable.142 Considering the long-term psychological, bi-

137. See id. (“The state’s liability arose from the fact that the state, through court order, had removed the juvenile from the care and custody of his parents and required him to live under the care and custody of the independent living program, which was acting as the state’s agent under a very detailed contract between the program and the state.”).

138. Compare Nicini v. Morra, 212 F.3d 798, 808 (3d Cir. 2000) (“A relationship between the state and foster children arises out of the state’s affirmative act in finding the children and placing them with state-approved families.” (quoting D.R. ex rel. L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1370 (3d. Cir. 1992) (en banc)) (internal quotation marks omitted)), with Morrow, 719 F.3d at 174 (“[T]he state, through court order, had removed the juvenile from the care and custody of his parents and required him to live under the care and custody of the independent living program . . . .”). The Third Circuit also recognized that the Smith court relied on the same paragraph in DeShaney that the Third Circuit relied on in Nicini. See id. at 174 (comparing Third Circuit’s reasoning in Nicini to D.C. Circuit’s reasoning in Smith); see also Smith, 413 F.3d at 93 (quoting language from DeShaney); Nicini, 212 F.3d at 807 (quoting same language from DeShaney).


140. See Smith, 413 F.3d at 96–97 (holding independent living program forged special relationship with juvenile compelled to attend school by court order).

141. See Morrow, 719 F.3d at 176–77 (expressing sympathy for Morrow family but holding Constitution does not provide remedy under facts of case).

142. See id. (“[N]either our holding here nor the Supreme Court’s jurisprudence forecloses states from providing public school students and their parents with personally enforceable remedies under state law. [But] [w]e realize that
ological, and educational impact of bullying, the Pennsylvania legislature should amend the PPSTCA to provide victims with an appropriate tort remedy.143

Although victims may still bring an action against the bully, it is essential to hold school districts liable for their inaction in order to effectively change the school environment.144 As Judge Ambro noted in his partial dissent, immunizing schools from liability creates a perverse incentive for administrators to turn a blind eye to persistent bullying.145 Further, Judge Fuentes argued that the court’s decision, coupled with the current statutory scheme, allows administrators to “take shelter under the label ‘inaction’” and “[d]ereliction of duty becomes a school’s best defense.”146 Judge Fuentes also expressed concern that parents and students may even resort to vigilantism if they conclude that school administrators are not actively intervening.147 Therefore, with no constitutional remedy availa-

Pennsylvania’s courts have held that school districts . . . are not subject to tort liability . . . when students are injured in the course of the school day . . . .” (fifth alteration in original) (quoting Auerbach v. Council Rock Sch. Dist., 459 A.2d 1376, 1378 (Pa. Commw. Ct. 1983)).

143. See id. at 177 (“[S]tate legislatures retain the authority to reconsider and change such restrictions in order to better respond to the kind of bullying that happened here and that appears to be all too pervasive in far too many of today’s schools.”). Similarly, Judge Smith suggests in his concurring opinion that Pennsylvania residents may pursue legislative action if they would like to “expose” school districts to liability for their failure to stop bullying. See id. at 183–84 (Smith, J., concurring) (“If the people of Pennsylvania . . . want to expose their schools to greater liability for inaction, or if they desire different solutions to the problem that all on this en banc court agree bullying to be, it is their prerogative to do so.”). For further discussion of the psychological, biological, and educational impact bullying has on its victims, see supra notes 11–13 and accompanying text.

144. See Morrow, 719 F.3d at 185 (Ambro, J., concurring in part, dissenting in part) (theorizing majority may be implicitly encouraging administrative inaction); see also id. at 184 (Smith, J., concurring) (“[S]tate law usually provides victims with the ability to sue and recover from bullies who assault, inflict emotional distress on, or commit other torts against fellow students and from the parents whose negligent care allow the bullies to do so.”).

145. See id. at 185 (Ambro, J., concurring in part, dissenting in part) (“[F]ailing to hold a school accountable for violence done to students creates an incentive for school administrators to pursue inaction when they are uniquely situated to prevent harm to their students.”); see also James Esposito, Recent Case, Morrow v. Balaski: Third Circuit Affirms High Bar for Establishing a “Special Relationship” Between School and Student, Rutgers J.L. & Pub. Pol’y Region in Rev. Blog (Jan. 13, 2014), http://www.rutgerspolicyjournal.org/morrow-v-balaski-third-circuit-affirms-high-bar-establishing-special-relationship-between-school-and ("These cases give school officials legal authority to turn a blind eye to a child being bullied.").

146. Morrow, 719 F.3d at 196 (Fuentes, J., dissenting).

147. See id. at 202 (“To the detriment of schools’ ability to manage their own affairs, concerned parents could seek greater control and awareness over the moment-to-moment safety of their children . . . . Some parents may even take unilateral acts to protect their children.”); see, e.g., Candice Nguyen, Gene Cubbison & R. Stickney, Cops Stop Armed Teen Heading to Confront School Bully, NBC 7 SAN DIEGO (Feb. 4, 2014, 12:54 PM), http://www.nbclosangeles.com/news/local/Student-Po-
ble to most bullied students, the next best option is to heed the majority’s suggestion and amend the PPSTCA.\footnote{148}

V. Conclusion: What Is the Sum of It All?

As Judge Weinstein of the Eastern District of New York stated, “[n]o one gains from ignoring school bullying . . . . Bullying and inappropriate peer harassment in its many forms provides an unacceptable toxic learning environment.”\footnote{149} In \textit{Morrow}, the Third Circuit held that, in most instances, public schools will not be held liable under section 1983 when they choose to ignore persistent bullying.\footnote{150} Although the court indicated its willingness to consider liability in unique and narrow circumstances, the Third Circuit rendered most Pennsylvania victims unable to hold schools responsible.\footnote{151} Therefore, in order to induce schools to stop bullying and to engender a healthy learning environment for all, it is incumbent upon the Pennsylvania legislature to amend the PPSTCA and expose Pennsylvania schools to liability for their passive inaction and willful neglect.\footnote{152}

\footnote{148. \textit{See Morrow}, 719 F.3d at 177 (encouraging Pennsylvania legislature to “reconsider and change” PPSTCA immunity).


150. \textit{See Morrow}, 719 F.3d at 171, 178–79 (holding typical school relationship is non-custodial and passive inaction does not equate to affirmative act).

151. \textit{See id.} at 171 (suggesting court may find a special relationship in unique situation where state restricts student liberty in excess of traditional school authority).

152. \textit{See id.} at 176–77 (encouraging Pennsylvania legislature to amend PPSTCA).}
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BRIGHT “IDEA” OR MISSING THE MARK?: THE THIRD CIRCUIT
RESTRICTS REIMBURSEMENT FOR RESIDENTIAL
PLACEMENT UNDER THE INDIVIDUALS WITH
DISABILITIES EDUCATION ACT

NICOLE PEDI*

“There is no doubt that many children benefit from placements at
exclusive residential facilities . . . . At the same time, many of those
placements . . . cost more than $100,000 per student per year. Given
the stakes, few educational decisions are as significant as whether a
public school district must pay for a private residential placement.”

I. INTRODUCTION: COUNTING THE COSTS OF A FREE EDUCATION

The Individuals with Disabilities Education Act (IDEA) has a clear
goal: to provide handicapped students with the right to an education ca-
tered to their particular needs and disabilities.2 While the goal of the
IDEA is clear, disagreement between parents and school districts over ap-
propriate education services demonstrates the practical complications the
IDEA creates.3 Specific difficulties arise when parents unilaterally pursue

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1. Mark Walsh, Supreme Court Declines Appeal on IDEA Residential Placements,
filed by former United States Solicitor General Neal K. Katyal). Katyal filed a
petition with the United States Supreme Court seeking review of a Tenth Circuit
decision granting reimbursement for unilateral residential placement. See Petition
Roxanne B., 702 F.3d 1227 (10th Cir. 2012) (No. 12-1175), 2013 WL 1247971
[hereinafter Petition for a Writ of Certiorari], cert. denied, 133 S. Ct. 2857 (2013).

2. See Ann K. Wooster, Annotation, What Constitutes Services That Must Be Pro-
vided by Federally Assisted Schools Under the Individuals with Disabilities Education Act
purpose of IDEA, as interpreted by the courts, was to remedy the condition of the
more than half of all handicapped children in the United States who were not
receiving an education appropriate to their needs.”).

3. See Thomas A. Mayes & Perry A. Zirkel, State Educational Agencies and Special
between parents of children with disabilities and school officials regarding the spe-
residential placement to ensure an adequate education for their child. Such challenges surface not only due to the financial hardship that residential tuition places on school districts, but also due to the complexity of students’ disabilities.

Despite multiple references to difficulties interpreting the IDEA and its practical ramifications, the Third Circuit has been credited with defining and clarifying proper remedies under the IDEA. Notably, the Third Circuit has developed the oldest and most popularly adopted test for evaluating the appropriateness of reimbursement for residential placements. Yet, over time, the Third Circuit has reformed its analysis of unilateral residential placements when identifying which placements are entitled to reimbursement. Recently, the Third Circuit narrowed its once permissive approach to residential placement reimbursement in Munir v. Pottsville Area School District, where the court denied reimbursement for the placement of an emotionally disturbed student in a residential facility. The notable decision in Munir is representative of an overarching transformation from the Third Circuit’s once broad treatment of qualifying residential

cial education of children with disabilities are reaching courts with greater frequency.

4. See Ralph D. Mawdsley, Applying the Forest Grove Balancing Test to Parent Reimbursement for Placement in Residential Medical Facilities, 253 Educ. L. Rep. 521, 527 (2010) (“[W]hen parents choose to place their children in residential facilities, the issue of school district reimbursement involves a more complex analysis of educational benefits and medical services under the IDEA.”).

5. See Laura Rothstein & Julia Irzyk, Disabilities and the Law § 2:27 (4th ed. 2013) (“Providing educational services to a student in a residential facility by the public school agency can be logistically problematic.”). Students who require residential placement due to the compilation of educational, physical, and mental disabilities create tremendous difficulties for courts in their efforts to evaluate reimbursement for such placements under the IDEA. See Dixie Snow Huefner, Special Education Residential Placements for Students with Severe Emotional Disturbances: The Implications of Recent Ninth Circuit Cases, 67 Educ. L. Rep. 397, 398 (1991) (designating cases “in which the student is severely emotionally disturbed and placed . . . in a psychiatric treatment center that offers both extensive medical and special education services,” as “[a]mong the most difficult cases” under IDEA).


9. 723 F.3d 425 (5d Cir. 2013).
placements to a more restrictive view of which services qualify for reimbursement.10

This Casebrief discusses the Third Circuit’s preferred analysis of reimbursement requests for residential placements and serves as a guide to practitioners litigating reimbursement disputes.11 Part II of this Casebrief traces the history of the IDEA, from the recognition of educational inequalities requiring legislative action to the present understanding of proper residential placements.12 Part III discusses the Third Circuit’s recent decision in Munir, focusing on the juxtaposition of the Circuit’s broad interpretation of reimbursement entitlement in early cases and the comparatively narrow approach the court employed in Munir.13 Part IV considers implications of the Third Circuit’s departure from its once inclusive methodology, taking into account the goals of the IDEA.14 Finally, Part V provides recommendations for practitioners in light of the court’s decision in Munir.15 Ultimately, this Casebrief highlights the Third Circuit’s abandonment of its original analysis of residential placements in exchange for an alternatively strict standard controlling reimbursement.16

Despite the Third Circuit’s insistence that its holding in Munir is merely a continuation of the court’s usual reimbursement analysis, this Casebrief recognizes the transformation in the Third Circuit’s standard and seeks to

10. See Appellant’s Opening Brief at 50, Jefferson Cnty. Sch. Dist. R-1 v. Elizabeth E. ex rel. Roxanne B., 702 F.3d 1227 (10th Cir. 2012) (No. 11-1334), 2011 WL 4438392 (describing “unmistakable trend among the federal circuits [moving] away from the ‘inextricably intertwined’ test toward the principle that when mental illness . . . requires treatment in and of itself, parents must look to resources other than educators and educational funding”); id. at 33 (referring to Mary T. as evidence that “the Third Circuit itself” has departed from understanding of inextricably intertwined explained in Kruelle (citing Mary T. v. Sch. Dist. of Phila., 575 F.3d 235, 244–46 (3d Cir. 2009))).

11. For a discussion of the Third Circuit’s considerations, see infra notes 100–10 and accompanying text.

12. For a discussion of background on the IDEA and judicial interpretations of reimbursement, see infra notes 18–81 and accompanying text.

13. For a discussion of the evolution of the Third Circuit’s treatment of unilateral residential placements for reimbursement purposes, see infra notes 100–10 and accompanying text.

14. For a discussion of the potential consequences of the Third Circuit’s transformative analysis of residential placement services, see infra notes 111–53 and accompanying text.

15. For a discussion of practitioner suggestions, see infra notes 154–76 and accompanying text. For closing comments, see infra notes 177–82 and accompanying text.

guide practitioners in response to the court’s new reimbursement assessment methodology.17

II. BACKGROUND: A HISTORY LESSON ON THE IDEA AND CIRCUIT COURT ASSESSMENTS

The high stakes in residential placement reimbursement disputes demonstrate the IDEA’s significance in the area of special education law.18 Yet, circuit courts’ inconsistent interpretations of appropriate residential placements under the IDEA force parents to navigate a complicated system when requesting reimbursement.19 This section provides a brief overview of the influences that prompted the IDEA’s creation and traces efforts by circuit courts to incorporate Congress’s goals into varying tests to analyze reimbursement claims.20 In the absence of congruency in the interpretation of services provided under the IDEA, this section also discusses motive for placement, which many courts have incorporated into their reimbursement analyses.21

A. Congress’s Not-So-New “IDEA”

Congress developed the IDEA in 1990, serving as a milestone in efforts to transform educational opportunities for handicapped students.22 The IDEA expresses Congress’s intention “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their

17. For a discussion of the changes in the Third Circuit’s reimbursement analysis and implications of such changes, see infra notes 111–53 and accompanying text.
18. See Walsh, supra note 1 (referring to importance of reimbursement disputes).
19. See Petition for a Writ of Certiorari, supra note 1, at 2–3 (commenting on varying court views on entitlement to reimbursement under IDEA).
20. For a discussion of the tests developed by the Third, Seventh, Fifth, and Tenth Circuits, see infra notes 31–62 and accompanying text.
21. For a discussion of cases considering motive for placement, see infra notes 63–81 and accompanying text.
22. See LaDonna L. Boeckman, Bestowing the Key to Public Education: The Effects of Judicial Determinations of the Individuals with Disabilities Education Act on Disabled and Nondisabled Students, 46 Drake L. Rev. 855, 865 (1998) (tracing history of IDEA’s development). In 1965, Congress enacted the Elementary and Secondary Education Act (ESEA), requiring public school districts to “meet the educational needs of educationally deprived children in economically disadvantaged locations.” See Wooster, supra note 2, § 2[a]. While intended as a response to disabled students’ “total exclusion from the classroom,” the ESEA failed to provide sufficient educational opportunities to disabled children and was subsequently replaced by the Education of the Handicapped Act (EHA) in 1970. See id. As part of amendments to the EHA in 1990, Congress renamed EHA the IDEA and “revamped” the educational program. See id.
unique needs . . . ."23 The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to qualifying children with disabilities.24 To provide a FAPE, school districts must develop an “individualized education program” (IEP) for qualifying students that outlines individualized goals and current academic achievement levels.25 School districts satisfy FAPE obligations by designing an IEP “reasonably calculated” to allow the particular student to receive “meaningful educational benefits in light of the student’s intellectual potential.”26

Under the IDEA, parents who believe that a public school district is not providing a FAPE for their qualifying child may unilaterally place that child in an alternative private school and then seek reimbursement from the school district for the tuition costs.27 Parents are entitled to reim-


24. See id. § 1412(a)(1) (containing FAPE requirement).

25. See id. § 1414(d) (describing school district obligations).


27. See 20 U.S.C. § 1412(a)(10)(C) (regulating payment following unilateral private placement); David S. Doty, A Desperate Grab for Free Rehab: Unilateral Placements Under IDEA for Students with Drug and Alcohol Addictions, 2004 BYU EDUC. & L.J. 249, 253 (2004) (describing development of “basic principles governing tuition reimbursement under IDEA” (citing Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 15 (1993); Sch. Comm. of Town of Burlington, Mass. v. Dep’t of Educ. of Mass., 471 U.S. 359, 370 (1985)))). Doty credits the U.S. Supreme Court’s decision in Burlington with recognizing reimbursement as a possible remedy and formulating the corresponding test for reimbursement entitlement. See id. at 253; see also Burlington, 471 U.S. at 370 (recognizing validity of reimbursement remedies under IDEA: “[W]e are confident that by empowering the court to grant ’appropriate’ relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case.”).

The IDEA’s “broad purpose of providing children with disabilities a FAPE,” combined with the potential lack of adequate public education programs to address a disabled student’s particular needs, have been credited as the reasons behind permitting disabled students to receive a proper private education at the school district’s expense. See Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 238 (2009); see also Carter, 510 U.S. at 12 (noting IDEA enables courts “to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act.” (quoting Burlington, 471 U.S. at 369) (internal quotation marks omitted))). Nonetheless, while the IDEA provides par-
bursement for such alternative private placements only if the student’s public school district failed to provide the child with a FAPE and the new placement is deemed appropriate. In certain instances, parents consider alternative placement in a private residential facility as necessary for their child to obtain educational benefits not otherwise available through public school. Should a court determine that residential placement is necessary to provide a child with an appropriate education, the school district must pay all placement costs, including non-medical care and room and board.

B. Setting the Curve: Competing Circuit Tests to Determine “Appropriate” Residential Placement

While parents are reimbursed for a child’s enrollment in an appropriate alternative placement, complications arise when a residential facility combines both educational and mental health services. Placement in residential facilities is to be at no cost to parents only “if placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.” (quoting 34 C.F.R. § 300.302 (2006)) (internal quotation marks omitted)).

See Petition for a Writ of Certiorari, supra note 1, at 2–3 (“The circuits have struggled for years to delineate the boundaries of school districts’ obligation to provide their students with a free appropriate public education in cases where the child’s mental health needs require the child to be placed in a residential facility.”).
tion and related services . . . .” 32 Still, federal courts of appeals are split regarding the proper test to determine whether a child’s placement is appropriate for reimbursement purposes. 33 As the IDEA explicitly exempts school districts from paying for medical expenses, 34 the proper test used to evaluate residential placements should differentiate between placements that qualify as “special education” or “related service” as opposed to a “medical service.” 35

The Third Circuit developed the “inextricably intertwined test” in Kruelle v. New Castle County School District.36 In Kruelle, the court adopted the view that residential placement may be necessary for educational purposes when the placement is part of a “specially designed instruction to meet the unique needs of a handicapped child.” 37 In holding that a severely handicapped child was entitled to residential placement, the Third Circuit referred to the student’s medical, emotional, and educational needs as inextricably intertwined.38

32. 34 C.F.R. § 300.104 (2006) (listing requirements for reimbursement for residential placement); see also 20 U.S.C. § 1412(10). “Related services” referred to in the IDEA have a broad definition, including “‘medical services’ to the extent that they are for diagnostic and evaluation purposes only.” Mawdsley, supra note 4, at 524 (quoting 20 U.S.C. § 1401(26)(A)).

33. See Mawdsley, supra note 4, at 327 (“Federal courts of appeal, in the absence of direction from the Supreme Court, have designed three separate tests to use in assessing whether parent residential placements can be considered to be appropriate for purposes of reimbursement.”).

34. For a discussion of the categories of services that the IDEA allows reimbursement for, see infra note 35.

35. See, e.g., Clovis, 903 F.2d at 638 (noting need to determine whether student’s placement was “related service” or “medical service” in order to establish whether reimbursement is owed). The IDEA’s definition of “related services” provides an exemption for “medical services,” rendering them not entitled to reimbursement under the IDEA. See 20 U.S.C. § 1401(17). Still, the IDEA also provides no definition of medical services or guidance on how courts should differentiate such medical services from related services. See Clovis, 903 F.2d at 638.

36. 642 F.2d 687 (3d Cir. 1981); see also Huefner, supra note 5, at 398 (discussing “unseverability test” developed in Kruelle).

37. See Kruelle, 642 F.2d at 694 (quoting 20 U.S.C. § 1401(6)) (internal quotation marks omitted) (describing court’s central inquiry).

38. See id. at 687; see also Huefner, supra note 5, at 398 (describing inextricably intertwined test). Huefner points to the court’s opinion in Kruelle as an instance where the court invoked “the unseverability of medical, emotional, and educational needs” in order to justify free residential placement for a student with severe disabilities. See id.

The court’s reimbursement analysis in Kruelle focused only on whether the services the child was receiving in the residential facility satisfied the IDEA’s definition of “special education” services. See Jefferson Cnty. Sch. Dist. R-1 v. Elizabeth E. ex rel. Roxanne B., 702 F.3d 1227, 1237 (10th Cir. 2012), cert. denied, 133 S. Ct. 2857 (2013). The court did not alternatively analyze whether the services would fit under the category of “related services,” for which the IDEA also entitles reimbursement. See id. (addressing Kruelle court’s silence “as to the scope of the term ‘related services’”). Nevertheless, in subsequent cases considering whether to adopt the test developed in Kruelle, courts often “conflate the two statutory provisions.” See id. (citing Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286, 298
In Kruelle, the court considered the appropriateness of residential placement for Paul Kruelle, a thirteen-year-old suffering from cerebral palsy and extreme physical, mental, and emotional inflictions. While the school district alleged that Paul's residential placement was necessary "for reasons of medical and domiciliary care, not for educational purposes," the court recognized that the reach of educational instruction is "necessarily broad" to effectively address the specialized needs of severely handicapped children like Paul. Therefore, when a student's medical and educational needs cannot be segregated, residential placement is appropriate, even when non-academic services are necessary.

39. See Kruelle, 642 F.2d at 688–89 (describing Paul's emotional and physical problems). The court described Paul as "profoundly retarded" with "the social skills of a six month old child" and an I.Q. "well below thirty." Id. at 688. Paul is unable to walk, dress, or eat without the assistance of an aid, is not toilet trained, does not speak, and has an "extremely low" "receptive communication" level. See id. at 688–89. Further, Paul has a "history of emotional problems" which lead to "choking and self-induced vomiting when experiencing stress." Id. at 689 (internal quotation marks omitted).

40. See id. at 693; see also Vander Malle v. Ambach, 667 F. Supp. 1015, 1038 (S.D.N.Y. 1987) ("Because Congress intended to provide education for all children 'regardless of the severity of their handicaps,' education within the meaning of the Act must necessarily be broadly interpreted." (citation omitted) (quoting 20 U.S.C. § 1412(2)(C))). The Third Circuit based its creation of the inextricably intertwined test on its understanding of Congress's intentions when passing the IDEA. See Kruelle, 642 F.2d at 690–91 (discussing reasons behind IDEA's passage). Specifically, the court noted that Congress recognized the "broad range of special needs presented by [children with disabilities], the lack of agreement within the medical and educational professions on what constitutes an appropriate education, and the tradition of state and local control over educational matters . . . ." Id. at 691.

41. See Huefner, supra note 5, at 398 (commenting on court's interpretation in Kruelle). Huefner explained the court's understanding that "[f]or some, the need for extensive special education and related services is inextricably intertwined with their physical and mental health needs, with the latter needs contributing heavily to the educational needs." Id. The court's holding suggested a distinction between cases where a student's special education and health needs are inextricably intertwined, versus those cases where medical issues are severable from educational needs. See Kruelle, 642 F.2d at 695. In the former case, the provision of mental or physical health treatment is necessary for particular students to experience any educational benefit. See, e.g., Jefferson Cnty. Bd. of Educ. v. Breen, 853 F.2d 853 (11th Cir. 1988) (ordering reimbursement for placement in residential facility that provided both psychiatric and educational services); Clevenger v. Oak Ridge Sch. Bd., 744 F.2d 514 (6th Cir. 1984) (same); B.G. ex rel. F.G. v. Cranford Bd. of Educ., 702 F. Supp. 1140 (D.N.J. 1988), supplemented, 702 F. Supp. 1158 (D.N.J. 1988) (same); Papacoda v. Connecticut, 528 F. Supp. 68 (D. Conn. 1981) (same). Alternatively, in "severable" cases, the disabled students at hand are capable of receiving special educational benefits through the provision of academic services in a non-residential setting. See Huefner, supra note 5, at 398. While the student's particular disabilities may also require separate medical residential treatment for emotional, behavioral, mental, or physical problems, such issues are considered secondary to educational needs. See, e.g., Burke Cnty. Bd. of Educ. v. Denton ex rel. Denton, 895 F.2d 973 (4th Cir. 1990) (denying reimburse-
Ultimately, the \textit{Kruelle} court found Paul’s “social, emotional, medical and educational problems to be so intertwined ‘that realistically it is not possible for the court to perform the Solomon-like task of separating them.’”\textsuperscript{42} Thus, Paul’s combination of emotional, mental, educational, and physical issues manifested the need for a residential setting to provide the consistency and structure necessary for any level of learning.\textsuperscript{43} Although Paul’s residential services would include non-educational treatment in light of his medical needs, the court held that such services are still covered under the IDEA, noting “[w]here basic self-help and social skills such as toilet training, dressing, feeding and communication are lacking, formal education begins at that point.”\textsuperscript{44}

In \textit{Dale M. ex rel. Alice M v. Board of Education of Bradley–Bourbonnais High School District No. 307},\textsuperscript{45} the Seventh Circuit rejected the Third Circuit’s inextricably intertwined test, instead choosing to evaluate the appropriateness of residential placements based on the primary purpose of the placement.\textsuperscript{46} Concerned that the inextricably intertwined test would lead to overly inclusive coverage under the IDEA, the majority in \textit{Dale M.} instead held that a residential facility is appropriate for placement only when it is considered “primarily educational.”\textsuperscript{47} Unlike the Third Circuit’s broad definition of “support services,” the Seventh Circuit’s “primary mission for residential placement due to severability of emotional and educational needs); Cain v. Yukon Pub. Schs., Dist. I-27, 775 F.2d 15 (10th Cir. 1985) (same); Matthews \textit{ex rel. Matthews v. Davis}, 742 F.2d 825 (4th Cir. 1984) (same); Hall \textit{ex rel. Allread v. Freeman}, 700 F. Supp. 1106 (N.D. Ga. 1987) (same); Garrick B. \textit{ex rel. Gary B. v. Curwensville Area Sch. Dist.}, 669 F. Supp. 705 (M.D. Pa. 1987) (same); Ahern v. Keene, 593 F. Supp. 902 (D. Del. 1984) (same).

42. \textit{Kruelle}, 642 F.2d at 694 (quoting North. v. D.C. Bd. of Educ., 471 F. Supp. 136, 141 (D.D.C. 1979)). The \textit{Kruelle} court drew from past cases that “actually collapsed the distinction by declaring the impossibility of separating emotional and educational needs in complex cases,” and applied similar logic to the case at hand. \textit{See id.} at 693 (citing \textit{North}, 471 F. Supp. at 141); \textit{see also} Huefner, supra note 5, at 398 (describing “the now well accepted view” developed in \textit{North} and \textit{Kruelle} that emotional and behavioral goals must sometimes accompany academic goals in effort to achieve overarching educational progress).

43. \textit{See Kruelle}, 642 F.2d at 694. (“[H]ere, consistency of programming and environment is critical to Paul’s ability to learn, for the absence of a structured environment contributes to Paul’s choking and vomiting which, in turn, interferes fundamentally with his ability to learn.”).

44. \textit{See id.} at 693 (quoting \textit{Battle v. Pennsylvania}, 629 F.2d 269, 275 (3d Cir. 1980)) (internal quotation marks omitted).

45. 237 F.3d 813 (7th Cir. 2001).

46. \textit{See ABA, Case Law Development}, 25 \textit{Mental \& Physical Disability L. Rep.} 207, 211 (2001) (discussing Seventh Circuit’s substitution of \textit{Kruelle} test for “very different formulation” which denies reimbursement if “the support services are not aimed at a problem that is ‘primarily educational’”).

47. \textit{See Dale M.}, 237 F.3d at 817; \textit{see also} Mawdsley, supra note 4, at 529 (“[W]here a student’s problems are not primarily educational so that they can be said to interfere with the acquisition of an education, a school district has no obligation to provide, and thus no obligation to reimburse parents for, a placement whose sole function is to keep a student out of jail.”). The Seventh Circuit’s test provides that reimbursement for placement in a residential setting merely for
rily oriented” test significantly restricts the reach of reimbursement for “related services” under the IDEA. While the Third Circuit’s inextricably intertwined test enables courts to consider how the combination of all services in a residential facility will impact a child’s overall ability to learn, the Seventh Circuit’s primarily oriented test alternatively restricts courts’ focus to only those services directly educational in nature.

In Richardson Independent School District v. Michael Z., the Fifth Circuit also rejected the Third Circuit’s inextricably intertwined test and developed an alternative test to assess residential placement for reimbursement purposes. The test consists of two parts: 1) the placement must be “essential in order for the disabled child to receive a meaningful educational benefit”; and 2) the placement must be “primarily oriented toward enabling a disabled child to obtain an education and services oriented more toward enabling the child to engage in noneducational activities.”

In Dale M., the court examined whether the placement of Dale, who suffered from severe behavioral issues, depression, and substance abuse problems, entitled his mother to reimbursement for tuition costs. While Dale was enrolled in a “therapeutic day school” for “disruptive and truant students,” where he was placed by the school district, he barely attended school and was subsequently hospitalized for depression, arrested for burglary and theft, and diagnosed with a conduct disorder. Against the recommendation of the school district to re-enroll Dale in the therapeutic day school, Dale’s mother instead enrolled Dale in The Elan School. The majority commented that “Dale’s problems are not primarily educational.” Drawing on Dale’s lack of cognitive issues and his general intelligence, the court held that “proper socialization” was actually the problem that Dale’s placement was used to address.

48. See Dale M., 237 F.3d at 817 (elaborating on primarily oriented test). The majority described a distinction “between services primarily oriented toward enabling a disabled child to obtain an education and services oriented more toward enabling the child to engage in noneducational activities.” Only the former category qualifies as “related services” deserving of reimbursement. See id. (describing school districts’ limited liability under IDEA). In his dissent, Circuit Court Judge Ripple criticized the majority in Dale M. for rejecting the interpretation of appropriate residential placement developed in Kruelle and adopted by a majority of courts. See id. at 818 (Ripple, J., dissenting) (“[T]he majority not only dooms Dale M.’s case but also sets this circuit on a course different from that of all the courts that have interpreted this provision.”). Judge Ripple explained that the majority’s new test failed to recognize Congress’s intention to provide for the varied, and sometimes broad, nature of services relating to education. See id. (“Every circuit that has addressed the question has held that the Congressional mandate requires the provision of a support service that is ‘a necessary predicate for learning,’ and not ‘segregable from the learning process.’” (citations omitted) (quoting Kruelle, 642 F.2d at 693)).

49. See Mawdsley, supra note 4, at 534 (“While the Kruelle test permits a court to consider all of the services in a residential medical facility in their total connection with a disabled student’s education, Dale M. limits the balancing test only to those services that directly affect educational benefits.”); see also Dale M., 237 F.3d at 818 (Ripple, J., dissenting) (“That the difference between the panel majority’s formulation and that of our sister circuits is not just one of semantics but a chasm of substance is made starkly clear by the analysis of the Third Circuit in Kruelle.”).

50. 580 F.3d 286 (5th Cir. 2009).

51. See id. at 299 (describing Fifth Circuit’s formulation of new alternative test).
bling the child to obtain an education.”

This test, incorporating “amalgamated elements of Kruelle and Dale M.” is a “very restrictive test” for analyzing residential placements. When practically applied, the test reduces parents’ opportunities to obtain reimbursement for unilateral residential placements. Similar to the Seventh Circuit’s treatment of the Kruelle test in Dale M., the Fifth Circuit rejected the inextricably intertwined standard based on concerns regarding its overly inclusive results.

52. See id. (enumerating Fifth Circuit’s test for reimbursement). The court differentiated its test from the Third Circuit’s test. See id. at 300 (“Unlike Kruelle, this test does not make the reimbursement determination contingent on a court’s ability to conduct the arguably impossible task of segregating a child’s medical, social, emotional, and educational problems.”). The first prong of the test eliminates a school district’s duty to pay for residential placement if the student in question would be able “to receive an educational benefit without the residential placement.” See id. The second prong incorporates the test articulated by the Seventh Circuit in Dale M., “asking whether the particular treatments that the private facility provided were primarily oriented towards enabling the child to receive a meaningful educational benefit.” Id.

53. Mawdsley, supra note 4, at 527; see also id. at 527–31 (comparing tests developed by Third, Seventh, and Fifth Circuits).

54. See Ralph D. Mawdsley, Post-Forest Grove Parental Reimbursement for Private School Placements: What About Parents Who Cannot Afford the Cost of Such Placements?, 292 EDUC. L. REP. 1, 13 (2013) (“In effect, at least in the Fifth Circuit, it is not sufficient for parents seeking reimbursement to prove that their child needed residential placement; the parents must produce evidence that their child’s treatment at their placement choice ‘was primarily oriented toward . . . enabling her to receive a meaningful educational benefit.’” (quoting Michael Z., 580 F.3d at 301)); see also Jose L. Martín, Modern Issues in Cases of Reimbursement for Unilateral Private Placements Under the IDEA, Presentation at the 2011 Tri-State Regional Special Education Law Conference 7 (Nov. 3, 2011), available at http://www.ksde.org/Portals/0/SES/legal/conf11/02b-Martin-UnilateralPlacements.pdf (“[T]his opinion significantly reduces the potential reimbursement parents can recover in most residential placement situations involving students with psychiatric needs.” (referring to Michael Z., 580 F.3d 286)).

55. See Michael Z., 580 F.3d at 299–300 (rejecting application of inextricably intertwined test). The Fifth Circuit ultimately reversed the lower court’s reimbursement award of $56,000 to the parents for the tuition costs of placing their daughter, Leah Z., in a residential facility. See id. at 291, 301. While the district court originally applied the inextricably intertwined test and found the placement appropriate under the IDEA, on appeal, the Fifth Circuit Court of Appeals criticized the Third Circuit’s test as overreaching. See id. at 299 (noting Kruelle expands school district liability beyond that required by IDEA). The Fifth Circuit found that any services that affect a student’s ability to “physically or psychologically receive an education” are potentially encompassed under the “broad language” of Kruelle. See id. (“Undoubtedly, it is difficult to conceive of a disabled child, particularly a child with mental disabilities, whose medical, social, or emotional problems would have no effect on the child’s ability to learn and would therefore be segregable from the learning process.”). The Fifth Circuit’s alternative test attempted to limit the reach of reimbursement entitlement available under Kruelle through a standard that more accurately reflects the intention of the IDEA drafters. See id. at 303 (Prado, J., concurring) (“This is a necessary limitation on Kruelle’s potentially expansive scope, as Kruelle asks only whether the placement is necessary.”).
In Jefferson County School District R-I v. Elizabeth E. ex rel. Roxanne B., the Tenth Circuit rejected all of the aforementioned tests, alternatively developing its own four-point statutory test based on the plain language of the IDEA. The creation of yet another test to analyze the appropriateness of unilateral placements expanded the disparities in federal circuit courts' responses to reimbursement claims. The Tenth Circuit claimed that its “straightforward application of the Act’s text,” escapes the shortcomings of the inextricably intertwined test and the Seventh and Fifth Circuits’ primarily oriented standards. While recognizing that the creation of the tests formulated by the Seventh and Fifth Circuits sought to prevent the expansion of school district liability beyond the parameters of the IDEA, the Elizabeth E. court recognized risks that arise following the Fifth and Seventh Circuits’ dispositive consideration of whether placements are primarily oriented towards education. Specifically, the Tenth Circuit noted that there is not a clear indication that only those placements with services primarily addressing academic issues will best serve a child’s educational needs. Rather, the court anticipated the possibility of residen-

56. 702 F.3d 1227 (10th Cir. 2012), cert. denied, 133 S. Ct. 2857 (2013).
57. See id. at 1236–37 (describing alternative test through which to examine residential placements). The Tenth Circuit’s test considers: (1) “whether the school district provided or made a FAPE available to the disabled child in a timely manner,” (2) “whether the private placement is a state-accredited elementary or secondary school,” (3) “whether the private placement provides . . . specially designed instruction . . . to meet the unique needs of a child with a disability,” and (4) whether any additional services the private placement provides beyond instruction can be characterized as “related services” under the Act. Id. (second alteration in original) (citations omitted) (internal quotation marks omitted).
59. See Elizabeth E., 702 F.3d at 1237–38 (comparing Tenth Circuit’s test with Third, Seventh, and Fifth Circuits’ tests). Specifically, the Tenth Circuit noted that its plain language test “dispenses with the need to fully dissect the amorphous, judicially crafted ‘primarily oriented’ standard of the Fifth and Seventh Circuits.” Id. at 1238.
60. See id. (“Unquestionably, the genesis of the ‘primarily oriented’ test is a concern with expanding school district liability beyond the requirements of the IDEA.”). While the Tenth Circuit acknowledged the purpose of the Fifth and Seventh Circuits’ rejection of the inextricably intertwined test, the court also designated “the ‘primarily oriented’ requirement” that the two circuits embraced as simultaneously “over-inclusive and under-inclusive.” See id.
61. See id. (“[I]t is not at all clear that determining whether a placement is ‘primarily oriented toward enabling a child to obtain an education’ sheds any light on the question of whether a placement provides specially designed instruction to meet a child’s unique needs . . . .”)
tial placement services that enabled “a child to receive a meaningful education” while not generally being “primarily oriented’ toward educational goals.”

C. Beyond the Final Exam: Motive as an Additional Consideration When Evaluating Residential Placement

In addition to the use of varying circuit court tests, some courts consider motive for placement when determining whether residential placement is eligible for reimbursement. While the Third Circuit did not explicitly discuss motive for placement in Kruelle, even courts in circuits that have adopted the inextricably intertwined test nonetheless consider motive in their reimbursement analyses. Courts’ incorporation of motive into reimbursement evaluations has resulted in a series of reimbursement denials when an event “unrelated to education” prompts a child’s placement.

In Clovis Unified School District v. California Office of Administrative Hearings, the Ninth Circuit’s consideration of motive for placement further limited the potential for reimbursement permitted under the Kruelle test. The Clovis court ultimately held that the parents of Michelle Sorey, a handicapped student, were not entitled to reimbursement for Michelle’s hospital stay following “an ‘acute’ psychiatric crisis.” While the majority

62. See id. (expanding on Tenth Circuit’s criticism of primarily oriented requirements adopted by Fifth and Seventh Circuits).
63. See Doty, supra note 27, at 263 (“Closely connected with the issue of eligibility is the issue of motive for the private placement.”); see also Huefner, supra note 5, at 399 n.13 (describing cases where courts “ruled that hospitalization for psychiatric reasons was essentially a medical placement and not an educational placement, even when special education services were provided on site” (citing Tice ex rel. Tice v. Botetourt Cnty. Sch. Bd., 908 F.2d 1200, 1209 (4th Cir. 1990); McKenzie v. Jefferson, 566 F. Supp. 404, 412 (D.D.C. 1983)).

64. For a discussion of the consideration of motive in a Third Circuit case and a Ninth Circuit case, see infra notes 66–81 and accompanying text.
65. See Doty, supra note 27, at 264 (“[N]umerous courts and hearing officers have denied reimbursement where the placement was made for reasons unrelated to education.”).
66. 903 F.2d 635 (9th Cir. 1990).
67. See Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286, 299 (5th Cir. 2009) (“Some courts applying the Kruelle test appear to have recognized the breadth of the ‘inextricably intertwined’ inquiry and have attempted to limit its application.” (citing Clovis, 903 F.2d at 643)); see also Clovis, 903 F.2d at 645 (reversing district court’s determination that hospitalization entitled parents to reimbursement because child “was hospitalized primarily for medical, i.e. psychiatric, reasons”); David C. Donohue, Note, Clovis Unified School District v. California Office of Administrative Hearings: Restricting Related Services Under the Individuals with Disabilities Education Act, 8 J. Contemp. Health L. & Pol’y 407, 420–21 (1992) (describing Clovis court’s holding as having “formulated a new test which considerably restricts the related services that a school district must supply for a student with a disability”).
68. See Clovis, 903 F.2d at 645 (noting reason for Michelle’s placement). Although the court acknowledged that Michelle’s need for some form of residential
explicitly conditioned its holding on the conclusion that Michelle’s placement was motivated by medical needs, the court cited *Kruelle* when describing its analysis.69

In reaching its holding, the court rejected the parents’ theory that placements such as Michelle’s, which provide services “supportive” of special education, escape exclusion from reimbursement as medical services.70 Instead, the majority pointed to various factors indicating the treatment provided was not primarily used to aid Michelle in benefiting from special education.71 Such factors included the psychiatric motivation for hospitalization, the “intensity” of the psychotherapy services provided, the high cost of the placement, the “characterization” of the facility, and the lack of educational services built in to the placement.72 The court placement was undisputed, the court denied reimbursement for Michelle’s hospitalization. See id.

69. See id. at 638 (“Because we find that Michelle was hospitalized for medical, rather than educational purposes, we reverse the orders of the District Court.”). The court articulated the focus of its evaluation as deciding whether Michelle’s placement was “necessary for educational purposes, or . . . a response to medical, social, or emotional problems that is necessary quite apart from the learning process.” *Id.* at 643 (citing Kruelle v. New Castle Cnty. Sch. Dist., 642 F.2d 687, 693 (3d Cir. 1981)).

While the *Clovis* court cited *Kruelle* when describing the analysis used to determine the appropriateness of placement, the *Clovis* court unequivocally rejected consideration of the intertwinement of medical and educational issues as referred to in *Vander Malle*. See id. at 643 (rejecting “line of reasoning” that requires state responsibility for all placement costs when child’s “medical, social or emotional problems that require hospitalization create or are intertwined with the educational problem” (quoting *Vander Malle* v. *Ambach*, 667 F. Supp. 1015, 1039 (S.D.N.Y. 1987)) (internal quotation marks omitted)). Despite the *Clovis* court’s differentiation between *Kruelle* and *Vander Malle*, the court in *Vander Malle* both cited *Kruelle* and adopted the *Kruelle* court’s analysis when evaluating school districts’ responsibility for reimbursement. See *Vander Malle*, 667 F. Supp. at 1039 (citing *Kruelle*, 642 F.2d at 693).

70. See *Clovis*, 903 F.2d at 643 (rejecting parents’ argument that relevant question to determine reimbursement is “whether the placement is *supportive* of a handicapped child’s education”). The court noted that “mere ‘supportiveness’ is too broad a criterion” to establish services as necessary and therefore entitled to reimbursement. See id. As “[a]ll medical services are arguably ‘supportive’ of a handicapped child’s education,” the court identified “supportiveness” as an overly inclusive standard contravening the IDEA’s “explicit exclusion of medical services.” See id.

71. See *Donohue*, *supra* note 67, at 424 (“The court’s test necessitates that the placement be primarily for special education reasons.”). For a discussion of the factors assessed by the court, see *infra* note 72 and accompanying text.

72. See *Clovis*, 903 F.2d at 645 (enumerating factors in favor of denying reimbursement for Michelle’s placement). The court noted that Michelle’s daily receipt of “intensive psychotherapy” demonstrated that services provided “appear ‘medical’ in that they address a medical crisis.” *Id.* The opinion also pointed to “the high cost of her placement” due to the facility’s status as a “medical facility, requiring a staff of licensed physicians, a high staff to patient ratio, and other services which would not be available or required at a placement in an educational institution.” *Id.* The court additionally reiterated the need for “educational programs for handicapped children” to “meet education standards of the State educa-
held that the aforementioned factors were evidence that Michelle’s placement was primarily motivated by health purposes rather than education purposes.73

The Third Circuit also incorporated motive as a determinative factor in its reimbursement evaluation in 2009, when it decided Mary T. v. School District of Philadelphia.74 In Mary T., parents sought reimbursement for the residential placement of their daughter Courtney, a special education student who suffered from various mental and emotional disorders.75 Courtney’s parents placed her in Supervised LifeStyles (SLS), a residential psychiatric facility, following the “deteriorat[ion]” of her mental state.76

While the court relied heavily on the facts and holding of Kruelle when determining the appropriateness of Courtney’s placement in SLS, much of the court’s analysis focused on factors not addressed in Kruelle.77 The...
Third Circuit focused particularly on services SLS provided to Courtney, such as a mood disorders group, anxiety disorders group, psychological skills group, life skills training group, and medication group, claiming such services were primarily “designed to make her aware of her medical condition and how to respond to it.”

Further, the Mary T. court noted SLS’s accreditation by the New York State Office of Mental Health as evidence of the program’s predominate purpose of “address[ing] medical, rather than educational, conditions.” Ultimately, the holding revealed that Courtney’s medical and educational needs were severable, distinguishing the case from Kruelle. Therefore, the court denied reimbursement to Courtney’s parents, demonstrating one of the first signs of the Third Circuit’s shift toward restrictive treatment of reimbursement requests.

III. Flunking Its Own Test or Keeping Up with the Class? The Third Circuit’s Decision in Munir

In Munir, the Third Circuit again addressed the boundaries of reimbursement entitlement under the IDEA. The court considered whether a student’s placement in a residential facility that provided psychological treatment and education services qualified for reimbursement. Though the court compared the placement to those in previous Third Circuit cases and a Ninth Circuit case, the court integrated the medically-induced motive for placement into its analysis and subsequently denied reimbursement. This holding not only mirrors the alternative evaluations embraced by other circuit courts, but it is also representative of the Third Circuit’s general transition toward restrictive treatment of reimbursement claims.

Circuit in Mary T. as having “effectively reversed, while purporting to distinguish, decades of analysis under the principles of [Kruelle].” Compare Mary T., 575 F.3d at 245 (identifying medical cause for Courtney’s placement), with Brief for Appellant at 55–56, Munir v. Pottsville Area Sch. Dist., 723 F.3d 423 (3d Cir. 2013) (No. 12-3008), 2012 WL 6813033 [hereinafter Brief for Appellant] (noting insignificance of reason for placement under Kruelle).

78. See Mary T., 575 F.3d at 245 (pointing to medical nature of treatment).
79. See id. (noting medical accreditation of residential facility).
80. See id. at 246 (“The present case is clearly distinguishable from Kruelle.”).
81. See id. at 248–49 (denying parents’ request for reimbursement).
82. See Munir v. Pottsville Area Sch. Dist., 723 F.3d 423, 425–26 (3d Cir. 2013) (framing case as inquiry regarding coverage for services under IDEA).
83. See id. at 426 (describing Munir’s efforts to obtain reimbursement for son’s placement).
84. See id. at 431–32 (differentiating minor O.M.’s placement from Paul’s placement in Kruelle); see also id. at 429 (crediting medical emergency as prompting O.M.’s residential placement). The Munir court specifically compared the facts at hand with the cases of Mary T. and Clovis, even though Clovis is a Ninth Circuit case. See id. at 432–34.
85. Compare Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286, 300 (5th Cir. 2009) (explaining treatment at residential facility must be “primarily oriented
A. The Road to Residential Placement: Facts and Background of Munir

*Munir* stems from a parent’s challenge to the Pottsville Area School District’s denial of reimbursement for a student’s residential placement.86 Parent and appellant, Muhammad Munir (Munir), unilaterally placed his minor son, O.M., in two private facilities following O.M.’s multiple suicide attempts.87 The school district previously evaluated O.M. for a learning disability but determined O.M. was not eligible for learning disability services or emotional disturbance services.88 Although O.M. passed his public school classes, he continued to display suicidal behavior, requiring multiple hospitalizations and warranting requests for district involvement.89

Following one of O.M.’s hospital stays in November 2008, the school district created a “Rehabilitation Act § 504 plan” for O.M.90 However, the school district did not create an IEP for O.M.91 After another suicide threat and subsequent hospitalization in January 2009, O.M.’s parents enrolled him at Wediko Children’s Services (Wediko), without formal approval from O.M.’s school district.92 While enrolled in Wediko, O.M. towards educational improvement” in order to be eligible for reimbursement), and Dale M. *ex rel.* Alice M. v. Bd. of Educ. of Bradley–Bourbonnais High Sch. Dist. No. 307, 237 F.3d 813, 817 (7th Cir. 2001) (denying reimbursement due to placement’s primary purpose of confinement), with *Munir*, 723 F.3d at 431–32 (commenting on facility’s primary focus on mental health treatment).

86. *See Munir*, 723 F.3d at 426 (providing procedural history of case).
88. *See id.* at 426–27 (describing school district’s previous testing of O.M.). Responding to O.M.’s pattern of suicidal threats and gestures and resulting hospital treatment, the Pottsville Area School District first conducted a psycho-educational evaluation of O.M. in 2005. *See id.* at 427. The school district’s evaluation included testing O.M. for a learning disability to determine whether he qualified for IDEA services while he was enrolled in a Pottsville public middle school. *See id.* Although the school district’s evaluation did not lead to the development of a learning disability prognosis or development of an IEP, O.M.’s suicidal behavior continued. *See id.* at 427–28 (describing O.M.’s subsequent hospital visits for suicidal behavior in April 2008, summer 2008, September 2008, November 2008, and January 2009).
89. *See id.* at 427 (“O.M. returned to Pottsville in the fall of 2005 and performed well academically for three years.”). *But see id.* (“He initially decided to take honors math classes, but began struggling academically and dropped them.”). The court referred to O.M.’s average academic performance to dispel assertions that “O.M.’s condition was affecting his ability to learn at that time.” *See id.* at 429. Nevertheless, O.M.’s suicidal tendencies continued, and following O.M.’s hospitalization in early September 2008, O.M.’s parents requested an IEP for their son. *See id.* at 427.
90. *See id.* (describing school district’s response).
91. *See id.* (noting school district’s failure to create IEP). For a discussion of school districts’ obligation to create appropriate IEPs in order to satisfy FAPE obligations under the IDEA, see *supra* notes 24–26 and accompanying text.
92. *See Munir*, 723 F.3d at 428 (describing O.M.’s placement). Wediko Children’s Services, where O.M. remained for the rest of the school year, is a private therapeutic residential treatment center in New Hampshire. *See id.*
received daily individual and group therapies, which included training in social skills, emotional regulation, stress management, and conflict resolution.93 Wediko also offered a full school day with a curriculum that met New Hampshire’s educational standards.94 After two to three weeks at Wediko, O.M. was able to attend small educational classes and “debriefing periods” that the facility offered.95

Following Wediko’s involvement, O.M.’s original school district re-evaluated O.M.’s need for an IEP and offered new services in response to his educational needs.96 O.M.’s parents nevertheless rejected the school district’s proposed IEP because it did not provide O.M. with small classes or the same types of counseling services he was receiving at Wediko.97 Alternatively, O.M.’s parents decided to have their son complete the 2008–2009 school year at Wediko and then enrolled O.M. in The Phelps School (Phelps) for the following school year.98 In August 2009, Munir initiated efforts to obtain school district financial support for O.M.’s placements in Wediko and Phelps, ultimately leading to a court of appeals challenge for tuition reimbursement totaling $68,752.61.99

B. The Third Circuit’s Analysis on Who Should Foot the Bill for O.M.’s “Free” Education

The Third Circuit held Munir was not entitled to reimbursement for O.M.’s placements in either facility, because both placements failed to

93. See id. (describing O.M.’s treatment while enrolled at Wediko).
94. See id. (expanding on Wediko’s offerings).
95. See id. (reporting O.M.’s participation in classes at Wediko). The classes were graded on a pass-fail basis, and there were three debriefing periods included in every school day used to assess how well O.M. was maintaining control of his thoughts, mood, and anxiety. See id.
96. See id. (discussing school district’s response to O.M.’s placement at Wediko). While O.M. was enrolled in Wediko, the facility conducted a series of cognitive and academic achievement tests on him in February 2009, to evaluate his “social-emotional functioning.” See id. Wediko then contacted O.M.’s original school district to recommend an IEP for him and provided the school district with its findings and recommendations. See id. In May 2009, the school district finally offered an IEP for O.M., and in September 2009, it added a cognitive-behavioral curriculum for students experiencing anxiety and depression, which included psychological services and increased social work services. See id.
97. See id. (explaining Munir’s rejection of proposed IEP).
98. See id. (describing O.M.’s subsequent placement in The Phelps School). The Phelps School is a residential school licensed by the Pennsylvania Department of Education. See id. O.M.’s parents transferred him to the new facility because they believed that O.M.’s suicide risk level “had decreased to the point where he could function in a less intensive environment.” See id. Further, O.M.’s parents liked that the school was closer to home and offered small classes and a supportive environment. See id. Following O.M.’s time at The Phelps School, he soon transitioned to a regular special education program and was eventually placed back in his “peer age group” before graduating. See Brief for Appellant, supra note 77, at 55.
99. See Munir, 723 F.3d at 428–29, 431 (tracing efforts to obtain reimbursement for O.M.’s placements).
meet the IDEA’s reimbursement requirements. To qualify for reimbursement, Munir was required to establish that: (1) the school district failed to provide O.M. with a FAPE, and (2) O.M.’s new placements were appropriate. The first prong of the test was not satisfied for O.M.’s placement in Phelps, because O.M.’s school district had created a proper IEP before he was transferred to the private facility. Additionally, although O.M.’s transfer to Wediko satisfied the first prong of the reimbursement test, the court determined that Wediko was not an “appropriate” placement, thereby failing the second prong.

The court of appeals affirmed the district court’s holding that Wediko did not constitute an appropriate placement, as the “primary purpose” of O.M.’s enrollment at the facility was the treatment of his mental health issues, as opposed to educational needs. The Third Circuit referred to the mental health motive for O.M.’s placement as evidence contradicting the educational claim for reimbursement. Additionally, the court viewed the involvement of a clinical psychologist in formulating O.M.’s...
treatment plan as indicative that Wediko’s services “were not focused primarily on education.”106 Rather, the court identified the educational benefits that O.M. undisputedly received during his time at Wediko as merely “incidental,” thereby rendering reimbursement improper.107

In its analysis, the Third Circuit cited Kruelle, acknowledging that a school district may be responsible for a residential placement when a child with disabilities requires a highly structured environment to obtain any level of educational benefits.108 Nevertheless, the Third Circuit distinguished O.M.’s placement from Paul Kruelle’s, because O.M.’s placement provided only an “incidental educational benefit” arising from “twenty-four-hour supervision for medical, social, or emotional reasons.”109 The court noted that O.M.’s needs did not parallel Paul Kruelle’s needs for a highly structured environment to obtain any level of educational benefits; alternatively, O.M.’s need for a private environment stemmed from medical reasons only.110

IV. TAKING A PEAK AT THE ANSWER KEY: DISCUSSING IMPLICATIONS OF THE THIRD CIRCUIT’S NEW REIMBURSEMENT ANALYSIS

The Third Circuit’s analysis in Munir is a departure from its once broad interpretation of reimbursement entitlement and is instead in line with an overarching trend in favor of restricting school district financial responsibility for unilateral placements.111 The specific focus on motive in the Third Circuit’s new reimbursement standard threatens results that contradict the purpose of the IDEA and ignore the nature of complex physical, mental, and emotional disabilities.112 Furthermore, the Third Circuit’s failure to clarify its shift away from the inextricably intertwined to attend Wediko in order to keep him safe from the effects of his depression, which led to suicide threats and gestures when he was living at home.”)

106. See id. (supporting determination that placement’s primary purpose was medical in nature).

107. See id. at 430 (adopting lower court’s observation).

108. See id. at 431 (citing Kruelle v. New Castle Cnty. Sch. Dist., 642 F.2d 687, 693 (3d Cir. 1981)). The court questioned whether the particular placement was “necessary to provide special education and related services.” See id. (quoting 34 C.F.R. § 300.104 (2006)) (internal quotation marks omitted).

109. See id. at 432 (distinguishing residential placement qualifying for reimbursement from placement that alternatively provides mostly medical treatment).

110. See id. (classifying O.M.’s educational benefits as “incidental” to his overall medical treatment).


112. For a discussion of the potential consequences of the Third Circuit’s incorporation of motive into its reimbursement analysis, see infra notes 121–24, 144–46, 150–53 and accompanying text.
test it established in Kruelle threatens to create confusion for practitioners seeking to present cases in line with the court’s preferences.\textsuperscript{113}

This section first addresses how the Munir court’s reimbursement evaluation incorporated factors and concerns not present in the Third Circuit’s original development of the Kruelle inextricably intertwined test.\textsuperscript{114} Next, this section addresses the Third Circuit’s failure to distinguish Munir from cases like Mary T. and Clovis, further revealing the court’s abandonment of the inextricably intertwined test in exchange for a new standard that incorporates the reimbursement tests of other circuits.\textsuperscript{115} Finally, this section addresses the consequences of the Third Circuit’s new reimbursement standard in light of the court’s failure to expressly recognize its departure from the original inextricably intertwined test.\textsuperscript{116}

A. New Test, New Focus

The Third Circuit’s holding in Munir exemplified the court’s incorporation of new priorities and factors into its reimbursement analysis.\textsuperscript{117} The court’s evaluation notably rejected indications that O.M.’s emotional and learning disabilities were intertwined and ignored the simultaneous academic and psychological treatment that O.M. received at Wediko.\textsuperscript{118} Rather, the opinion extensively focused on the medically-induced motive for O.M.’s placement, contradicting other courts’ descriptions of the Third Circuit’s overly inclusive construal of proper residential placements.\textsuperscript{119}

Overlooking the indisputable academic offerings Wediko provided, the Third Circuit’s determination turned on the reasoning that Wediko’s offerings “were directed primarily at the child’s medical or emotional

\textsuperscript{113} For a discussion of the difficulties for practitioners created by the Third Circuit’s failure to expressly clarify its new reimbursement standard, see infra notes 141–43, 147–49 and accompanying text.

\textsuperscript{114} For a discussion of the evolution of the Third Circuit’s reimbursement standard exemplified by Munir, see infra notes 117–32 and accompanying text.

\textsuperscript{115} For a discussion of the Third Circuit’s missed opportunity to distinguish Munir from Mary T. and Clovis, see infra notes 133–46 and accompanying text.

\textsuperscript{116} For a discussion of the consequences of the Third Circuit’s new reimbursement standard, see infra notes 147–53 and accompanying text.

\textsuperscript{117} For a discussion of the changes in the Third Circuit’s priorities in Munir, see infra notes 118–32 and accompanying text.

\textsuperscript{118} See Munir v. Pottsville Area Sch. Dist., 723 F.3d 423, 433 (3d Cir. 2013) (“Unlike the students in Mary T. and Clovis, O.M. was placed at a facility that did offer an educational component.”). But see id. (“O.M.’s participation in some educational programs at Wediko does not conclusively establish that the purpose of his placement there was educational.”).

\textsuperscript{119} Compare id. at 434 (“Because O.M.’s parents have not shown that they placed O.M. at Wediko in order to meet his specialized educational needs, the District Court correctly determined that they are not entitled to reimbursement.”), with Petition for a Writ of Certiorari, supra note 1, at 13 (describing “extraordinarily broad test for residential placements” utilized by courts adopting standard developed in Kruelle).
needs... Thus, while the Third Circuit’s opinion resolves concerns for over-inclusivity of eligible services under the IDEA, it also eliminated any redress for Munir despite the school district’s complete lack of an IEP for O.M. Such a result fails to satisfy the IDEA’s “broad purpose” of providing a FAPE to qualifying children. Alternatively, the court’s denial of reimbursement, despite the district’s failure to create an appropriate IEP, exemplifies a handicapped student’s exclusion from the public education system: the same outcome Congress intended to avoid with the passage of the IDEA. Ultimately, the narrow definition of “appropriate” placement the court employed effectively required Munir to pay for the district’s abandonment of its IDEA obligations.

Furthermore, the Munir opinion stressed O.M.’s satisfactory grades in public school as evidence that his educational needs were already adequately addressed without residential placement. Yet, the Third Circuit failed to reflect on the amount of school that O.M. missed due to hospitalizations following his suicide threats and attempts. Had the court acknowledged that O.M.’s placement sought to resolve emotional disabilities that directly prevented educational progress in light of forced absences, Munir’s request for reimbursement would have been grounded in a clear educational purpose for his son’s residential placement.

Moreover, the court overlooked O.M.’s overall success and improvement while partaking in Wediko’s programming. The services that

120. See Munir, 723 F.3d at 432 (drawing on references to primary purpose of placement from Mary T. and Clovis).
121. See Kessler, supra note 16 (“The court’s opinion treats the district’s obligations under IDEA leniently by failing to address the lack of a proposed IEP between 2005 and 2009.”).
123. See Kruelle v. New Castle Cnty. Sch. Dist., 642 F.2d 687, 691 (3d Cir. 1981) (describing IDEA’s goal to establish “the personal independence and enhance the productive capacities of handicapped citizens”).
124. See Sch. Comm. of Town of Burlington, Mass. v. Dep’t of Educ. of Mass., 471 U.S. 359, 370 (1985) (“If that were the case, the child’s right to a free appropriate public education, the parents’ right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete.”).
125. See Munir, 723 F.3d at 433–34 (“O.M. was an above-average student at Pottsville, who had no serious problem with attendance and socialized well with other students.”).
126. See Brief for Appellant, supra note 77, at 45, 54 (pointing to O.M.’s hospital stays that “caused him to miss school” and “[h]is daily trips to the guidance office, and leaving early from school several times” as evidence that O.M.’s emotional issues adversely affected his attendance and education).
127. See id. at 54 (describing Munir’s attempt to show educational purpose for placement, as facility could remedy attendance problems stemming from O.M.’s emotional issues).
128. See id. at 52 (“The record suggests that it is residing at the private school that is the key to the absence of suicide threats, gestures and attempts since January 2009...” (alteration in original) (quoting Hearing Officer Opinion) (internal quotation marks omitted)).
O.M. received at Wediko enabled his transfer to a less-intensive environment and eventual placement back into classes with his peer age group.129 Thus, Wediko’s dual mental health and academic program conveyed a “meaningful benefit” to O.M. in the form of control over his suicidal thoughts and tendencies.130 O.M.’s increased control following his enrollment in Wediko enabled him to miss less school, which translated to an undoubtedly meaningful benefit for his education.131 Yet, the Third Circuit’s analysis focused on the medical emergency that induced O.M.’s placement rather than the educational services he received at Wediko or his resulting academic success from the placement.132

B. Dodging the Opportunity to Distinguish

The Third Circuit’s decision in Munir also restricted entitlement to reimbursement by rejecting the opportunity to distinguish the case from Mary T. and Clovis.133 Instead, the Third Circuit pointed to both cases as evidence that Munir was not entitled to reimbursement for his unilateral placement of O.M.134 While the Munir court drew on similarities between Mary T. and Clovis with the case at hand, a number of factual distinctions afforded the Third Circuit the ability to distinguish Munir from the cases where courts denied requests for reimbursement.135 First, both residential facilities at issue in Mary T. and Clovis were psychiatric facilities without educational affiliation.136 The minor educational services offered at the respective facilities do not compare to Wediko’s extensive educational programming.137 Wediko’s provision of

129. See id. at 55 (describing O.M.’s progress at Wediko).
130. See id. (highlighting O.M.’s mental health milestones that led to academic success).
131. See id. (commenting on end of O.M.’s suicide attempts following his enrollment at Wediko).
133. See id. at 433 (noting Wediko provides an “educational component” unlike programs in Mary T. and Clovis where facilities did not have school affiliation or educational accreditation). But see id. (explaining that while facilities’ failure to offer educational programs “may be strong evidence that the child was placed there to meet his medical or emotional needs,” existence of educational program alone is not conclusive evidence that placement in such facility is for educational purposes).
134. See id. at 432–34 (comparing facts of Munir to facts in Mary T. and Clovis).
135. For a discussion of the distinctions between Munir and Mary T. and Clovis, see infra notes 136–43 and accompanying text.
136. See Brief for Appellant, supra note 77, at 52 (noting that Courtney’s placement in Mary T. “was not at a school; she was in a mental health rehabilitation facility”).
debriefing sessions between classes provided O.M. with the opportunity to
discuss his progress controlling his anxieties and thoughts during his in-
struction and classes.138 These sessions exhibited a program that quite
literally intertwined O.M.’s emotional treatment with academic re-
sources.139 Such programming suggests the educational services O.M. re-
ceived at Wediko were not merely “incidental” benefits, but rather, part of
an intentional plan to address his overlapping academic and psychological
challenges.140

Instead of distinguishing O.M.’s placement in Wediko from the resi-
dential placements in Mary T. and Clovis, the Third Circuit incorporated
those courts’ consideration of motive for placement into its analysis in
Munir.141 The Munir court’s repeated references to the medically-ori-
tented primary purposes of Wediko also echo components of the primarily
oriented tests that other circuits created in place of the inextricably inter-
twined test.142 Thus, the Third Circuit’s reference to reimbursement as
contingent on a facility’s primary focus on education blurs the line be-
tween the inextricably intertwined test and the Fifth and Seventh Circuits’
primarily oriented tests. This opinion not only demonstrates the Third
Circuit’s transition from its original reimbursement standard, but also re-

138. See Munir, 723 F.3d at 428 (explaining O.M.’s debriefing sessions).
139. See id. (describing Wediko’s combination of classes and debriefing
sessions).
140. See Brief for Appellant, supra note 77, at 53 (arguing O.M.’s educational
and psychological treatments were combined because emotional disturbance and
academic issues “were not severable”).
141. See supra notes 69, 76–81, 119–20 and accompanying text (discussing fo-
cus on motive for placement in Clovis, Mary T., and Munir respectively).
142. For a discussion of courts’ attention to the primary orientation of treat-
ment in residential placements in Munir, Dale M., and Michael Z., see supra note 85
and accompanying text.

In Kruelle, the Third Circuit demonstrated an understanding of the “neces-
sarily broad” reach of proper educational services anticipated in the IDEA, which
often made it impossible to distinguish treatment as either health-based or educa-
1981) (“Where basic self-help and social skills such as toilet training, dressing,
feeding and communication are lacking, formal education begins at that point.”
(quoting Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1980) (internal quotation
marks omitted)). The Fifth and Seventh Circuits alternatively envisioned a dichot-
omy of “appropriate” and excludable treatment and conditioned reimbursement
on services’ appearance as “primarily oriented” towards education. See, e.g., Dale
M. ex rel. Alice M. v. Bd. of Educ. of Bradley–Bourbonnais High Sch. Dist. No. 307,
237 F.3d 813, 817 (7th Cir. 2001) (drawing distinction “between services primarily
oriented toward enabling a disabled child to obtain an education and services ori-
ented more toward enabling the child to engage in noneducational activities”).
But, as the Tenth Circuit observed when it refused to adopt a primarily oriented
standard, limiting reimbursement to those programs with a strict focus on education
overlooks the potential of residential placements that enable a student “to re-
ceive a meaningful education” while not generally being “primarily oriented to-
Roxanne B., 702 F.3d 1227, 1238 (10th Cir. 2012), cert. denied, 133 S. Ct. 2857
(2013).
reflects the resulting lack of clarity for practitioners attempting to adhere to the circuit’s new methodology.\textsuperscript{143}

The Third Circuit’s departure from the \textit{Kruelle} test, as exemplified by \textit{Munir}, suggests that simply demonstrating a child’s inextricably intertwined health-based and learning disabilities is no longer adequate to obtain reimbursement for residential placement.\textsuperscript{144} \textit{Munir} instead establishes an education-based primary purpose of placement as an additional requirement that parents seeking reimbursement must meet.\textsuperscript{145} Thus, the Third Circuit’s holding requires an evolution of practitioners’ approach to reimbursement cases.\textsuperscript{146}

C. Consequences of the Third Circuit’s New Normal in Reimbursement Cases

Despite the absence of motive as a relevant factor when the Third Circuit developed the \textit{Kruelle} test, in \textit{Munir}, the court consistently emphasized that O.M.‘s placement was triggered by the onset of a mental health emergency.\textsuperscript{147} While the court’s decision to adapt its initial \textit{Kruelle} standard is not problematic in and of itself, the court’s failure to clarify its departure from its original analysis threatens significant confusion for practitioners.\textsuperscript{148} Without express recognition of the transition away from the inextricably intertwined test, practitioners lack sufficient guidance on

\textsuperscript{139} See Martín, \textit{supra} note 54, at 7–8 (noting similarities between Third Circuit and Fifth Circuit consideration of primary purpose of residential placements). In summarizing the Third Circuit’s evaluation of the appropriateness of residential placement in \textit{Mary T.}, Martín commented on the court’s consideration of Courtney’s placement in a “medically-oriented” facility. \textit{See id.} at 7. Martín compared the court’s acknowledgement that Courtney’s placement was “not primarily oriented at enabling the child to receive an education” to the Fifth Circuit’s use of the “primarily oriented” test. \textit{See id.} Martín explained, “[t]hus, one could argue that the Third and Fifth Circuit are not that far off in their respective analyses, although they certainly use different wording and structure their ‘tests’ in different ways.” \textit{Id.} at 8.

\textsuperscript{140} For a discussion of changes in the Third Circuit’s analysis in \textit{Munir}, when compared with its analysis in \textit{Kruelle}, see \textit{infra} note 147 and accompanying text.

\textsuperscript{141} See \textit{Munir} v. Pottsville Area Sch. Dist., 723 F.3d 423, 429 (3d Cir. 2013) (denying reimbursement because O.M.’s placement was result of “medical/mental health crisis that required immediate treatment” (internal quotation marks omitted)).

\textsuperscript{142} For practitioner tips in response to the Third Circuits’ new reimbursement standard, see \textit{infra} notes 154–76 and accompanying text.

\textsuperscript{143} See \textit{Munir}, \textit{supra} note 1, at 13–14 (describing inextricably intertwined test as mandating “public school districts to fund a residential placement as long as the placement confers some educational benefits—regardless of the reason for the placement”).

\textsuperscript{144} See \textit{Munir}, 723 F.3d at 431–32 (referring to court’s analysis in its \textit{Kruelle} decision). Despite the \textit{Munir} court’s references to the Third Circuit’s definition of appropriate residential services developed in \textit{Kruelle}, the \textit{Munir} court also referred to the health emergency that prompted O.M.’s placement, although no such consideration for motive was originally provided in \textit{Kruelle}. \textit{See id.} at 433.
the proper arguments that should be made in accordance with the Third Circuit’s new reimbursement analysis.\textsuperscript{149}

Additionally, the incorporation of motive into the Third Circuit’s reimbursement analysis following \textit{Munir} effectively prevents reimbursement for all future Third Circuit residential placements that follow a health-based emergency.\textsuperscript{150} The \textit{Munir} holding disregards the interconnectivity between a child’s disability and ability to achieve educational goals by stipulating that all treatment initiated by a health emergency is not appropriate for reimbursement purposes.\textsuperscript{151} Therefore, the Third Circuit’s dispositive consideration of motive for placement ignores overlapping disabilities that require treatment even in the immediate aftermath of a health emergency.\textsuperscript{152} Despite the possibility of a coincidental medical emergency spurring residential placement for a student that already required such placement, the dispositive treatment of motive for placement would automatically render the placement inappropriate for reimbursement purposes.\textsuperscript{153}

V. HOW TO SCORE EXTRA CREDIT IN THIRD CIRCUIT REIMBURSEMENT CASES: RECOMMENDATIONS FOR PRACTITIONERS

Reimbursement debates impose significant costs on all parties involved.\textsuperscript{154} Therefore, counsel for school districts and parents alike can benefit from adjusting their litigation strategies in light of the holdings of recent reimbursement cases.\textsuperscript{155} Further, recognizing the time, energy, and resources expended on reimbursement legal battles, attorneys should

\textsuperscript{149} See id. at 431–32 (referencing \textit{Kruelle}, but providing no description of factors incorporated into Third Circuit’s current reimbursement analysis that were not similarly included in \textit{Kruelle}). For a discussion of changes in \textit{Munir} when compared with the Third Circuit’s analysis in \textit{Kruelle}, see supra note 147 and accompanying text.

\textsuperscript{150} See Doty, supra note 27, at 263 (noting connection between “motive for the private placement” and eligibility for reimbursement). Doty refers to a number of cases where reimbursement was denied because placement was a result of “medical or psychiatric” reasons, “family conflict, drug abuse, or delinquent behavior.” See id. at 264.

\textsuperscript{151} See \textit{Munir}, 723 F.3d at 433 (denying reimbursement for O.M.’s placement at Wediko because his placement “was prompted by a medical emergency”).

\textsuperscript{152} See id. (holding placement at Wediko was inappropriate under IDEA despite district court’s recognition that O.M. “undoubtedly benefitted” from facility’s educational program).

\textsuperscript{153} For a discussion of the ramifications of the Third Circuit’s dispositive consideration of motive, see supra notes 150–52 and accompanying text.

\textsuperscript{154} See Mayes & Zirkel, supra note 3, at 62 (“The stakes in such lawsuits are extraordinarily high, with effects that reach beyond the immediate parties.”).

\textsuperscript{155} Telephone Interview with Marion M. Walsh, Attorney, Littman Krooks LLP (Feb. 17, 2014) (advocating for increased negotiations between all parties in reimbursement disputes to reduce significant litigation costs).
recommend negotiations between parents and the school district before final placement decisions are made.\textsuperscript{156}

\textbf{A. Tips for Parents on Acing the Race to Reimbursement}

When fighting for unilateral residential placement reimbursement, parents have a difficult task in convincing courts that the placement is “appropriate” under the IDEA.\textsuperscript{157} Showing academic progress and psychological growth is important to demonstrate the success of residential treatment, but as \textit{Munir} indicated, progress alone will not always lead to reimbursement.\textsuperscript{158} One special education attorney suggests presenting testimony to portray that the particular placement is “individually tailored for the student’s specific needs.”\textsuperscript{159} Features such as licensed teacher-employees, strong monitoring, use of proven methodologies, counseling specific to academic challenges, educational accreditation, and solid educational programming are also all ideal factors to highlight in any residential placement.\textsuperscript{160}

Frustration often accompanies representing parents in reimbursement disputes based on school districts’ tendencies to mislabel disabilities as medical in nature when unfamiliar with the complexities of emotional disturbances.\textsuperscript{161} One special education attorney explains that parents of students with passing grades and high cognitive levels often face an uphill battle, even when initially requesting IDEA services, due to misconceptions regarding the manifestation of learning disabilities.\textsuperscript{162} Furthermore, school districts sometimes fail to comprehend that even those disabilities that appear medical in nature are potentially covered under the IDEA due

\textsuperscript{156} See id. (describing “success stories” where parties reached settlement, allocated funds to education rather than litigation).

\textsuperscript{157} See id. (noting burden is on parents to convince courts that placement is appropriate).

\textsuperscript{158} Compare Brief for Appellant, \textit{supra} note 77, at 55 (“The obvious answer to the question of whether O.M.’s emotional disturbance was severable from his academic needs is that once O.M. was at Wediko, his emotional state immediately improved.”), \textit{and} Telephone Interview with Marion M. Walsh, \textit{supra} note 155 (pointing to progress as important factor when fighting for reimbursement), \textit{with} \textit{Munir v. Pottsville Area Sch. Dist.}, 723 F.3d 423, 433 (3d Cir. 2013) (“[A]ny educational benefit he received from the Wediko placement was incidental.”).

\textsuperscript{159} Telephone Interview with Marion M. Walsh, \textit{supra} note 155 (explaining that relating methods treatment facility provides to particularities of students’ emotional issues helps demonstrate that placement was strategically selected to address child’s needs).

\textsuperscript{160} See id. (providing suggestions for parents bringing reimbursement suits).

\textsuperscript{161} See id. (tracing challenges of reimbursement claims). Walsh pointed to anorexia as a disorder that school districts often do not know how to address. See \textit{id.} She explained that districts will automatically label anorexia as a medical disorder, overlooking the impact it may have by preventing students from attending class. See \textit{id.}

\textsuperscript{162} See id. (commenting on school districts’ limited understanding regarding reality of intertwined medical and educational disabilities).
to the adverse impact on attendance that such issues create for students.163

In light of the misunderstandings surrounding the existence of learning disabilities, settlement negotiations before unilateral placement offer parents’ attorneys the opportunity to clarify the realities of students’ learning needs and capabilities.164 Such negotiations may enable parents to reach an agreement through which their child’s school district agrees to provide the student with additional services, potentially preventing the need for residential placement altogether.165 Even if negotiations cannot avoid the need for residential placement, parents’ efforts to work with their child’s school district before a medical emergency occurs avoid labeling the placement as medically motivated if necessary after a health-based occurrence.166 Pre-placement negotiations also save parents litigation costs and redirect school district funding to be used on better means, such as training school personnel to identify disabilities earlier.167

B. Instructions on an A+ Defense for School Districts

Counsel for school districts should attempt to establish a “bright line” division between medical treatment and academic services provided in residential facilities.168 Even if a residential facility is accredited by an educational agency, school districts can highlight involvement of medical staff in creating and executing the program as evidence that a program is primarily medical in scope.169 Further, school districts’ counsel should emphasize any disparities in psychological versus educational services offered and attempt to isolate psychological breakdowns as out-of-school occurrences, thereby rendering them unconnected to academic progress.170

Reimbursement cases under the IDEA pose financial strains on school districts, even if the court does not ultimately order reimburse-

163. See id. (elaborating on school districts’ incomplete understanding of all disabilities that potentially qualify for services under IDEA).

164. See id. (pointing to settlements as best option for parents).

165. See id. (explaining benefits of early negotiations with school districts to avoid need for unilateral placement).

166. For a discussion of the court’s focus on medically-induced placement in Munir and the ramifications of the Third Circuit’s dispositive consideration of such medically-based motives for placement, see supra notes 117, 150–53 and accompanying text.

167. See Telephone Interview with Marion M. Walsh, supra note 155 (describing “getting the school district on board” as key to progress in treating student’s emotional disabilities).

168. See supra note 32 (describing treatment encompassed by IDEA’s definition of “related services”).

169. See, e.g., Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings, 903 F.2d 635, 645 (9th Cir. 1990) (pointing to facility’s use of medical staff in providing Michelle’s treatment).

170. See Telephone Interview with Marion M. Walsh, supra note 155 (describing strategies used by school districts in defending reimbursement actions).
Therefore, attorneys representing school districts should instruct their clients to take proactive measures prior to having to defend reimbursement claims.\(^{172}\) Efforts to address parents’ claims of public education shortcomings may help to mitigate the potential for lofty reimbursement awards.\(^{173}\) One commentator suggests that school districts propose IEP reevaluation immediately upon notice of parent interest in unilateral placement.\(^{174}\) Incorporating objective consultants into efforts to evaluate the success of current IEPs or special education services allows school districts to demonstrate their efforts to fulfill FAPE requirements.\(^{175}\) Further, if parents continue to seek unilateral placement after reevaluation attempts, school districts have a basis for arguing that parents failed to cooperate in the “collaborative, interactive approach envisioned by the IDEA.”\(^{176}\)

VI. THE THIRD CIRCUIT’S GRADUATION TO A NEW REIMBURSEMENT ANALYSIS

Commenters once credited the Third Circuit with leading the charge in developing a reimbursement standard cognizant of the complicated reality for students with severe disabilities and intertwined academic challenges.\(^{177}\) Yet, opinions such as *Munir* reveal the court’s imposition of additional barriers that parents must now overcome to qualify for reimbursement for residential placements.\(^{178}\) Critics will disagree on whether the Third Circuit’s transition to a narrow interpretation of proper placement represents a necessary response to an overly burdensome test or an ill-advised shift requiring parents to shoulder the costs regularly reserved for school districts.\(^{179}\)

\(^{171}\) See *Doty*, *supra* note 27, at 250 (describing “demands for private residential care” as “disastrous regardless of the outcome” due to “time, money, and human capital” schools must dispose of when fighting requests).

\(^{172}\) See *Martín*, *supra* note 54, at 23 (warning against school district inaction following private placement).

\(^{173}\) See *Martín*, *supra* note 54 (identifying correlation between school districts’ “failure” to respond proportionately to the challenges presented by the student’s needs and reimbursement awards for unilateral placement).

\(^{174}\) See *Martín*, *supra* note 54 (encouraging school districts to duplicate “program strengths” of residential placements parents are interested in and to “incorporate similar services or interventions into the student’s IEP”).

\(^{175}\) See *Martín*, *supra* note 54 (enumerating steps that both help to avoid unilateral placement and also defend school districts should reimbursement case arise).

\(^{176}\) See *Martín*, *supra* note 54 (recommending school districts “document any instances of lack of cooperation on the part of parents in the IEP development and revision process”).

\(^{177}\) See *Zirkel*, *supra* note 6, at 881 (describing Third Circuit’s positive reputation for IDEA interpretation).

\(^{178}\) See *Kessler*, *supra* note 16 (identifying new standard to qualify for reimbursement under *Munir*).

\(^{179}\) Compare *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 299 (5th Cir. 2009) (disapproving of inextricably intertwined test as overly broad), with *Kessler*, *supra* note 16 (criticizing narrow interpretation adopted in *Munir*).
Regardless, the court’s opinion in Munir has made it clear that the Third Circuit’s analysis of residential placements has transformed from its initial creation of the inextricably intertwined test in Kruelle.\textsuperscript{180} The Third Circuit’s notable incorporation of motive into its reimbursement analysis demonstrates the need for attorneys to recognize the dispositive outcome that results when a unilateral placement follows a medical emergency.\textsuperscript{181} While the new reimbursement standard raises challenges for practitioners in light of the Third Circuit’s failure to admit to the significant transformation of its original reimbursement analysis, recognizing the clear departure from Kruelle will better enable attorneys to advise clients and prepare for trial.\textsuperscript{182}

\textsuperscript{180.} See Appellant’s Reply Brief, \textit{supra} note 8, at 5 (arguing that “the test applied by the Third Circuit, as it revisited \textit{Kruelle}” in subsequent cases, no longer requires school districts to shoulder the costs “where mental illness affects education”).

\textsuperscript{181.} For a discussion of the Third Circuit’s incorporation of motive for placement as a dispositive factor in its reimbursement analysis, see \textit{supra} notes 150–53 and accompanying text.

\textsuperscript{182.} For a discussion of litigation recommendations, see \textit{supra} notes 154–76 and accompanying text.
SECRET’S OUT: THIRD CIRCUIT FINDS DELAWARE’S STATE-SPONSORED ARBITRATION PROGRAM VIOLATES FIRST AMENDMENT RIGHT OF PUBLIC ACCESS IN DELAWARE COALITION FOR OPEN GOVERNMENT v. STRINE

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I. INTRODUCTION

Imagine living in a country where the public and the press were barred from viewing any and all judicial proceedings; only a select few would understand the judicial process, and it would leave those in charge unaccountable for their actions.1 While it is true that limiting access to judicial proceedings might be necessary to protect privacy in certain instances, a judicial system that bars the public and press from all proceedings would completely shatter the notions of fairness and public confidence that are currently an essential part of the American judicial system.2 Without these notions, the basis upon which the American judicial system was built would crumble.

This inevitable result illustrates the importance of the First Amendment right of public access.3 The right of public access is an implicit right contained in the First Amendment that guarantees the ability of the public to attend certain judicial proceedings. It is a key part of the judicial system

1. See United States v. Simone, 14 F.3d 833, 839 (3d Cir. 1994) (recognizing that “promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the judicial system” and “serving as a check on corrupt practices by exposing the judicial process to public scrutiny” are benefits of open judicial proceedings (quoting United States v. Smith, 787 F.2d 111, 114 (3d Cir. 1986))). In addition to public understanding and public scrutiny, the Third Circuit has found four other societal interests promoted by openness. See id. (identifying six societal interests promoted by open court proceedings). For a full discussion of the six interests promoted by openness, see infra note 48 and accompanying text.

2. For a further discussion of situations in which either public access or privacy is necessary, see infra notes 5–6 and accompanying text.

3. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 556–57 (1980) (“The right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated.”).

(877)
because “without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated.”4 Despite its paramount importance, this right is a limited one.5 One area in which the right of public access can be restricted is in proceedings that require secrecy to function properly, such as grand jury proceedings.6 Determining how and when this right is applied is the subject of this Casebrief.

The Supreme Court first recognized the right of public access in Richmond Newspapers, Inc. v. Virginia,7 when Chief Justice Burger declared that the First Amendment includes a right of public access to criminal trials.8

4. See id. at 557 (explaining First Amendment right of public access).
5. See PG Pub’g Co. v. Aichele, 705 F.3d 91, 98–99 (3d Cir. 2013) (explaining that First Amendment right of public access is limited). In finding that the right of public access is limited, the court in PG Publishing examined the implicit limitations on this right. See id. (“The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally.” (quoting Fell v. Procurier, 417 U.S. 817, 834 (2000)) (internal quotation marks omitted)); see also Branzburg v. Hayes, 408 U.S. 665, 684 (1972) (“It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”); Zemel v. Rusk, 381 U.S. 1, 17 (1965) (“The right to speak and publish does not carry with it the unrestrained right to gather information.”).
6. See Press-Enterprise Co. v. Superior Court of Cal. for Riverside Cnty. (Press II), 478 U.S. 1, 8–9, 27 (1986) (acknowledging that while most proceedings operate best when held in public, some proceedings would be “totally frustrated” if held in public; for example “the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings” (quoting United States v. Sells Eng’g, Inc., 463 U.S. 418, 424 (1983))). The Court explained that while some proceedings require privacy to function properly, others “plainly require public access.” See id. at 9. For instance, the Court had previously explained the important role that openness played in maintaining the fairness—and the appearance of fairness—in criminal trials and juror selection. See id. (citing Press-Enterprise Co. v. Superior Court of Cal., Riverside Cnty. (Press I), 464 U.S. 501, 501 (1984)).
8. See id. at 576–77 (“The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could . . . be foreclosed arbitrarily.”). Although the right of public access was not recognized by the Supreme Court until 1980, the right dates back to English common law. See Publicher Indus., Inc. v. Cohen, 733 F.2d 1059, 1068 (3d Cir. 1984) (explaining that since its passage in 1267, Statute of Marlborough required that “all Causes ought to be heard, ordered, and determined before the Judges of the King’s Courts openly in the King’s Courts . . . .” (quoting 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 103 (6th ed. 1681))). Additionally, the fact that all judicial trials were held in public was one of the most distinct features of English justice and “appears to have been the rule in England from time immemorial.” See Richmond Newspapers, 448 U.S. at 556 (quoting EDWARD JENKS, THE BOOK OF ENGLISH LAW 73–74 (6th ed. 1967))). This tradition continued in colonial America where courthouses had a “central place in the life of communities they served” and encouraged “the active participation of community members” in developing the “local practice of justice.” Norman W. Spaulding, The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial, 24 YALE J.L. & HUMAN. 311, 318–19 (2012).
Subsequently, the Supreme Court has found a right of public access to the voir dire of jurors in criminal trials and to certain preliminary criminal hearings.\(^9\) In determining whether the right of public access applies to certain judicial proceedings, the Court has developed the logic and experience test.\(^{10}\) This test considers whether there has been a history of openness to the proceeding at issue and whether “access plays a significant positive role in the functioning of the particular process in question.”\(^{11}\)

Arbitration is one type of proceeding that requires privacy in order to function properly.\(^{12}\) In recent years, the use of arbitration to resolve business and commercial disputes has been rapidly increasing.\(^{13}\) Between 1994 and 2004, the caseload of the American Arbitration Association’s International Center for Dispute Resolution grew by almost 330%.\(^{14}\) Arbitration is one type of proceeding that requires privacy in order to function properly.\(^{12}\) In recent years, the use of arbitration to resolve business and commercial disputes has been rapidly increasing.\(^{13}\) Between 1994 and 2004, the caseload of the American Arbitration Association’s International Center for Dispute Resolution grew by almost 330%.\(^{14}\)

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9. See Press II, 478 U.S. at 10 (finding right of public access to preliminary criminal proceedings as conducted in California); Press I, 464 U.S. at 511 (finding right of public access to voir dire of jurors in criminal trials); Del. Coal. for Open Gov’t, Inc. v. Strine, 733 F.3d 510, 514 (3d Cir. 2013) (citing El Vocero de P.R. (Caribbean Int’l News Corp.) v. Puerto Rico, 508 U.S. 147, 149–50 (1993) (finding right of public access to preliminary criminal proceedings as conducted in Puerto Rico)).

10. See Press II, 478 U.S. at 8 (articulating bounds of logic and experience test).

11. See id. (explaining logic prong of logic and experience test). The logic and experience test has its origins in Richmond Newspapers, but it has been developed by the Supreme Court in two subsequent cases: Press II and Globe Newspaper Co. v. Superior Court of Norfolk County, 457 U.S. 596 (1982). See PG Publ’g Co. v. Aichele, 705 F.3d 91, 104 (3d Cir. 2013) (explaining development of logic and experience test by Supreme Court).

12. For a further discussion of the arbitration process, see infra notes 50–54 and accompanying text.

13. See Strine, 733 F.3d at 523 (Roth, J., dissenting) (noting that arbitration has been increasing both in United States and abroad). This increase in the use of arbitration proceedings can be attributed to the fact that arbitration “resolv[es] disputes expeditiously,” that there has been an “increase in commercial disputes between businesses located in different countries,” and that “arbitration permits the proceedings to be kept confidential, protecting trade secrets and sensitive financial information.” Id. Judge Roth also noted the advantages of arbitration as articulated by the Supreme Court:

The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. It can be specified, for example, that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets. And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.

Id. at 523–24 (quoting AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1749 (2011)) (internal quotation marks omitted). But see Brian J.M. Quinn, Arbitration and the Future of Delaware’s Corporate Law Franchise, 14 CarFoo J. CONFLICT RESOL. 829, 837 (2013) (explaining that recent study found only 11% of contracts contain arbitration provisions). Even though the use of arbitration is rapidly rising, it only represents a fraction of adjudications. See id.

14. See Strine, 733 F.3d at 523 (Roth, J., dissenting) (discussing one factor that could account for rise in arbitration is fact that “[b]usinesses in this country and
Arbitration rates are growing internationally as well.\textsuperscript{15} For instance, London’s Court of International Arbitration has seen a 300% increase in the number of arbitration requests over the last decade.\textsuperscript{16} The rise in the use of arbitration can be attributed to factors such as its speed in adjudicating disputes, its ability to keep sensitive information confidential, and the increase in disputes between parties from different countries.\textsuperscript{17}

With the rise in the use of arbitration, Delaware creatively attempted to enter the arbitration market by creating a state-sponsored arbitration program.\textsuperscript{18} Delaware has long been viewed as the preeminent destination for incorporation in the United States.\textsuperscript{19} In fact, 51% of publicly traded companies and 61% of Fortune 500 companies are incorporated in Delaware.\textsuperscript{20} One of the main reasons for this preeminence is the Delaware Court of Chancery’s expertise in articulating the bounds of Delaware corporate law.\textsuperscript{21} Although the Court of Chancery is viewed as the foremost venue for resolving business disputes, companies are increasingly turning to arbitration to settle their disputes.\textsuperscript{22} Consequently, Delaware created a state-sponsored arbitration program in an effort to “preserve Delaware’s abroad need to get commercial conflicts resolved as quickly as possible so that commercial relations are not disrupted”).

\textsuperscript{15} See id. (describing rise in popularity of arbitrations internationally).

\textsuperscript{16} See id. (detailing rise in number of arbitrations abroad). Arbitration has become a key method for adjudicating “commercial disputes between businesses located in different countries.” Id. This is especially true with “non-U.S. companies, with no familiarity—or with too much familiarity—with the American judicial system” that “may prefer arbitration with the rules set by the parties to lengthy and expensive court proceedings.” Id.

\textsuperscript{17} See id. (explaining rise in arbitration).


\textsuperscript{19} See Jores Kharatian, Note, Secret Arbitration or Civil Litigation?: An Analysis of the Delaware Arbitration Program, 6 J. BUS. ENTREPRENEURSHIP & L. 411, 411 (2013) (explaining that Delaware is home to many large corporations and “Justice Steele, Chief Justice of the Delaware Supreme Court, has reiterated the prominent reason why many corporations choose Delaware as the state of their incorporation is the presence of highly knowledgeable judges within the business law realm, as well as the predictability of its judicial system”).


\textsuperscript{21} See Kharatian, supra note 19, at 411; see also LEWIS S. BLACK, JR., WHY CORPORATIONS CHOOSE DELAWARE 5 (2007), available at http://1.usa.gov/HAgIRP. (“Many experienced lawyers believe that the principal reason to recommend to their clients that they incorporate in Delaware is the Delaware courts and the body of case law those courts have developed. They point, in particular, to the national reputation and importance of the Court of Chancery.”).

\textsuperscript{22} See Quinn, supra note 13, at 841 (“The specialized Chancery Court is one of the sources of Delaware’s competitive advantage in corporate law.”); see also
preeminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters. In order to qualify for Delaware’s program, “at least one party must be a ‘business entity formed or organized’ under Delaware law and neither party can be a ‘consumer.’”

Additionally, the amount in controversy must exceed one million dollars.25

In Delaware Coalition for Open Government, Inc. v. Strine, the Third Circuit declared Delaware’s state-sponsored arbitration program unconstitutional as a violation of the First Amendment right of public access.27 This Casebrief identifies the Third Circuit’s application of the logic and experience test in determining the right of public access.28 Part II introduces the right of public access and the logic and experience test.29 Additionally, Part II examines Delaware’s arbitration program and the decisions of the United States District Court for the District of Delaware and Third Circuit regarding the constitutionality of the program.30 Part III analyzes the Third Circuit’s conflicting approaches to the application of the logic

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23. See Strine, 733 F.3d at 512 (internal quotation marks omitted) (declaring Delaware’s motive in creating state-sponsored arbitration program); Quinn, supra note 13, at 832 (“[I]n its pleadings before the court in the citizens’ challenge and its public defense, Delaware regularly points to the potential threat of losing adjudications to arbitrators in New York, London, or Singapore as a motivation for implementing its court-sponsored procedure.” (citing Brief for NASDAQ OMX Group Inc. & NYSE EuroNext as Amici Curiae Supporting Respondents at 8, Del. Coal. for Open Gov’t v. Strine, 894 F. Supp. 2d 493 (D. Del. 2012) (No. 1:11-1015))). Quinn also recognized that “[t]he perceived long-term threat to Delaware’s central position in the corporate law as a result of adjudications moving overseas and elsewhere is obvious.” Id.

24. See Strine, 733 F.3d at 512 (citation omitted) (laying out qualifications to participate in Delaware’s state sponsored arbitration program).

25. See id. (stating minimum amount in controversy needed to participate in program).

26. 733 F.3d 510 (3d Cir. 2013).

27. See id. at 521 (“Because there has been a tradition of accessibility to proceedings like Delaware’s government-sponsored arbitration, and because access plays an important role in such proceedings, we find that there is a First Amendment right of access to Delaware’s government-sponsored arbitrations.”). For a further discussion of the facts and procedure of Strine, see infra notes 57–90 and accompanying text.

28. For a further discussion of the logic and experience test, see infra notes 43–49 and accompanying text.

29. For a further discussion of the right of public access, see infra notes 34–42 and accompanying text. For a further discussion of the logic and experience test, see infra notes 43–49 and accompanying text.

30. For a further discussion of Delaware’s state-sponsored arbitration program, see infra notes 50–56 and accompanying text. For a further discussion of the district court’s decision, see infra notes 57–60 and accompanying text. For a further discussion of the Third Circuit’s decision, see infra notes 61–97 and accompanying text.
and experience test. Further, Part III argues that the potential negative effects on Delaware’s position as a place of incorporation may not be as dire as some suggest. Finally, Part IV addresses the overall impact of the Strine decision and its importance in the Third Circuit.

II. The Right of Public Access: Development, Application, and the Conflict in Delaware

The Supreme Court first recognized the right of public access in 1980, when it decided Richmond Newspapers, Inc. v. Virginia. In Richmond Newspapers, the Court held that a Virginia trial court’s decision to close a criminal trial to the public violated the First Amendment. In that case, Chief Justice Burger emphasized the importance of public access in the American judicial system when he wrote, “[t]he explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could . . . be foreclosed arbitrarily.” Since its decision in Richmond Newspapers, the Supreme Court has expanded the right of public access to certain additional criminal proceedings, but it has never considered the question of whether the right is

31. For a further discussion of the conflicting applications of the logic and experience test, see infra notes 104–28 and accompanying text. For a further discussion of the recently filed petition for a writ of certiorari, see infra notes 129–42 and accompanying text.

32. For a further discussion of the potential effects of the Third Circuit’s decision on Delaware as a primary place of incorporation, see infra notes 143–54 and accompanying text.

33. For a further discussion of the overall impact of Strine, see infra notes 155–59 and accompanying text.

34. See 448 U.S. 555, 580 (1980) (finding right of public access to criminal trials implicit in First Amendment). For a further discussion regarding the common law development of right of public access, see supra note 8 and accompanying text.

35. See Richmond Newspapers, 448 U.S. at 580 (holding that First Amendment provides right of public access to criminal proceedings). The decision in Richmond Newspapers was a fractured one, consisting of five different opinions; however, seven of the eight justices who participated in the decision held in favor of finding a right of public access to criminal proceedings. See id.; id. at 583 (Stevens, J., concurring); id. at 585 (Brennan, J., concurring); id. at 599 (Stewart, J., concurring); id. at 604 (Blackmun, J., concurring).

36. See id. at 576–77 (plurality opinion) (detailing importance of First Amendment right of public access to American judicial system). Chief Justice Burger traced the history of criminal trials being open to the public. See id. After reviewing several hundred years of records, Chief Justice Burger could not find “a single instance of a criminal trial conducted in camera in any federal, state, or municipal court . . . .” See id. at 573 n.9 (quoting In re Oliver, 333 U.S. 257, 266 (1948)). In explaining the importance of a First Amendment right of public access, Chief Justice Burger identified some of the public benefits that stem from enforcing this right: public accountability and educating the public about the judicial system. See id.
warranted in civil proceedings. Although the Supreme Court has never expressly examined the question of a right of public access to a civil proceeding, it noted in Richmond Newspapers that "historically both civil and criminal trials have been presumptively open."

A. Finding the Right of Public Access in the Third Circuit

Many circuit courts, including the Third Circuit, have considered the question of public access, and all have found a right of public access to civil trials. The Third Circuit has held that this right also applies to meetings of a Pennsylvania city planning commission and post-trial juror examinations. However, the Third Circuit has declined to extend the right of public access to certain proceedings, such as judicial disciplinary boards, the records of state environmental agencies, and the voting process. In determining whether there is a First Amendment right of public access to a certain proceeding, the Third Circuit applies the logic and experience test.

37. See Del. Coal. for Open Gov’t v. Strine, 733 F.3d 510, 514 (3d Cir. 2013) (acknowledging Supreme Court has only found right of access in criminal proceedings).

38. See Richmond Newspapers, 448 U.S. at 580 n.17 (“Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.”). For a further discussion regarding proceedings for which the Supreme Court has found a right of public access applies, see supra note 9 and accompanying text.


41. See PG Publ’g Co. v. Aichele, 705 F.3d 91, 112 (3d Cir. 2013) (declining to extend First Amendment right of public access to voting process); N. Jersey Media Grp., Inc. v. Ashcroft, 308 F.3d 198, 200 (3d Cir. 2002) (declining to extend First Amendment right of public access to deportation hearings); First Amendment Coal. v. Judicial Inquiry & Review Bd., 784 F.2d 467, 477 (3d Cir. 1989) (declining to extend First Amendment right of public access to judicial disciplinary board hearings); Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1175–76 (3d Cir. 1986) (declining to extend First Amendment right of public access to records of state environmental agencies).

42. See, e.g., Strine, 733 F.3d at 514 (“In order to qualify for public access, both experience and logic must counsel in favor of opening the proceeding to the public” (citing N. Jersey Media Grp., 308 F.3d at 213–14)).
B. Determining a Right of Public Access: The Logic and Experience Test

The logic and experience test is a two-pronged test that courts use to determine whether there is a right of public access. Under the experience prong of the test, courts generally examine the history of a particular proceeding to decide whether that proceeding has traditionally been open to the public. This is an objective standard that draws “on a plethora of historical sources . . . .” Put simply, if a proceeding has traditionally been open to the public, that tradition of openness implies that a proceeding will pass the experience prong of the test; however, a showing of openness at common law is not always required.

The logic prong of the test considers whether “access plays a significant positive role in the functioning of the particular process in question.” In answering this question, courts apply an objective standard and consider two things: “the positive role of access” and “the extent to which openness impairs the public good.” To find that a proceeding qualifies

43. See, e.g., N. Jersey Media Grp., 308 F.3d at 202 (applying logic and experience test to determine if there is right of public access to deportation hearings). The Third Circuit adopted the logic and experience test from Richmond Newspapers, the decision where the Supreme Court first found a constitutional right of public access. See id. (“[W]e find that the application of the Richmond Newspapers experience and logic tests does not compel us to declare the Creppy Directive unconstitutional.”). In order to find a First Amendment right of public access, both the experience and logic prongs of the test must be met. See id. at 213–14.

44. See, e.g., Press II, 478 U.S. 1, 10 (1986) (examining history of preliminary proceedings in criminal trials and finding tradition of accessibility to these proceedings dating back to “the celebrated trial of Aaron Burr for treason”); see also Strine, 733 F.3d at 515–18 (examining history of civil trials and arbitrations); N. Jersey Media Grp., 308 F.3d at 211 (stating that court considers “whether the place and process have historically been open to the press and general public” (quoting Press II, 478 U.S. at 8)); Publicker Indus., 733 F.2d at 1068 (tracing history of openness of civil trials back to Statute of Marlborough in 1267).

45. See PG Publ’g, 705 F.3d at 108 (explaining how Third Circuit and Supreme Court analyze experience prong of logic and experience test under objective standard). These sources include “comments made by the Framers, practice at the English court of law, congressional procedures, relevant regulatory schemes, and court decisions.” Id.

46. See id. (“[A] tradition of accessibility implies the favorable judgment of experience.” (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 589 (1980)); see also Strine, 733 F.3d at 515 (“In order to satisfy the experience test, the tradition of openness must be strong; however, ‘a showing of openness at common law is not required.’” (quoting PG Publ’g, 705 F.3d at 108)). But see N. Jersey Media Grp., 308 F.3d at 213 (explaining that while “a 1000-year history is unnecessary” in establishing experience prong, experience cannot be dispensed with just because “history is ambiguous or lacking”).

47. See Press II, 478 U.S. at 8 (explaining that while some governmental proceedings “operate best under public scrutiny,” others, such as grand jury proceedings, “would be totally frustrated if conducted openly”).

48. See Strine, 733 F.3d at 518 (quoting N. Jersey Media Grp., 308 F.3d at 202) (laying out elements of logic prong of logic and experience test). The logic prong is also examined under an objective standard. See PG Publ’g, 705 F.3d at 111. In applying the logic prong, courts will examine six traditional benefits that flow from openness. See id. These benefits include:
for the First Amendment right of public access, a court must determine that “both experience and logic [ ] counsel in favor of opening the proceeding to the public.”

C. Preserving Delaware’s Preeminence in the Realm of Corporate Law

In 2009, the Delaware General Assembly amended the Delaware Code to grant sitting judges on the Court of Chancery the “power to arbitrate business disputes.” The goals of Delaware’s arbitration program were two-fold: (1) addressing businesses’ increasing demand for alternatives to civil litigation as a means of resolving commercial disputes, and (2) making the state’s expert judiciary available to satisfy that demand with well-reasoned results and savings of time and expense.

[1] promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the [proceeding]; [2] promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; [3] providing a significant community therapeutic value as an outlet for community concern, hostility and emotion; [4] serving as a check on corrupt practices by exposing the [proceeding] to public scrutiny; [5] enhancement of the performance of all involved; and [6] discouragement of [fraud].

Id. (alterations in original) (quoting United States v. Simone, 14 F.3d 833, 839 (3d Cir. 1994)) (internal quotation marks omitted).

49. See Strine, 733 F.3d at 514 (citing N. Jersey Media Grp., 308 F.3d at 213–14) (indicating that both prongs of logic and experience test must be met for proceeding to qualify for First Amendment right of public access). Once a presumption of public access is given to a proceeding on the basis of the experience and logic test, the right of public access can only be overturned by a compelling state interest. See Press II, 478 U.S. at 9–10 (explaining right of public access is not absolute but rather “[t]he presumption may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.” (quoting Press I, 464 U.S. 501, 510 (1984)) (internal quotation marks omitted)).

50. See H.B. 49, 145th Gen. Assemb. (Del. 2009) (resulting in Court of Chancery arbitration program outlined in Del. Code Ann. tit. 10, § 349 (2009)); see also Steele, supra note 20, at 376 (clarifying that Delaware’s state-sponsored arbitration program was created by statute and not court rule). Additionally, Chief Justice Steele explained that the District Court’s opinion gave the impression that the program was a court rule and not created by statute. See id.

51. See DiTomo, supra note 18, at 31 (citing H.B. 49, 145th Gen. Assemb. (Del. 2009)) (stating goals of Delaware’s state-sponsored arbitration program). In order to qualify for Delaware’s arbitration program, parties must meet three conditions: (1) at least one party must be a Delaware corporation; (2) neither party can be a consumer; and (3) the amount-in-controversy must be at least one million dollars. Id. (citing Del. Code Ann. tit. 10, § 349); see also Steele, supra note 20, at 376 (explaining that purpose of Delaware’s program was to provide service “to our constituents, our customers, in addition to the regular court system”). Chief Justice Steele further explained that the program is an advantage offered to corporations who are either incorporated in or have their principle place of business in Delaware. See id.
Under the program, the judges sitting on the Court of Chancery would hear arbitration proceedings during normal business hours. However, unlike normal Chancery Court proceedings, these arbitrations would be closed to the public. Court of Chancery rules governed arbitrations for the purposes of depositions and discovery, and the judge could “grant any remedy or relief that [the judge] deem[ed] just and equitable and within the scope of any applicable agreement of the parties.” Ultimately, the confidentiality of the program caused the District Court and the Third Circuit to declare the arbitration program unconstitutional. While it is true that privacy is an important component of the arbitration process, critics argued that this alleged need for confidentiality did not weigh heavily against the longstanding tradition of openness, which is at the heart of the First Amendment right of public access.

D. Civil Trial or Arbitration? A Dilemma in the District Court

The Delaware Coalition for Open Government (the Coalition) brought suit in the United States District Court for the District of Delaware, alleging that the confidentiality of Delaware’s arbitration program...

52. See Strine, 733 F.3d at 512–13 (describing procedure of Delaware’s arbitration program). Before an arbitration proceeding is heard, the parties are required to file a petition with the Register in Chancery. See id. at 512. Arbitrations typically begin ninety days after the Register in Chancery has been petitioned, and they cost $6,000 per day after an initial $12,000 filing fee. See id. at 513. Additionally, arbitrations are governed by the rules of the Court of Chancery unless the parties agree otherwise. See id. The presiding judge “[m]ay grant any remedy or relief that [s/he] deems just and equitable and within the scope of any applicable agreement of the parties” and both parties have the right to appeal the decision to the Delaware Supreme Court. Id. (alterations in original) (quoting DEL. CH. R. 98(f)(1)). However, the chances of overruling decisions made by the arbitrator are limited because, on appeal, the Delaware Supreme Court applies a set of standards outlined in the Federal Arbitration Act that are highly deferential to the lower court’s arbitration decision. See id. One situation where the Delaware Supreme Court may disagree with the arbitrator’s decision is if the appellant shows that the “award was procured by corruption, fraud, or undue means” or there was misconduct on the part of the arbitrator. Id. (quoting 9 U.S.C. § 10 (2012)). Without proof of some sort of misconduct on the part of the arbitrator, there are very few circumstances in which an arbitration decision will be overturned on appeal. See id.

53. See id. at 513 (“[T]he statute and rules governing Delaware’s proceedings bar public access.”).

54. See id. (quoting DEL. CH. R. 98(f)(1)) (explaining procedure for arbitration program). Although depositions and discovery were to be governed by Court of Chancery rules generally, parties could amend how the rules would apply. See id.

55. See id. at 521 (declaring Delaware’s state-sponsored arbitration program unconstitutional as violation of First Amendment right of public access).

56. See Quinn, supra note 13, at 848 (“[T]he provision for the broad protections of confidentiality for the arbitration proceedings places it squarely at odds with long-held notions of openness of court proceedings and a qualified First Amendment right of public access to the courts.”).
violated the First Amendment right of public access. The Coalition argued that these secret arbitrations were more akin to civil trials than arbitrations. The court agreed and found that “the Delaware proceeding functions essentially as a non-jury trial before a Chancery Court judge,” and, therefore, the First Amendment right of public access applied to these proceedings. The district court did not apply the logic and experience test because it found that Delaware’s state-sponsored arbitration program was “sufficiently like a trial,” and therefore, the right of public access automatically applied.

E. Letting the Secret Out: The Third Circuit Gets the Case

On appeal, the Third Circuit found that the district court erred in not applying the logic and experience test. Although the Third Circuit recognized that there were similarities between civil trials and Delaware’s arbitration program, these parallels were not enough to bypass the logic and experience test. Therefore, the Third Circuit proceeded to examine


58. See id. at 500 (“[T]he Delaware proceeding is essentially a bench trial and Publicker Industries governs the state’s ability to close the proceeding to the public.”).

59. See id. at 494 (finding Delaware’s state-sponsored arbitration program sufficiently like trial to apply First Amendment right of public access). In finding a First Amendment right of public access, the court decided that although it was called an arbitration, Delaware’s proceeding was essentially a civil trial. See id. at 502.

60. See id. at 500–03 (determining Delaware’s state-sponsored arbitration program is essentially civil trial and therefore court did not need to apply logic and experience test). In deciding whether to apply the logic and experience test, the district court determined that it needed to address a threshold question: “Has Delaware implemented a form of commercial arbitration to which the Court must apply the logic and experience test, or has it created a procedure ‘sufficiently like a trial’, such that Publicker Industries governs?” Id. at 500 (citing El Vocero de P.R. (Caribbean Int’l News Corp.) v. Puerto Rico, 508 U.S. 147, 149–50 (1993)). After examining Delaware’s state-sponsored arbitration program, the court determined that “[t]he Delaware proceeding, although bearing the label arbitration, is essentially a civil trial.” Id. at 502. Because the court found the arbitration proceeding was, in effect, a civil trial, there was no need to apply the logic and experience test. See id. at 503–04.

61. See Del. Coal. for Open Gov’t v. Strine, 733 F.3d 510, 515 (3d Cir. 2013) (“We find the District Court’s reliance on El Vocero misplaced and its decision to bypass the experience and logic test inappropriate.”). The Third Circuit recognized similarities between civil trials and Delaware’s state-sponsored arbitration program, but it found that these were not enough to justify skipping the logic and experience test. See id.

62. See id. at 514–15 (finding similarities between civil trials and Delaware’s state-sponsored arbitration program, but not enough to find program “sufficiently like a trial” in order to skip logic and experience test (quoting Strine, 894 F. Supp. 2d at 500)).
Delaware’s state-sponsored arbitration program under the logic and experience test.63

1. Experience Prong: An Examination of History

In applying the experience prong, the court needed to decide which proceeding’s history to examine: civil trials or arbitrations.64 The Coalition argued that only the history of civil trials should be examined, whereas the Appellants argued that only the history of arbitrations should be examined.65 The Third Circuit did not agree with either party.66 Rather, the court explained that it need not “engage in so narrow a historical inquiry,” and instead, it would examine the history of both civil trials and arbitrations.67

a. Civil Trials: A Long History of Openness

The Strine court began its analysis by noting that, “there is a long history of [public] access to civil trials.”68 It then traced the history of openness in civil trials through English common law, beginning with the passage of the Statute of Marlborough in 1267.69 Next, the court proceeded to explain that American colonists adopted the tradition of openness and that courthouses played a central role in colonial life.70 Finally, the court concluded its analysis of the history of civil trials by noting that civil trials generally remain open to the public today.71

63. See id. at 515 (“We therefore must examine Delaware’s proceeding under the experience and logic test.”).
64. See id. (noting that parties in this case disagreed about which proceedings’ history Third Circuit should examine in order to decide experience prong of experience and logic test).
65. See id. (“The Appellants suggest that we only examine the history of arbitrations, whereas the Coalition suggests we only examine the history of civil trials.”).
66. See id. (concluding that “[n]either suggestion is appropriate in isolation”).
67. See id. ("There is no need to engage in so narrow a historical inquiry as the parties suggest. In determining the bounds of our historical inquiry, we look 'not to the practice of the specific public institution involved, but rather to whether the particular type of government proceeding [has] historically been open in our free society.' " (alteration in original) (quoting Pg Publ’g Co. v. Aichele, 705 F.3d 91, 108 (3d Cir. 2013))). In “[f]ollowing this broad historical approach,” the court found “that an exploration of both civil trials and arbitration [was] appropriate . . . .” Id. at 516.
68. See id. (citing Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1068–70 (3d Cir. 1984)) (noting that Third Circuit has previously explained long history of civil trials in Publicker).
69. See id. (explaining Statute of Marlborough required “all Causes . . . to be heard, ordered, and determined before the Judges of the King’s Courts [were to be heard] openly in the King’s Courts” (alterations in original) (quoting Coke, supra note 8)).
70. See id. (citing Spaulding, supra note 8, at 318–19) (discussing how courthouses served as central place in colonial life).
71. See id. (“Today, civil trials and the court filings associated with them are generally open to the public.”).
b. Arbitrations: A Mixed History

In examining the history of arbitrations, the Third Circuit once again began its analysis with the English common law, finding records of arbitrations in England dating back to the twelfth century. These records suggest that arbitrations were held in public and involved community participation. The court went on to explain that, beginning in colonial times and continuing throughout the eighteenth century, arbitration in the United States began to develop formal procedures and that at least some of these arbitrations were public.

Despite this development, the court explained that it was not until the Federal Arbitration Act of 1925 that arbitrations became an important tool in resolving commercial disputes. Today, there is an entire industry devoted to arbitrations, and these arbitrations are “distinctly private” because “[c]onfidentiality is a natural outgrowth of the status of arbitrations as private alternatives to government-sponsored proceedings.” Thus, the court determined that the history of arbitrations contains a combination of privacy and openness. After its analysis, the court found that Delaware’s program met the experience prong of the test. According to the court, Delaware’s program, “a binding arbitration before a judge that takes place in a courtroom,” was similar to proceedings that have a strong tradition of openness.

72. See id. (citing 1 MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION § 2:5 (3d ed. 2011)) (detailing history of arbitration).
73. See id. at 517 (“Early arbitrations involved community participation, and evidence suggests that they took place in public venues.”).
74. See id. (recounting development of arbitration in America from colonial time to eighteenth century). The court noted that in colonial times, arbitrations served mainly as a tool for those who were suspicious of the legal system and wanted to solve disputes in a “‘less public and less adversarial’ way.” Id. (citing JEROLD S. AUERBACH, JUSTICE WITHOUT LAW?: RESOLVING DISPUTES WITHOUT LAWYERS 4 (1983); Bruce H. Mann, The Formalization of Informal Law: Arbitration Before the American Revolution, 59 N.Y.U. L. REV. 443, 454 (1984)). In addition, the court noted that by the eighteenth century, despite the fact that arbitrations had become more formal, at least some continued to take place in public. See id.
75. See id. (recognizing that passage of Federal Arbitration Act in 1925, along with New York’s Arbitration Act in 1920, which first treated arbitration agreements as contracts, allowed arbitration to evolve into tool it is today).
76. See id. at 517–18 (explaining that groups such as the American Arbitration Association set up and facilitate private arbitrations).
77. See id. at 518 (noting that there is mixed history with regards to openness of arbitrations but “they have often been closed, especially in the twentieth century”).
78. See id. (finding Delaware’s state-sponsored arbitration program “differ[ed] fundamentally” from traditional arbitrations and that this type of proceeding does not qualify for protection from First Amendment right of public access).
79. See id. (finding proceedings similar to Delaware’s state-sponsored arbitration program have traditionally been open to public). The court found that “the history of openness is comparable to the history that this court described in Publicker.” Id. Thus, the court relied on the history in Publicker to find a right of public access to civil trials. See generally id. at 516–18 (citing Publicker Indus., Inc. v. Co-
2. The Logic Prong: Weighing the Benefits and Disadvantages of Openness

After finding that Delaware’s proceeding met the experience prong, the Third Circuit applied the logic prong of the test. When applying the logic prong, a court must decide whether “access plays a significant positive role in the functioning of the particular process in question.” In doing so, the Third Circuit weighed both the positive and negative roles that openness would play in Delaware’s state-sponsored arbitration program.

The Third Circuit has recognized six main benefits of public access. These benefits include: keeping citizens informed, maintaining the fairness that accompanies open proceedings, providing an outlet for community concern, allowing public scrutiny, enhancing the performance of those involved in the judicial process, and discouraging fraud or misrepresentation. The Third Circuit concluded that opening Delaware’s arbitration program to the public would serve the same benefits. According to the court, an open proceeding would give stockholders and the public a better understanding of Delaware’s dispute resolution methods, “allay the public’s concerns” over the process, expose parties and the court to scrutiny, and discourage perjury and misrepresentation.

Weighed against these benefits, the court found the detriments of open arbitrations to be “slight.” Appellants argued that privacy is necessary to protect “patented information, trade secrets, and other closely held information,” to “prevent the loss of prestige and good will” that would follow an open proceeding, and to curb the hostility that often accompanies open proceedings. Additionally, Appellants argued that openness
would effectively end the arbitration program. Despite Appellants’ arguments, the court did not find these interests compelling and held that the logic prong weighed in favor of a right of public access.

F. Disagreement Among the Judges: The Dissenting Opinion

Judge Roth issued a strong dissenting opinion in Strine. She took exception to the majority’s application of the logic and experience test because it examined the history of both civil trials and arbitrations. Instead, Judge Roth examined only the history of arbitrations. She explained why those benefits would be slight). The court rebuffed each argument put forth by Appellants in favor of privacy. See id. at 519. The court disagreed that privacy was necessary to protect “patented information, trade secrets, and other closely held information” because that information is “already protected under Delaware Chancery Court Rule 5.1 . . . .” Id. (internal quotation marks omitted). With regard to the potential loss of goodwill and prestige that parties would suffer, the court responded that it “would not hinder the functioning of the proceeding.” Id. Appellants further argued that privacy encourages a “less hostile, more conciliatory approach,” however, the court noted that private arbitrations can become “contentious” as well. Id. (internal quotation marks omitted). Lastly, Appellants argued that openness would end Delaware’s arbitration program. See id. at 520. The court found that, if true, Delaware’s arbitrations were akin to civil trials and created to “contravene the First Amendment right of access.” See id.

89. See id. (“This argument assumes that confidentiality is the sole advantage of Delaware’s proceeding over regular Chancery Court proceedings. But if that were true—if Delaware’s arbitration were just a secret civil trial—it would clearly contravene the First Amendment right of access.”).

90. See id. at 521 (“Like history, logic weighs in favor of granting access to Delaware’s government-sponsored arbitration proceedings. The benefits of access are significant. It would ensure accountability and allow the public to maintain faith in the Delaware judicial system. A possible decrease in the appeal of the proceeding and a reduction in its conciliatory potential are comparatively less weighty, and they fall far short of the ‘profound’ security concerns we found compelling in North Jersey Media Group.”).

91. See id. at 523 (Roth, J., dissenting) (focusing solely on issue of confidentiality).

92. See id. at 524–26 (disagreeing with majority’s decision to examine history of both civil trials and arbitrations). Judge Roth argued that the majority erred in looking “not to the practice of the specific public institution involved, but rather to whether the particular type of government proceeding [has] historically been open . . . .” Id. at 524 (first alteration in original) (quoting Strine, 733 F.3d at 515 (majority opinion)) (internal quotation marks omitted). Further, she opined that the majority’s analysis, which classifies Delaware’s program as a “particular type of government proceeding” that has traditionally been open to the public, “begs the question.” Id. at 525 (quoting Strine, 733 F.3d at 515 (majority opinion)) (internal quotation marks omitted).

93. See id. at 523–26 (examining history of arbitrations only). In examining the history of arbitrations, Judge Roth found that there was a strong tradition of privacy and confidentiality in arbitrations that began in England, continued through the founding of the United States, and remained to today. See id. at 525. Thus, she did not find a tradition of openness for arbitrations. See id. at 525–26. Additionally, under the logic prong, she found that “the resolution of complex business disputes, involving sensitive financial information, trade secrets, and technological developments, needs to be confidential so that the parties do not suffer the ill effects of this information being set out for the public . . . .” Id. at 526.
plained that arbitrations in England and the American colonies were private and that confidentiality in arbitration proceedings continues today. Additionally, she noted that “the major national and international arbitral bodies continue to emphasize confidentiality.” Consequently, Judge Roth concluded that arbitrations have historically been held in private and therefore lacked the tradition of openness needed to satisfy the experience prong.

Finally, in examining the logic prong, she found that the “resolution of complex business disputes, involving sensitive financial information, trade secrets, and technological developments, needs to be confidential . . . .” Therefore, under Judge Roth’s application of the logic and experience test, Delaware’s state-sponsored arbitration program does not violate the right of public access and should be upheld.

III. Analysis

The Third Circuit’s decision in Strine forced two issues to the forefront: the application of the logic and experience test and the decision’s impact on Delaware’s position as a destination for incorporation. First, Strine evidences the contrasting applications of the logic and experience test—that mirror a division among the circuit courts—and provides an intriguing forum in which to examine these two approaches. Second, Therefore, Judge Roth concluded that the arbitration program should remain private. See id.


95. See id. (citing AAA & ABA, Code of Ethics for Arbitrators in Commercial Disputes, Canon VII(B) (2004); AAA, Commercial Arbitration Rules R-23 (2009); UNCITRAL, Arbitration Rules art. 21(3) (2010)) (emphasizing that confidentiality is key to arbitration today and that arbitrations are not held in public unless parties agree).

96. See id. at 526 (concluding that arbitrations have not traditionally been open to public and press).

97. See id. (determining that confidentiality is essential to prevent third parties from obtaining and misappropriating confidential information needed to arbitrate disputes).

98. For a further discussion of the application of the logic and experience test, see infra notes 101–42 and accompanying text. For a further discussion of the decision’s impact on Delaware’s position as a destination for incorporation, see infra notes 143–54 and accompanying text.

99. See Petition for a Writ of Certiorari at 19–21, Strine v. Del. Coal. for Open Gov’t, 134 S. Ct. 1551 (2014) (No. 13-869), 2014 WL 262086 (explaining differing applications of logic and experience test and division among circuits). The Petition notes two main applications of the logic and experience test. See id. The main applications are demonstrated in Strine, with the majority adopting a more lenient approach and the dissent adopting a more stringent approach. Compare Strine, 733
Delaware’s position as a destination of incorporation has been at the forefront of Delaware’s arguments throughout litigation; however, some commentators have stated strong disagreements with this position.\textsuperscript{100}

A. Conflicting Applications of the Logic and Experience Test

The correct application of the experience prong of the logic and experience test is a point of contention among the circuits and some state supreme courts.\textsuperscript{101} The issue arises over the degree of strictness, or leniency, courts use in applying a historical analysis.\textsuperscript{102} These different applications can produce opposite results, as was displayed in \textit{Strine}, where the majority adopted the more lenient approach and the dissent the stricter approach.\textsuperscript{103}

1. Contrasting Approaches Create Headaches for Practitioners in the Third Circuit

There are two main applications of the experience prong of the test.\textsuperscript{104} First, some courts require “a long and unbroken history of openness,” whereas other courts allow for a much more lenient historical showing.\textsuperscript{105} The stricter version of the test, which requires a “long and unbroken history of openness,” seems to more closely resemble the test promulgated in \textit{Richmond Newspapers}, in which the Supreme Court first

\textsuperscript{100} For a further discussion of Delaware’s insistence that its arbitration program is necessary to preserve its preeminence as the destination for incorporation, and the disagreement of certain commentators, see infra notes 143–54 and accompanying text.

\textsuperscript{101} See Petition for Writ of Certiorari, supra note 99, at 19 (“Beyond the traditional criminal or civil trial—and the ‘unbroken, uncontradicted history’ of public access to those proceedings—the lower courts disagree sharply on the historical showing needed to satisfy the experience standard.” (citation omitted) (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980))). But see Brief for Respondent Delaware Coalition for Open Government, Inc. in Opposition at 14, Strine v. Del. Coal. for Open Gov’t, 134 S. Ct. 1551 (2014) (No. 13-869), 2014 WL 547054 (arguing there is no circuit split regarding application of logic and experience test).

\textsuperscript{102} For a further discussion of the divergent applications of the logic and experience test, see infra notes 104–28 and accompanying text.

\textsuperscript{103} See Strine, 733 F.3d at 515 (applying lenient standard). But see id. at 518 (Roth, J., dissenting) (applying strict standard).

\textsuperscript{104} See Petition for a Writ of Certiorari, supra note 99, at 19–20 (explaining applications of test). There is a third application in which some courts uphold First Amendment claims “notwithstanding the absence of any tradition of openness.” See id. at 20–21. That approach has only been applied in the Second Circuit and will not be discussed in this Casebrief.

\textsuperscript{105} See id. at 19 (explaining two main applications of test that circuits are split over).
recognized the right of public access.\textsuperscript{106} It is also the approach taken by Judge Roth in her dissenting opinion in \textit{Strine}.\textsuperscript{107} Additionally, the Seventh Circuit, D.C. Circuit, and the state of Massachusetts have adopted this stricter approach.\textsuperscript{108}

The second approach to the experience prong is the approach applied by the majority in \textit{Strine}.\textsuperscript{109} The First, Third, and Sixth Circuits have also applied this approach.\textsuperscript{110} Compared to the first approach, this approach is much more lenient because it allows for a more ambiguous showing of openness than the first approach.\textsuperscript{111} Additionally, this approach allows courts to analogize the particular proceeding at issue to other proceedings with clear histories of openness in order to find a right of public access, thereby increasing the number of proceedings that qualify for the right of public access.\textsuperscript{112}

The majority and dissenting opinions in \textit{Strine} provide an intriguing forum to examine how these two different approaches treat the same issue.\textsuperscript{113} The majority in \textit{Strine} found that there was "a strong tradition of openness for proceedings like Delaware’s government-sponsored arbitra-

\textsuperscript{106.} See \textit{id.} at 17–18 (arguing that lenient approach is not consistent with test derived from \textit{Richmond Newspapers}).

\textsuperscript{107.} See \textit{Strine}, 733 F.3d at 523–25 (Roth, J., dissenting) (analyzing history of arbitration only). Judge Roth argued that the majority’s analysis, finding that Delaware’s program is the “particular type of government proceeding” that has historically been held open, “begs the question.” \textit{id.} at 524–25.

\textsuperscript{108.} See \textit{Petition for a Writ of Certiorari, supra note 99}, at 19 (indicating which courts have applied this approach to logic and experience test). It also appears that the Third Circuit applied this approach in a previous case to hold that there was not a right of public access to deportation hearings. See \textit{N. Jersey Media Grp., Inc. v. Ashcroft}, 308 F.3d 198, 221 (3d Cir. 2002). For a further discussion of this case, see \textit{infra} notes 125–27 and accompanying text.

\textsuperscript{109.} See \textit{Strine}, 733 F.3d at 515–18 (applying more lenient approach to experience prong by examining history of both civil trials and arbitrations).

\textsuperscript{110.} See \textit{Petition for a Writ of Certiorari, supra note 99}, at 20 (listing circuits that apply more lenient approach).

\textsuperscript{111.} See \textit{id.} at 19–20 (contrasting applications of test). The first application requires a “long and unbroken history,” whereas the second approach allows for a much more ambiguous showing, such as allowing courts to analogize to other proceedings. \textit{See id.}

\textsuperscript{112.} See \textit{Strine}, 733 F.3d at 515–18 (analogizing Delaware’s state-sponsored arbitration program to histories of both civil trials and arbitrations and finding “[w]hen we properly account for the type of proceeding that Delaware has instituted—a binding arbitration before a judge that takes place in a courtroom—the history of openness is comparable to the history that this court described in \textit{Publicker and the Supreme Court found in \textit{Richmond Newspapers}}”; \textit{see also In re Boston Herald}, Inc., 321 F.3d 174, 184 (1st Cir. 2003) (explaining that tradition should not be construed narrowly and that court can analogize to similar proceedings); \textit{Detroit Free Press v. Ashcroft}, 303 F.3d 681, 702 (6th Cir. 2002) (finding right of access to deportation hearings by analogizing them to “judicial proceeding[s]”).

\textsuperscript{113.} For a further analysis of the divergent applications of the test as displayed by \textit{Strine}, see \textit{infra} notes 114–28 and accompanying text.
The majority’s decision not to explicitly classify the proceeding—either as a civil trial or arbitration—highlights a significant advantage of using the lenient approach. Under the lenient approach, the classification of a specific proceeding is not of paramount importance. Accordingly, the lenient approach allowed the majority to conclude that the Delaware program shared elements of both civil trials and arbitrations and to examine the history of both. Like the majority in Strine, courts benefit from applying the lenient approach because it allows courts to analogize the matter at hand to another proceeding’s history when the proceeding at issue has no identifiable history.

Conversely, Judge Roth, in her dissent, examined Delaware’s program against the history of arbitrations only. The application used by Judge

114. See Strine, 733 F.3d at 521 (concluding logic and experience test counsels in favor of finding First Amendment right of public access, because proceedings similar to Delaware’s state-sponsored arbitration program have historically been open to public and press). Despite this conclusion, the court did not give a clear indication regarding whether it considered Delaware’s state-sponsored program to be a civil trial or an arbitration. See id. Rather, it noted that the program shared features with both civil trials and arbitrations. See id. at 518. The court seemed to imply, however, that Delaware’s program is more like a civil trial than an arbitration in two respects. See id. First, the court conceded that most arbitrations are held in private. See id. Second, it distinguished Delaware’s state-sponsored arbitration program from traditional arbitrations by comparing the state-sponsored arbitration’s features to those of traditional civil trials. See id. The court did not feel the need to expressly classify the program as a civil trial or arbitration because “in prior public access cases we have defined the type of proceeding broadly, and have often found ‘wide-ranging’ historical inquiries helpful to our analysis of the First Amendment right of public access.” Id. at 515 (citing PG Publ’g Co. v. Aichele, 705 F.3d 91, 108 (3d Cir. 2013)).

115. See id. (choosing not to classify Delaware’s program as either arbitration or civil trial). This highlights the flexibility of this approach, allowing courts to take the proceeding at issue and analogize it to other proceedings as the court did in Strine.

116. See Petition for a Writ of Certiorari, supra note 99, at 19–21 (explaining that lenient approach allows courts to analogize to other proceedings). The classification is not paramount in these proceedings, because courts are not confined by the history of a single proceeding, as they are able to analogize to similar proceedings. See id.

117. See Strine, 733 F.3d at 515 (declining to examine either proceeding in isolation).

118. See, e.g., id. ("Following this broad historical approach, we find that an exploration of both civil trials and arbitrations is appropriate here. Exploring both histories avoids begging the question and allows us to fully consider the ‘judgment of experience.’" (quoting Press II, 478 U.S. 1, 11 (1986))).

119. See id. at 524–25 (Roth, J., dissenting) (disagreeing with majority’s analysis because Judge Roth did not examine practice of specific institution but rather whether particular type of proceeding has history of openness). The application of the test by the majority is strongly contrasted by Judge Roth’s application in her dissent. See id. In her dissent, Judge Roth strongly disagreed with the analysis put forth by Judge Sloviter in the majority opinion, stating that “[i]n my view, [Judge Sloviter’s] analysis begs the question.” Id. at 525.
Roth is stricter than that of the majority.120 This approach requires courts to make a choice about a proceeding’s explicit classification.121 In doing so, this approach is more predictable and makes it easier for attorneys and judges to recognize which proceedings have a concrete history of openness and which ones do not.122 Nevertheless, the question remains as to how to correctly classify a proceeding.123

The application of the logic and experience test in Strine presents a problem for practitioners in the Third Circuit.124 Not only do Strine’s majority and dissenting opinions apply different applications of the test, but the Third Circuit as a whole appears to waver on which application of the test to apply.125 While the court in Strine applied a more lenient historical

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120. See Petition for a Writ of Certiorari, supra note 99, at 19–20 (explaining strict approach requires “long and unbroken history of openness,” whereas lenient approach “holds a much more ambiguous historical showing sufficient”).

121. See id. at 19 (explaining that this approach requires “long and unbroken history of openness”). Because this approach requires the proceeding to have a “long and unbroken history,” courts cannot find a right of access by analogizing it to other proceedings. See id.

122. See, e.g., In re Reporters Comm. for Freedom of the Press, 773 F.2d 1325, 1336 (D.C. Cir. 1985) (stating that “we cannot discern an historic practice of such clarity, generality and duration as to justify” First Amendment right of public access to sealed discovery documents). But see, e.g., Strine, 733 F.3d at 515–18 (analogizing Delaware’s state-sponsored arbitration program to history of civil trials in order to find right of public access). This approach is easier to predict because it does not allow judges to analogize to the history of another proceeding; rather, judges are forced to examine solely the history of the proceeding in front of them. See, e.g., In re Reporters, 773 F.2d at 1336 (confining historical analysis to one type of proceeding only).

123. See Strine, 733 F.3d at 515 (questioning whether Delaware’s proceeding was actually arbitration). In her dissenting opinion, Judge Roth assumed that Delaware’s proceedings actually were arbitrations. See id. at 525 (Roth, J., dissenting). The majority acknowledged this issue when it noted that it could not take Delaware’s designation at face value, otherwise a government could prevent access to a proceeding simply by renaming a civil trial a “sivel trial.” See id. at 515 (majority opinion). The Supreme Court of the United States has held that “the First Amendment question cannot be resolved solely on the label we give the event, i.e., ‘trial’ or otherwise . . . .” Press II, 478 U.S. at 7.

124. See Strine, 733 F.3d at 515–18 (applying experience prong leniently to find right of public access). But see N. Jersey Media Grp., Inc. v. Ashcroft, 308 F.3d 198, 211 (3d Cir. 2002) (“[T]he tradition of open deportation hearings is too recent and inconsistent to support a First Amendment right of access.”).

125. See PG Publ’g Co. v. Aichele, 705 F.3d 91, 112 (3d Cir. 2013) (applying lenient standard). But see N. Jersey Media Grp., 308 F.3d at 211 (applying strict standard). For in-depth treatment of the strict standard applied in N. Jersey Media Grp. and how it compares to a more lenient application, see Donna Mackenzie, Note, Do Democracies Die Behind Closed Doors? The Third and Sixth Circuits Split over the Closure of Removal Hearings, 49 Wayne L. Rev. 813 (2003). Mackenzie explains that the Sixth Circuit found a right of public access to deportation hearings. See id. at 820. In doing so, the Sixth Circuit found that a “brief historical tradition might be sufficient to establish a First Amendment right of access where the beneficial effects of access to that process are overwhelming and uncontradicted.” Id. (quoting Detroit Free Press v. Ashcroft, 303 F.3d 681, 701 (6th Cir. 2002)) (internal quotation marks omitted). Additionally, the court relied on “acts enacted by the Immigra-
analysis, the Third Circuit appeared to apply a much stricter analysis in *North Jersey Media Group, Inc. v. Ashcroft*,\(^{126}\) where it found there was not a right of public access to deportation hearings.\(^{127}\) In using both applications of the test, the Third Circuit has left practitioners to play a guessing game to determine which types of proceedings must remain open to the public and which ones can remain private.\(^{128}\)

2. **Unresolved Issues: Petition for a Writ of Certiorari**

On January 21, 2014, then-Chancellor Leo E. Strine, Jr. and the other judges of the Delaware Court of Chancery petitioned the Supreme Court for a Writ of Certiorari regarding the outcome in *Strine*\(^{129}\). The main question presented was whether the logic and experience test rendered Delaware’s state-sponsored arbitration program unconstitutional.\(^{130}\)

The judges argued that the *Strine* majority erred in finding that Delaware’s program met the experience prong because there was a *mixed tradition* of openness.\(^{131}\) The judges asserted that in order to hold a
proceeding unconstitutional under the logic and experience test, a court must show a long tradition of openness.\textsuperscript{132} If the majority in \textit{Strine} had applied the strict approach instead of the more lenient approach, then the First Amendment claim would have been rejected.\textsuperscript{133}

The different applications of the logic and experience test create inconsistent results, as some states have adopted the lenient approach and others have adopted the strict approach.\textsuperscript{134} For example, it appears that a state like Massachusetts would have come to the opposite conclusion as the \textit{Strine} court and would have upheld an arbitration program if it were identical to Delaware’s program.\textsuperscript{135}

Supreme Court jurisprudence on the right of public access is scarce.\textsuperscript{136} Further, the Supreme Court has never ventured outside the scope of criminal proceedings when examining the right of public access.\textsuperscript{137} This scarcity of jurisprudence is one of the main reasons for the divergent applications of the logic and experience test described above.\textsuperscript{138}

The judges, in their Petition, argued that the Supreme Court should take the same conservative approach to civil proceedings as it did with criminal proceedings.\textsuperscript{139} They argued that the Third Circuit’s application of the logic and experience test in \textit{Strine} is inconsistent with the test origi-
nally devised by the Supreme Court. Unfortunately, these issues seem destined to remain unresolved, because the Supreme Court denied the judges’ Petition for a Writ of Certiorari. In denying the Petition, the Supreme Court effectively refused to give practitioners—inside and outside of the Third Circuit—guidance on how to correctly apply the logic and experience test.

**B. Not as Bad as it Seems: Delaware’s Preeminence Is Not in Jeopardy**

Delaware’s state-sponsored arbitration program was created in order to “preserve Delaware’s preeminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters.” In attempting to justify its arbitration program, Delaware has continuously pointed to the threat of losing adjudications to private arbitrators.

Despite Delaware’s insistence that this program is necessary to maintain its position as the preeminent state for incorporation, at least one commentator has argued that “[t]he court’s ruling in Strine may not be as big a blow as many may set it out to be for the state of Delaware . . . .” According to this commentator, one of the main reasons that businesses incorporate in Delaware is because of the uniformity within the judicial system, especially in the Court of Chancery. If closed arbitration were to become the norm, then the large body of decisional law created by the Court of Chancery would no longer be as enticing. Therefore, Dela-

140. See id. (arguing that application by Third Circuit is not consistent with Supreme Court’s interpretation of test).


142. For a further discussion of the differing applications of the logic and experience test, see supra notes 101–28 and accompanying text.


144. See Quinn, supra note 13, at 892 (citing Brief for NASDAQ OMX Group Inc. & NYSE EuroNext as Amici Curiae Supporting Respondents at 8, Del. Coal. for Open Gov’t v. Strine, 894 F. Supp. 2d 493 (D. Del. 2012) (No. 1:11-1015)) (stating that Delaware implemented its program to avoid losing potential adjudications to “arbitrators in New York, London, or Singapore”). Quinn also noted that Delaware feels that its “central position in the corporate law” is being threatened by the possibility of corporations taking their business disputes to be arbitrated outside of Delaware. See id.

145. See Kharatian, supra note 19, at 419 (arguing that having Delaware’s state-sponsored arbitration program struck down will not be big blow to state’s preeminent position as center of incorporation because Court of Chancery remains very attractive option even without arbitration).

146. See id. (explaining that Court of Chancery’s body of decisional law is attractive to businesses).

147. See id. at 419–20 (explaining importance of Court of Chancery’s body of decisional law). In addition, many large corporations prefer traditional litigation when compared to arbitration. See id. at 420. Further, most choice of law and forum clauses are not negotiated and are instead standard, boilerplate language.
ware’s Court of Chancery would continue to attract corporations and might even be better off without closed arbitration proceedings.\footnote{148}

Another commentator has argued that having the provisions struck down will actually benefit Delaware.\footnote{149} While the arbitration program would have probably ensured that Delaware remained competitive in the short term, the program could have eventually weakened Delaware’s position as the center of incorporation by decreasing its body of decisional law.\footnote{150} Additionally, the assumed benefits traditionally associated with arbitration, such as speed, may not be as beneficial as previously thought.\footnote{151} In terms of the speed of adjudication, the Court of Chancery is already one of the quickest and most efficient courts in the country.\footnote{152} Moreover, although arbitration is a growing alternative to traditional adjudication, it is far from being a dominant force.\footnote{153} Thus, despite Delaware’s insistence to the contrary, it may well retain its preeminent position as a destination of incorporation despite the absence of a state-sponsored arbitration program.\footnote{154}

C. New Hope for an Arbitration Program

Although some commentators believe Delaware will not be disadvantaged—or will even benefit—by having its arbitration program declared unconstitutional, the newly elected Chief Justice of the Delaware Supreme Court, Leo E. Strine, Jr., disagrees.\footnote{155} In his first State of the Judiciary

\begin{quote}
See id. Thus, Delaware would still be a very attractive state to incorporate in without the arbitration program. See id.

148. See id. (explaining how Delaware’s body of decisional law is one of main reasons for its preeminence as destination of incorporation).

149. See Quinn, supra note 13, at 874–75 (explaining that state-sponsored arbitration program is not in best long-term interests of Delaware).

150. See id. (arguing that Delaware’s state-sponsored arbitration program would ensure short-term competitiveness but weaken market for adjudications in long term). Quinn argues that the supposed benefits of Delaware’s state-sponsored arbitration program may not outweigh the cost of reducing the rule making power of the Court of Chancery. See id.

151. See id. at 862 (explaining that many benefits associated with arbitrations, such as speed, are already present in Court of Chancery).

152. See id. (explaining that arbitration program is not substantially faster than formal Chancery Court proceedings). To illustrate, a recent Delaware Chancery Court case took just over six months from the date the initial complaint was filed to the date the court issued the final order. See id. (citing Martin Marietta Materials, Inc. v. Vulcan Materials Co., 56 A.3d 1072 (Del. Ch. 2012)).

153. See id. at 897 (highlighting that only small percentage of business disputes are actually solved through arbitration).

154. See id. (explaining that benefits of incorporating in Delaware still exist without state-sponsored arbitration program).

address, Chief Justice Strine declared that a new proposal for a confidential arbitration program will be presented to the Delaware General Assembly in January 2015. Chief Justice Strine is undeterred by the original program being declared unconstitutional, stating:

Regrettably, a federal court in Philadelphia issued a divided ruling striking down these statutes because they violated two judges’ reading of unsettled precedent, a reading that, if good law, would invalidate long-standing dispute resolution procedures used in their own federal court system . . . . But, consistent with our history, Delaware is not wallowing in defeat . . . .

Chief Justice Strine believes the arbitration program is the key to keeping Delaware competitive for corporate business, especially with the emerging Latin American market. Despite his insistence on creating the program, Chief Justice Strine was not clear on how the program would avoid the issues that caused the Third Circuit to declare Delaware’s state-sponsored arbitration program unconstitutional in the first place.

IV. CONCLUSION

The Third Circuit’s decision in Strine illustrates the Third Circuit’s approach to the logic and experience test and the existing dispute over the test’s conflicting applications. This decision will have a tremendous effect, not just on right of public access cases, but also on the state of Delaware as it strives to keep pace with the growth in arbitration and maintain its position as the preeminent state of incorporation. The Supreme Court’s decision not to review the Third Circuit’s decision comes as a blow not only to those who championed Delaware’s arbitration program, but also to Third Circuit practitioners looking for guidance in applying

158. See Mordock, supra note 156 (explaining importance of arbitration program in keeping Delaware competitive as place of incorporation).
159. See O’Sullivan, supra note 155 (offering few details on specifics of new program or how it would be different from program struck down in Strine).
160. See Del. Coal. for Open Gov’t v. Strine, 733 F.3d 510, 515–18 (3d Cir. 2013) (applying lenient standard to find right of public access to Delaware’s state-sponsored arbitration program). But see id., at 523–26 (Roth, J., dissenting) (applying strict standard and arguing there should not be right of public access).
161. See Petition for a Writ of Certiorari, supra note 99, at 19–21 (arguing that Delaware’s program is necessary to maintain its position as central place for incorporation). But see Quinn, supra note 13, at 875 (arguing that Delaware would be “better served” by having arbitration program struck down).
the logic and experience test.\textsuperscript{162} Though it appears Third Circuit practitioners will have to wait for guidance, champions of Delaware’s arbitration program may not have to wait much longer to see a new program in action. However, although Chief Justice Strine plans to have a new program presented to the Delaware General Assembly in January 2015, whether the new program will withstand judicial scrutiny after the Third Circuit’s decision in \textit{Strine} remains to be seen.\textsuperscript{163}

\textsuperscript{162} For a further discussion of the diverging applications of the logic and experience test, see \textit{supra} notes 104–28 and accompanying text.

\textsuperscript{163} For a further discussion of Chief Justice Strine’s plan to introduce a new arbitration program, see \textit{supra} notes 155–59 and accompanying text.