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ARKANSAS JOURNAL
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ABOUT THE JOURNAL

The Arkansas Journal of Social Change and Public Service is a vehicle for identifying and addressing the pressing needs of our society. It examines issues lying at the intersection of policy, public interest, academia, and the law, raising awareness of topics insufficiently examined in traditional scholarly publications.

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EDITOR'S PREFACE – 14.2

Madison Martin

With great pleasure, the 2025-2026 Editorial Board presents Volume 14, Issue II of the *Arkansas Journal of Social Change and Public Service*. We invite our readers to join us in celebrating the spirit of collective intellect and its power to propel society forward.

In the note, *Reconfiguring Title VII Doctrine in the Digital Work Environment*, I examine the evolving challenges the digital age poses for employers, employees, and the courts. The note explores how the widespread use of technology in the workplace has created new avenues for hostile-environment claims, quid pro quo claims, privacy disputes, and discovery issues under Title VII. This note provides practical guidance for employers. Ultimately, the note emphasizes that as workplace technologies continue to evolve, so too must the legal frameworks and institutional safeguards designed to protect employees and ensure compliance under Title VII.

In her insightful note, *State Takeover: How the LEARNS Act Limits Local School Board Policy Concerning Teacher Terminations and Renewals*, Megan Prettyman Halford analyzes the significant administrative burdens that Arkansas school districts face under policies adopted to comply with the LEARNS Act. Ms. Prettyman Halford argues that, although districts may include explicit protections in their termination and renewal policies without jeopardizing state funding, even the most protective policies permissible under current law fall short of meeting districts' practical needs. She traces the historical development of the Teacher Fair Dismissal Act (TFDA), the transformative impact of the LEARNS Act, and the limitations imposed on local policymaking before demonstrating how current statutory constraints leave districts without adequate tools to support and retain educators. Ultimately, Ms. Prettyman Halford contends that meaningful reform—be it through reinstating the TFDA, enacting equivalent legislation, or removing the prohibition on providing additional local protections—is necessary to address these systemic challenges and promote stable, effective school governance.

Finally, in her note, *Discontinuing Absolute Immunity for Presidential Candidates Convicted of Felonies as First Reviewed in Trump v. United States*, Sarah Davis examines the unprecedented constitutional questions surrounding presidential immunity. Ms. Davis explores whether broad grants of immunity risk placing presidents beyond the reach of criminal prosecution and argues that the Supreme Court should adopt a clear, uniform standard for assessing which acts fall within the scope of official immunity. Her note highlights the profound uncertainty now facing lower courts tasked with

distinguishing official from unofficial presidential conduct. Ms. Davis ultimately contends that the absence of a definitive standard threatens both constitutional accountability and the rule of law, echoing concerns raised by the dissenting Justices and underscoring the need for clearer doctrinal guidance moving forward.

We extend gratitude to our authors. It is their insightful perspectives that enrich and further the fundamental mission of the *Arkansas Journal of Social Change and Public Service*.

EMPLOYMENT LAW—RECONFIGURING TITLE VII DOCTRINE IN THE DIGITAL WORK ENVIRONMENT

*Madison O. Martin**

I. INTRODUCTION

The digital age has presented issues arising from the heightened use of technology in the workplace. Modernly, the most prevalent issue pertains to the increased use of email in the workplace as it relates to hostile environment, harassment by email, and privacy concerns. As a result, the judiciary has begun to address these unique issues in employment law and Title VII of the Civil Rights Act of 1964 ("Title VII").[1] This Note will cover nuanced matters that concern Title VII sexual harassment claims, office email use and privacy issues, as an employer's guide to reduce exposure to liability and sexual harassment claims. Parts I and II of this Note will begin with a summary and overview of Title VII, including the history and interpretation of the statute. Part III provides seminal Supreme Court decisions regarding sexual harassment. In Parts IV and V, the Note considers digital communication as grounds for a sexual harassment claim and other email issues pertaining to privacy and discovery in Title VII actions. Part VI of this Note then addresses what employers should do to limit liability by increasing the personnel responsible for taking complaints. Finally, Part VII of the Note concludes by highlighting the implications of the digital age, the technological measures employers must undertake to prevent digital harassment in the workplace, the policies an employer must have to address digital harassment, and measures employers must have in place to properly respond to complaints by increasing personnel. It is paramount to note that as the digital age progresses, so will the need for appropriate policies and procedures to combat Title VII claims.

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1.Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a), 78 Stat. 241, 255 (codified in sections of 42 U.S.C. § 2000a–2000h).

II. TITLE VII OF THE CIVIL RIGHTS ACT

A. HISTORY

The primary purpose of Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII") was to eradicate discrimination in employment.[2] The Civil Rights Era provides the reference point for the beginning of life in a meritocracy focused on the nation's collective commitment to provide meaning to the following language of our Founding Fathers in the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness."[3] Since its inception, Title VII has been regarded to as a seminal piece of legislation.[4] After Title VII was adopted in 1964, the states undertook legislative efforts to comply with the Act. Title VII incorporated the Equal Employment Opportunity Commission (hereinafter "EEOC") to enforce the regulation and eliminate unlawful employment discrimination.[5] In 1991, and in response to the recent decisions of the Supreme Court, Congress amended the Civil Rights Act, to address the procedural guidelines by which claimants can pursue relief and to specify the available remedies.[6] The purpose of the Civil Rights Act of 1991 was to provide appropriate remedies for intentional discrimination and unlawful harassment and statutory guidelines for the adjudication of disparate impact suits under Title VII.[7]

Beginning with the language of the Act itself, Title VII prohibits employers from discriminating based on race, color, sex, religion, or national origin if such discrimination affects the terms, conditions, or privileges of employment.[8] This applies to both applicants and current employees. Title VII applies to employers, employment agencies, apprenticeship programs, corporations, associations, unincorporated organizations, and labor organizations that are involved or engaged in interstate commerce.[9] It applies to all employers, with the exception of employers with less than fifteen (15) employees.[10]

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2. 42 U.S.C. § 2000(e).
3. The Declaration of Independence para. 2 (U.S. 1776).
4. Graham Boone, "*Labor law highlights, 1915–2015*," U.S. Bureau of Lab. Stats.: Monthly Labor Review, (October 2015), https://www.bls.gov/opub/mlr/2015/article/labor-law-highlights-1915-2015.htm [https://doi.org/10.21916/mlr.2015.38].
5. *Id*.
6. *Id*.
7. Civil Rights Act of 1991, Pub. L. 102-166, §§ 3(1), (3) and (4), 105 Stat. 1071. (The amendments added the cause of action of hostile environment without a requirement of tangible employment action).
8. 42 U.S.C. § 2000e-1 to -17 et seq (1964).
9. *Id*.
10. *Id*.

In 1993, the Arkansas Legislature enacted the Arkansas Civil Rights Act. [11] The Act prohibits discrimination on the basis of race, religion, ancestry, national origin, gender, or the presence of any sensory, mental or physical disability.[12] The Arkansas Civil Rights Act applies to employers that employ twenty (20) or more calendar weeks in the current or preceding calendar year and have at least nine (9) employees.[13] Provided that the business entity meets the preceding requirements and falls under Title VII, employers must understand conduct that amounts to sexual harassment. This is because sexual harassment is a form of sex-based discrimination under Title VII.

B. SEXUAL HARASSMENT

The Equal Employment Opportunity Commission Guidelines on Sexual Harassment define sexual harassment as (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.[14] In determining whether the alleged conduct amounts to sexual harassment, the EEOC looks at the totality of circumstances and the context in which the behavior occurred.[15] The determination of the legality of a particular action will be made from the facts, on a case-by-case basis.[16] The EEOC determination rests on whether the behavior was welcome, whether the employee solicited or incited the behavior, and whether the employee regarded the behavior as desirable or offensive.[17]

There are two types of sexual harassment theories that courts recognize under Title VII: (1) hostile work environment and (2) quid pro quo sexual harassment.[18] A claim for hostile work environment entails "bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment."[19] Quid pro quo harassment conditions employment or promotion on sexual favors and occurs when an employee gives in to an employer's or co-worker's sexual demands when those demands are made

11. Ark. Code Ann. §§ 16-123-101 to -108.
12. *Id*.
13. *Id.* § 16-123-102.
14. EEOC Sex Discrimination Guidelines, 29 C.F.R. § 1604.11.
15. *Id.*
16. *Id.*
17. *Id.*
18. Simi Lorenz, *Opposing Sexual Harassment May Not Be Enough for A Retaliation Claim Under Title VII: Why Refusing Sexual Advances Is Not Enough*, 50 John Marshall L. Rev. 1007, 1009 (2017).
19. *Id*.

a condition of employment benefits.[20] One notable difference is that a hostile work environment claim does not make employment standing or benefits conditional on sexual demands.[21] The terms are simply used to differentiate between cases involving threats, quid pro quo, general offensive conduct, and hostile work environment.[22] As such, the two types of harassment require different elements to establish a prima facie case for sexual harassment under Title VII.[23] The terms quid pro quo and hostile work environment are not controlling for purposes of determining employer liability for harassment by a supervisor. However, the terms are helpful in making a rough demarcation between Title VII cases in which sexual harassment threats are carried out and where they are not or are absent altogether. Thus, the terms are relevant when there is threshold question whether employee can prove discrimination in violation of Title VII.[24] When analyzing whether an employer should be held liable for a supervisor's sexual harassment, courts should separate such cases into two groups: (1) harassment which culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment, and (2) harassment in which no adverse tangible employment action is taken but which is sufficient to constructively alter an employee 's working conditions.[25]

C. HOSTILE WORK ENVIRONMENT

A hostile work environment arises when the sexual harassment has the purpose or effect of unreasonably interfering with the employee's work performance or creates a exercised reasonable care to prevent and promptly correct any sexual harassment.[26] The burden of proof is on the employee to prove not only that the conduct was subjectively offensive to that employee and created a hostile work environment, but that the conduct was objectively intimidating, hostile, offensive, or abusive in the eyes of a reasonable person.[27] An employer may raise affirmative defenses to defend against such a claim by satisfying two necessary elements: (a) that employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that employee unreasonably failed to take advantage of any preventive or

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20. *Id*. at 1009-10.
21. *Id*.
22. *Id*. at 1010.
23. *Id*.
24. 33 Am. Jur. Trials 257 (Updated Feb. 2025).
25. *Id*.
26. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998); *see also* Faragher v. City of Boca Rotan, 524 U.S. 775 (1998).
27. *Id*.

corrective opportunities provided by employer or to avoid harm otherwise.[28] An employer is subject to vicarious liability to victimized employee for actionable hostile environment created by supervisor with immediate (or successively higher) authority over employee; when no tangible employment action is taken, employer may raise affirmative defense to liability or damages, subject to proof by preponderance of the evidence.[29]

The Eighth Circuit stated the elements to establish a hostile work environment claim as the following: (1) the plaintiff belongs to a protected group, (2) the plaintiff is subject to unwelcome sexual harassment, (3) the harassment was based on sex, (4) the harassment affected a term, condition or privilege or employment, and (5) the employer knew or should have known of the harassment in question and failed to take proper remedial action.[30] The fourth element of a Title VII sexual harassment claim involves both objective and subjective components; it requires that the harassment be severe or pervasive enough to create an objectively hostile or abusive work environment and that the victim subjectively believe her working conditions have been altered.[31] When evaluating a hostile environment under Title VII, the Eighth Circuit looks at the totality of the circumstances, including the frequency and severity of the discriminatory conduct, whether such conduct was physically threatening or humiliating, as opposed to a mere offensive utterance, and whether the conduct unreasonably interfered with the employee's work performance.[32] More than a few isolated incidents are required to amount to a hostile work environment under Title VII, and the alleged harassment must be so intimidating, offensive, or hostile that it poisoned the work environment.[33]

D. QUID PRO QUO

To establish a quid pro quo claim the employee must show that: (1) the plaintiff was a member of a protected class, (2) the plaintiff was subject to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors, (3) the harassment was based on sex, and (4) the plaintiff's submission to the unwelcome advances was an express or implied condition for receiving job benefits or that the plaintiff's refusal to submit resulted in a tangible job detriment.[34] The quid pro quo theory of liability makes an employer responsible for a supervisor's sexual harassment when the supervisor uses the employer's power over the employment relationship to exert pressure

28. *Id*.
29. *Id*.
30. Blomker v. Jewell, 831 F.3d 1051, 1056 (8th Cir. 2016).
31. *Id*.
32. *Id*.
33. *Id*.
34. EEOC Sex Discrimination Guidelines, 29 C.F.R. § 1604.11.

in exchange for terms and conditions of the job.[35] To make out a quid pro quo claim the plaintiff must show that it was "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[36] The conduct must be such that not only did the plaintiff subjectively view it as creating an abusive working environment, but that an objectively reasonable person would also view it as such.[37] Employers facing these claims may still use the same affirmative defenses as a hostile work claim. An employer may raise affirmative defenses that comprise two necessary elements: (a) that employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by employer or to avoid harm otherwise.[38] However, no affirmative defense is available to employers when the supervisor's harassment results in a tangible, adverse employment action such as discharge, demotion, or undesirable reassignment.[39]

III. SEXUAL HARASSMENT CLAIMS VARY IN NATURE

In the discussion *supra*, the terms quid pro quo and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether. However, beyond this demarcation, the terms are of limited utility. As Justice Ginsburg pointed out in her concurrence in *Ellerth*, "the labels quid pro quo and hostile work environment are not controlling for purposes of establishing employer liability."[40] In fact, the terms do not appear in the statutory text of Section 703(a) of Title VII.[41] The terms first appeared in the academic literature;[42] found their way into decisions of the Courts of Appeals[43]; and were mentioned in the Supreme Court's decision in *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57 (1986).[44] With this backdrop, the following addresses seminal Supreme Court decisions regarding sexual harassment. Each of the forthcoming cases is in chronological order. This section will emphasize the historical evolution of sexual harassment claims. It will also

35. Ellerth, 524 U.S. 742; Faragher, 524 U.S. 775.
36. 29 C.F.R. § 1604.11.
37. *Id*.
38. *Id*.
39. *Id*.
40. Ellerth*,* 524 U.S. 742, 766 (1998) (Ginsburg J. concurring).
41. *Id*.
42. *See* C. MacKinnon, *Sexual Harassment of Working Women* (1979).
43. Henson v. Dundee, 682 F.2d 897, 909 (C.A.11 1982).
44. *See generally* E. Scalia, *The Strange Career of Quid Pro Quo Sexual Harassment*, 21 Harv. J.L. & Pub. Policy 307 (1998).

portray the implications of employer liability and the alteration of the employees' burden of proof.

A. Meritor Savings Bank v. Vinson

In *Meritor Savings Bank v. Vinson*, Mechelle Vinson was employed for four years at Meritor Savings Bank under the direct supervision of Sidney Taylor.[45] Vinson brought the Title VII action against Taylor and the bank after being constantly subjected to sexual harassment by Taylor.[46] At the bench trial, testimony established that shortly after her training was complete, Taylor invited her out to dinner and suggested that they go to a motel to have sexual relations.[47] Vinson refused at first, but the risk of losing her job ultimately lead her to submit to the advancements.[48] Thereafter, Taylor made repeated sexual demands upon her at the branch, fondled her, followed her to the women's restroom, exposed himself to her, and even forcibly raped her on several occasions.[49]

The Supreme Court held that a plaintiff may establish a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2(a)(1), prohibiting sex discrimination in employment, by proving that discrimination based on sex has created hostile or abusive work environment.[50] The Supreme Court announced that it is "without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex."[51] Notably, the Court demonstrated that the existence of a grievance procedure and the failure of the plaintiff to invoke that procedure did not insulate the employer from liability for a supervisor's wrongdoing in sexual harassment claims.[52] Without issuing a definite rule on employer liability, the Court opined that legislative intent highlights that Congress's wanted courts to look to agency principles for guidance in this area.[53] This is so, the Court continued, because while such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer in 42 U.S.C. §2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.[54] For

45. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 59 (1986).
46. *Id*.
47. *Id*. at 60.
48. *Id*.
49. *Id*.
50. *Id.* at 57.
51. *Id.* at 64.
52. *Id.* at 72.
53. *Id*.
54. *Id.*

that same reason, the Court stated that absence of notice to an employer does not necessarily insulate that employer from liability.[55]

B. Harris v. Forklift Systems, Inc.

Seven years later, Justice O'Connor delivered the unanimous opinion of the Court in *Harris v. Forklift Systems, Inc*., which held that (1) to be actionable under Title VII as "abusive work environment" harassment, the conduct need not seriously affect an employee's psychological well-being or lead the employee to suffer injury; (2) the *Meritor* standard requires an objectively hostile or abusive environment as well as the victim's subjective perception that the environment is abusive; and (3) whether an environment is sufficiently hostile or abusive to be actionable requires consideration of all the circumstances, not any one factor.[56] The Harris decision clarified that to fall within Title VII's purview, the conduct must be objectively hostile or abusive, meaning one that a reasonable person would also find the conduct hostile or abusive, coupled with the victim's subjective belief that the conduct was hostile or abusive.[57] The Court explained that determining whether an environment is hostile or abusive requires case-by-case adjudication and is determined by looking at all the circumstances.[58] These circumstances may include the frequency of discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; whether it unreasonably interferes with an employee's work performance; and of course, the effect on the employee's psychological well-being.[59] But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.[60] In other words, this is a factor test that is ultimately weighed by the court.

C. Oncale v. Sundowner Offshore Services, Inc.

In *Oncale v. Sundowner Offshore Services, Inc*., a former employee brought a Title VII action against a former employer and male supervisors and co-workers, alleging sexual harassment.[61] There were however notable differences in this case. In *Oncale*, the former employee was a male and filed suit against male supervisors and co-workers.[62] Being presented with the

55. *Id.*
56. Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).
57. *Id*. at 21.
58. *Id*.
59. *Id*. at 23.
60. *Id*.
61. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998).
62. *Id*. at 78.

opportunity, the Supreme Court announced that sexual harassment can occur between members of the same sex.[63] The court stated that "nothing in Title VII necessarily bars the claim of discrimination because of sex merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex."[64] The court concluded that sexual harassment does not need to be motivated by sexual desire to support an inference of discrimination because of sex.[65] To reach its conclusion, the Court relied on language found in both *Meritor* and *Harris,* stating:

> The statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the "conditions" of the victim's employment. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview.[66]

The Supreme Court stated two examples that a trier of fact might find to support a claim of sexual harassment as it relates to same sex suits.[67] First, the Supreme Court stated a female plaintiff may allege harassment in the form of sex-specific and derogatory terms by another woman to show the harasser is motivated by general hostility to the presence of women in the work place.[68] Second, the plaintiff may offer evidence of how the alleged harasser treated members of both sexes in a mixed sex work place.[69] The *Oncale* Court enunciated that in either evidentiary route, the plaintiff must establish that the conduct actually constituted discrimination because of sex.[70]

D. Faragher v. City of Boca Raton & Burlington Industries, Inc. v. Ellerth

A few months after the *Oncale* decision was announced, the Supreme Court decided two cases that declared affirmative defenses available to the employer in sexual harassment cases. In *Faragher*, after resigning from her employment, the plaintiff brought an action against two supervisors and the

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63. Oncale, 523 U.S. 75.
64. *Id*. at 79.
65. *Id*. at 80.
66. Harris, 510 U.S. 17, 21 (1993) and Meritor Sav. Bank, FSB v. Vison, 477 U.S. 57, 67 (1986).
67. *Id*. at 80-81.
68. *Id*. at 80.
69. *Id*. at 81.
70. *Id*. *See also* Harris v. Fork Lift Systems, Inc., 510 U.S. 17 (1993).

city under Title VII for sexual harassment.[71] The City had adopted a sexual harassment policy but failed to disseminate its policy.[72] The Court had the opportunity to answer the open question as to the identification of the circumstances under which an employer may be held liable under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.,* for the acts of a supervisory employee whose sexual harassment of subordinates has created a hostile work environment amounting to employment discrimination.[73] In answering this question, the Court looked to the guidance of Court of Appeals decisions and revisited the *Meritor* decision to impute the principles of agency law in devising standards for employer liability.[74] The Supreme Court decided *Ellerth* on the same day and tactically reapplied the ultimate holding in *Faragher*.[75] The only notable difference in *Ellerth*, was that the employer had a complaint procedure and anti-harassment policy, but the employee never reported the harassment.[76] In rendering its holding, the Court stated, "in order to accommodate the principle of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees, we adopt the following holding in this case and in *Ellerth*, also decided today."[77]

Justice Souter announced the ultimate holding, that an employer is subject to vicarious liability under Title VII to a victimized employee for actionable discrimination caused by a supervisor, but employer may raise an affirmative defense that looks to the reasonableness of employer's conduct in seeking to prevent and correct harassing conduct and to the reasonableness of employee's conduct in seeking to avoid harm.[78] The Court then addressed that the limited holding was applicable when no tangible employment action is taken and stated that a defending employer may raise this affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.[79] The *Ellerth-Faragher* affirmative defense is unavailable when a tangible action has been taken, such as discharge, demotion, or undesirable reassignment.[80] The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to

71. Faragher v. City of Boca Raton, 524 U.S. 775 (1998).
72. *Id*. at 782.
73. *Id*. at 780.
74. *Id*. at 791.
75. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).
76. *Id*. at 765.
77. Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).
78. *Id*. at 807.
79. *Id*.
80. *Id*. at 808.

take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[81]

To meet the first element of the test, an employer may proffer a policy suitable to the employment circumstances that is an effective mechanism for reporting and resolving complaints of sexual harassment.[82] While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense.[83] As for the second element, an employer may only show that the employee did not seek remedial protocol within the employer's policy.[84] Though proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.[85] In sum, these cases announced a radical shift by providing an employer with affirmative defenses.

E. Vance v. Ball State University

With the decisions of *Faragher* and *Ellerth*, the Supreme Court announced that employers could be held vicariously liable for the harassing conduct of supervisory employees, even if the victimized employee did not suffer a tangible employment action.[86] However, the Court did not explicitly define who qualifies as a supervisor.[87] Presumably, this is because no case has required exploration of that issue. In *Vance*, the Court enunciated that definition.[88] The answer was naturally found in the framework set out in *Faragher* and *Ellerth*. Both of which drew a sharp line between co-workers and supervisors, and implied that the authority to take tangible employment actions is the defining characteristic of a supervisor.[89] The Court stated that to qualify as a supervisor for purposes of vicarious liability under Title VII, he or she is empowered by the employer to take tangible employment actions against the victim.[90] A tangible employment action is defined as "a significant change in

81. *Id*. at 807.
82. *Id*. at 806.
83. *Id*. at 807.
84. *Id*.
85. *Id*.
86. *Id*.
87. Employment Discrimination, 40 No. 8 PREVIEW 367.
88. Vance v. Ball State U., 570 U.S. 421 (2013).
89. *Id*.
90. *Id*. at 421.

employment status, such as hiring, firing, failure to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[91]

To simplify the test with this definition in mind, the Court announced that under Title VII, an employer's liability for workplace harassment may depend on the status of the harasser.[92] If the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions. In cases in which the harasser is a "supervisor," however, different rules apply. If the supervisor's harassment culminates in a tangible employment action the employer is strictly liable.[93] But if no tangible employment action is taken, the employer may escape liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided.[94]

The *Vance* decision made no attempt to exhaust the types of tangible employment actions. Ultimately, this caused confusion among the circuits for two reasons. First, courts did not know whether the tangible actions announced were an exhaustive list. Second, and critically, courts did not know how "significant" the harm must be from the tangible employment action. This could be in part because the Court in *Vance* used the regrettable word "significant" not once, but twice. This caused a circuit split as to the standard of level of harm suffered by the employee. Circuits were at odds with what the level of harm should apply in determining whether the harassing actions have been such as to constitute a tangible employment action. That was until *Muldrow*.[95]

F. Muldrow v. City of St. Louis, Missouri

The recent Supreme Court decision was a radical shift to the requirements for an employee to bring a Title VII suit. Prior to the highly anticipated decision, courts evaluating Title VII suits more closely scrutinized employment actions that did not affect economic or tangible employment actions (such as hiring, firing, promotions and compensation) to determine whether such actions were sufficiently "adverse" to support an employee's claim.[96] Courts of Appeals were at odds with the level of harm that amounts to adverse

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91. *Id*. at 424 *see also* Ellerth, 524 U.S. at 761.
92. *Id*. at 421.
93. Ellerth, 524 U.S. at 742, 760-61.
94. Faragher, 526 U.S. at 775, 807; Ellerth, 524 U.S. at 765.
95. Muldrow v. City of St. Louis, 601 U.S. 346, 346 (2024).
96. Laura Flath, et al., Supreme Court lowers the bar for Title VII employment claims, 2024 PRINDBRF 0355. (2024).

action. Some circuits followed the "adverse employment action" rule or similar doctrine, which requires an employee to prove some additional harm over and above the discriminatory transfer—generally economic harm—to sustain a Title VII discrimination claim.[97] Other circuits have held discriminatory transfers, even when they are not accompanied by reductions in pay, benefits, or other "materially significant disadvantages," are actionable under Title VII.[98] The U.S. 4th Circuit Court of Appeals has found discriminatory practices are unlawful under Title VII when the employee can show the employer's conduct "had some significant detrimental effect" on the employee.[99] The U.S. Supreme Court granted certiorari to resolve this circuit split over whether an employee challenging a transfer under Title VII must meet a heightened threshold of harm—be it dubbed significant, serious, or something similar.[100] On April 17th, 2024, the Court unanimously decided *Muldrow v. City of St. Louis*, *Missouri*.[101]

In *Muldrow*, Sergeant Jatonya Claborne Muldrow filed a Title VII suit against her employer, the St. Louis Police Department after she was involuntarily transferred from one job to another because of her sex.[102] From 2008—2017, Seargeant Muldrow worked as a plainclothes officer in the Department's specialized Intelligence Division.[103] In 2017, the new Intelligence Division commander requested to transfer Muldrow out of the unit so he could replace her with a male officer.[104] The commander later testified that despite receiving positive feedback about Muldrow from the outgoing commander of the Intelligence Division, he requested she be replaced by a male police officer because, "a male officer "seemed a better fit for the Department's 'very dangerous' work."[105] The Department approved the request to transfer Muldrow and reassigned her to a uniformed job elsewhere in the Department.[106] The new position forced her to move from a job in a prestigious specialized division that gave her substantial responsibility over priority investigations to a position that primarily concerned administrative work.[107] Despite Muldrow's rank and pay remaining the same in the new position, her responsibilities, schedule, and perks did not.[108] The new position limited her to

97. Marcus D. Black, *Supreme Court to Decide if Lateral Job Transfers can be Discriminatory under Title VII.* 34 No. 5 Cal. Emp. L. Letter 4 (2024).
98. *Id*.
99. *Id*.
100. *Id.* at 346.
101. *Id*.
102. *Id.*
103. *Id*.
104. *Id*.
105. *Id*. at 351.
106. *Id.* at 346.
107. *Id*.
108. *Id*.

administrative tasks and reduced her opportunities for important investigative work with higher-ups on the force.[109] Her once consistent Monday to Friday schedule was altered to a rotating schedule that frequently required her to work during the weekends.[110] Additionally, she suffered losses in material benefits, such as access to an unmarked take-home vehicle.[111]

The District Court, viewing the matter differently, granted the City summary judgment. Under Circuit precedent, the court explained, Muldrow needed to show that her transfer effected a "significant" change in working conditions producing "material employment disadvantage."[112] And Muldrow, the court held, could not meet that heightened-injury standard. "[S]he experienced no change in salary or rank."[113] Her loss of "the networking [opportunities] available in Intelligence" was immaterial because she had not provided evidence that it had harmed her "career prospects."[114] And given her continued "supervisory role," she had not "suffered a significant alteration to her work responsibilities."[115] Finally, the District Court concluded that the switch to a rotating schedule (including weekend work) and the loss of a take-home vehicle could not fill the gap. Although mentioning those changes "in her statement of facts," Muldrow had not relied on them in "her argument against summary judgment."[116] And anyway, the court stated, they "appear to be minor alterations of employment, rather than material harms."[117]

The Court of Appeals for the Eighth Circuit affirmed.[118] It agreed that Muldrow had to—but could not—show that the transfer caused a "materially significant disadvantage."[119] Like the District Court, the Eighth Circuit emphasized that the transfer "did not result in a diminution to her title, salary, or benefits."[120] And the Circuit, too, maintained that the change in her job responsibilities was "insufficient" to support a Title VII claim.[121] In the Fifth District, the court reasoned, Muldrow still had a "supervisory role" and participated in investigating serious crimes.[122] Thus, the court thought Muldrow's view of the new job—"more administrative and less prestigious"—was

109. *Id*.
110. *Id*.
111. *Id*.
112. Muldrow*,* 2020 WL 5505113, *8–*9.
113. *Id.,* at *9.
114. *Id.,* at *8.
115. *Id.,* at *9.
116. *Id.*, n. 20.
117. Muldrow, 2020 WL 5505113, n. 20.
118. Muldrow v. City of St. Louis*,* 30 F.4th 680, 688 (8th Cir. 2022).
119. *Id*.
120. *Id.* at 688–89.
121. *Id.* at 689.
122. *Id.* at 688.

unsupported by record evidence and not "persuasive."[123] The court did not address Muldrow's new schedule or her loss of a car, "apparently thinking those matters either forfeited or too slight to mention."[124] Overall, the court held, Muldrow's claim could not proceed because she had experienced "only minor changes in working conditions."[125]

On writ of certiorari, the issue before the Supreme Court was whether a job transfer without any change in rank or salary amounted to an adverse action under Title VII.[126] The Court held that an employee challenging a job transfer as discriminatory under Title VII must show *some harm* with respect to an identifiable term or condition of employment, but that the harm need not be significant.[127] The precedent now establishes that the threshold for employees to establish an adverse action alleging workplace discrimination stemming from involuntary transfers has been lowered.[128] *Muldrow* will make it significantly easier for employees to satisfy the well-known *McDonnell Douglas* burden-shifting framework to make out a prima facie case in employment discrimination cases.[129]

Scholars have opined on the implications of the *Muldrow* decision. Many have cautioned employers to revisit current HR practices and expand discrimination training to emphasize the nuances of lateral transfers that might support claims under Title VII. Similarly, because the standard is now minimal—"some harm"—employers may face a growth in complaints. The Muldrow decision makes it easier for employees to assert claims of discrimination, when the only adverse action they suffered was a transfer. Employers must be advised by counsel when determining whether to transfer an employee because harm arising from it, such as inferior schedule or more administrative work, even with the same salary, may be sufficient to bring a lawsuit against the employer under *Muldrow*. The Muldrow decision clarified circuit chaos and has now enunciated the precedent for all Title VII cases.

IV. SEXUAL HARASSMENT MAY PERPETRATE THROUGH DIGITAL COMMUNICATIONS

While sexual harassment is typically in the form of physical acts, it is not limited to that form. Sexual harassment can present itself in the form of texts, emails, or other forms of digital communication, and is not free from

123. *Id.*
124. *Id.*
125. *Id.*
126. Muldrow v. City of St. Louis, Missouri, 601 U.S. 346, (2024).
127. *Id*.
128. Pamela Langham, Esq., U.S. Supreme Court Lowers the Benchmark for Adverse Employment Actions in Title VII Cases, Md. B.J., Summer 2024, at 38.
129. *Id*.

judicial scrutiny. Social media accounts are the most common venue cited for harassment. Inappropriate comments or messages on sites like Facebook, Instagram, LinkedIn, Snapchat, and X can lead to a sexual harassment claim. Cyberstalking is another form of technological behavior that can involve using emails, texts, or social media messages. Cyberstalking may also include sharing private information or photos, like spreading revenge porn without consent.

The ubiquitous availability of digital technology and remote working environments has facilitated many instances of sexual harassment.[130] From 2010 to 2024 the EEOC reported there were over 188,160 cases filed alleging sexual harassment.[131] Between 2018 and 2024, the EEOC estimated about 51,830 charges of workplace sexual harassment.[132] According to a 2017 Pew Research study, over 41% of Americans have been personally subjected to harassing behavior online.[133] Other studies have shown that over 20% of email users report receiving sexually harassing email.[134] Both email and the Internet can be used to download pornography or to send harassing and sexually explicit messages. These emails can be used as evidence in any type of Title VII claim.

Although the Supreme Court has yet to hear such a digital sexual harassment case, it is likely that digital sexual harassment will be treated in the same regard as physical harassment. For purposes of employer liability, the Court will presumably begin by determining whether the alleged sexual harassment came from a (1) supervisor, (2) co-employee, or (3) a third party (like a client or customer). Once this is determined, the court will undertake the appropriate analysis. If the person is a co-employee or third party, the court will determine whether (1) the employer knew or should have known of the co-employee harassing conduct; and (2) the employer failed to take immediate and appropriate corrective action. On the other hand, if the person is judicially classified as a supervisor, and meets the *Vance*, *Ellerth*, and *Faragher* judicial interpretation of "supervisor," the second part of the analysis is whether the supervisor took a tangible action. If the supervisor has not taken tangible action, the

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130. *See* U.S. Equal Employment Opportunity Commission, Sexual Harassment Charges EEOC & FEPAs Combined: FY 1997-FY 2011, http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm (last visited November 9, 2025).

131. *See* U.S. Equal Employment Opportunity Commission, Charges Alleging Sexual Harassment: Table E2c., https://www.eeoc.gov/data/enforcement-and-litigation-statistics-0 (last visited November 9, 2025).

132. *See* U.S. Equal Employment Opportunity Commission, Enforcement and Litigation Statistics, EEOC Explore Charge Statistics, https://www.eeoc.gov/data/enforcement-and-litigation-statistics-0 (last visited November 9, 2025).

133. Pew Research Center, Online Harassment 2017 (July 11, 2017), https://www.pewresearch.org/internet/2017/07/11/online-harassment-2017/.

134. Jarrod J. White, *Commentary: E-Mail@work.com: Employer Monitoring of Employee E-Mail*, 48 ALA. L. REV. 1079 (1997).

employer may utilize the affirmative defenses previously mentioned. As it relates to the digital realm, if an employer fails to use technological measures to prevent, mitigate, or correct any known known digital sexual harassment behavior, the employer could be barred from utilizing the affirmative defenses.[135] To make out a showing of digital sexual harassment, it is likely that the employee will have to establish more than a single incident or single email, which is also true in the physical harassment line of cases.

V. OTHER EMAIL ISSUES: PRIVACY AND DISCOVERY

A. Employer Monitoring, Workplace Privacy, and Invasion of Privacy

The erosion of the demarcation between work and personal life was noted by Justice Blackmun thirty years ago: "it is all too true that the workplace has become another home for most working Americans: the tidy distinctions between the workplace and professional affairs, on the one hand, and personal possessions and private activities, on the other, do not exist in reality."[136] In the digital age, Justice Blackmun's theory rings true with the monitoring of employees in the current workplace. Employee monitoring involves using various methods and software systems to monitor employee activity in the digital realm during working hours.[137] With more employees working remotely than before, employers are using these software systems to ensure productivity.[138] The systems are integrated on work issued devices and may be monitored by the employer.[139] Employers monitor employees' computer activity, email, network usage, time spent on tasks, location, among other things.[140] Employers do so for a variety of legitimate business reasons, including, but not limited to, measuring productivity, reducing supervision and micromanagement, preventing employee burn out, and providing an employer with a better insight into employee performance. The most fundamental reasons are limiting liability and maximizing expenditure.

As an employer, it is generally permissible to monitor an employer's own computer systems including, but not limited to, employees' email communications. There are three primary sources of legal authorities governing the issue of workplace monitoring: the Electronic Communications Privacy Act (hereinafter "EPCA"), which encompasses both the Wiretap Act and Stored Communications Act (hereinafter "SCA"), 18 U.S.C. § 2510, *et seq*.;

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135. Blakey v. Contl. Airlines, Inc., 751 A.2d 538, 551-52 (N.J. 2000).

136. Robert Sprague, *Survey of (Mostly Outdated and Often Ineffective) Laws Affecting Work-Related Monitoring*, 93 Chi.-Kent L. Rev. 221 (2018).

137. *Id*.

138. *Id*.

139. *Id*.

140. *Id*.

state statutes prohibiting or regulating such surveillance; and common law protections against the invasion of privacy.[141] Depending on the situation, any one or all three of these bodies of law might apply. The Federal Wiretap Act, as amended by the EPCA, governs an employer's liability for intercepting emails.[142] Generally, an employer may not record telephone conversations unless one of two exceptions applies. First, the consent exception allows an employer to monitor or intercept employee communications so long as the employee consents to the surveillance.[143] Consent is implied when an employee is notified that his or her calls are being recorded or has expressly given consent pursuant to an employment contract or company policy.[144]

Under the EPCA, if an employer has a policy in effect that clearly states that it can monitor its email system, employers may monitor emails sent by employees on work issued devices.[145] It is essential that an employer have a policy that states that employee emails and internet usage may be monitored and that employees are on notice that employees do not maintain an expectation of privacy in their email communications or computer usage while at work or when using work issued devices.[146] However, an employer should be aware that when an employee accesses personal emails or social media accounts through their employer's network, that information can be stored by the employer.[147] The Stored Communications Act (hereinafter "SCA"), codified at 18 U.S.C. Chapter 121 §§2701—2712, governs stored communications, including an employee's search history, emails, passwords, and other information stored on an employer's network.[148] The SCA prohibits an employer without authorization from reviewing private electronic communications that are not stored on an employer's network.[149]

Although it does not involve email communications, it is interesting to note that an employee's work phone calls and voicemail may not be private. The Federal Wiretap Act, commonly referred to as Title III of the Federal Omnibus Crime Control and Safe Streets Act of 1968 ("Omnibus Act"), prohibits employers from intercepting and taping telephone calls.[150] However,

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141. *Id*.
142. *Id*. at 232.
143. *Id*.
144. *Id*.
145. Ryan Neumeyer and Karina Conley, *Employment Law Q&A: May I monitor an employee's email and internet usage?* (April 26, 2018) https://www.mcdonaldhopkins.com/insights/news/Employment-Law-QA-May-I-monitor-an-employees-email.
146. *Id*.
147. *Id*.
148. *Id*.
149. Lisa Nagele-Piazza, Privacy in the E-Workplace: What Employers Need to Know (November 23, 2016), https://www.shrm.org/topics-tools/employment-law-compliance/privacy-e-workplace-employers-need-to-know.
150. *See* 18 U.S.C. § 2510-20 (2002).

the Omnibus Act does allow interception of, or listening to, a telephone call if one party consents, or if the employee is using an extension telephone and the employer's interception is done in the ordinary course of business.[151] The extension telephone exception has been limited to situations where (1) the employer suspects the employee is discussing confidential business matters with third parties[152]; (2) the employer provides training to third parties[153]; and (3) the employer wants to determine if the employee is making personal calls on the job in violation of company policy.[154]

In certain circumstances, employers may be legally compelled to monitor workers.[155] A hostile work environment is one such area.[156] Employment law in this area is somewhat marinated with the common law privacy, which originated from Fourth Amendment jurisprudence.[157] The third-party doctrine in the Fourth Amendment in substance is that one generally cannot claim an invasion of privacy against someone who has obtained highly personal or private information from a third party.[158] Apart from the third-party doctrine, the Supreme Court has announced that an officer may not search the contents of a cell phone as an incident to arrest without a warrant.[159] The amusing phrase in one of the most significant Fourth Amendment jurisprudence cases, *Riley v. California*, "modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."[160] In *Riley v. California*, Chief Justice Roberts wrote about the pervasive use of cell phones:

> " . . . Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day . . . now it is the person who is not carrying a cell phone, with all that it contains, who is the exception . . . a decade ago police officers searching an arrestee might have occasionally stumbled across a highly personal item such as a diary . . . today, by contrast, it is no exaggeration to say that many of the more than [ninety percent] of American adults who own a cell

151. *Id*. at § 2511(2)(3); Lewellen v. Raff, 843 F.2d 1103 (8th Cir. 1988).
152. Briggs v. American Air Filter Co., 630 F.2d 414 (5th Cir. 1980).
153. James v. Newspaper Agency Corp., 591 F.2d 579 (11th Cir. 1979).
154. Simmons v. Southwestern Bell, 452 F.Supp. 392 (W.D. Okla. 1978), *affirmed*, 611 F.2d 342 (10th Cir. 1971).
155. Robert Sprague, *Survey of (Mostly Outdated and Often Ineffective) Laws Affecting Work-Related Monitoring*, 93 Chi.-Kent L. Rev. 221 (2018).
156. Jessica K. Fink, *In Defense of Snooping Employers*, 16 U. Pa. J. Bus. L. 551 (2014).
157. *Id*. at note 135.
158. Katz v. United States, 389 U.S. 360, 361 (1967).
159. Riley v. California, 573 U.S. 373 (2014).
160. *Id*. at 385.

> phone keep on their person a digital record of nearly every aspect of their lives--from the mundane to the intimate."[161]

As it relates to employment law, the question becomes whether an employee maintains a reasonable expectation of privacy in email communications sent by an employer-provided technology that is done through a third-party software system. Although separate bodies of law, the interplay between the bodies of law illustrates their synchronous nature. The public sector of employment traditionally follows the reasonable expectation of privacy test while the private sector employment is governed by the Restatement (Third) of Employment Law, among others.[162] The ultimate result in both employment sectors is the same: employees maintain no actual protection of their privacy with respect to personal data on social networks.[163]

Chapter 7 of the Restatement (Third) of Employment Law which addresses employee privacy and personal autonomy.[164] As reported by the Restatement, employees have a right not to be subjected to wrongful employer intrusions upon their protected privacy interests.[165] Notably, Chapter 7 applies the intrusion-upon-seclusion tort developed in the Restatement (Second) of Torts § 652B, to the employment relationship.[166] Chapter 7 attempts to strike a balance between the employer's responsibility for conduct within the workplace and employees' privacy rights.[167] With respect to monitoring electronic communications and data, Chapter 7 reports that "an employee has a protected privacy interest against employer intrusion into physical and electronic locations, including employer-provided locations, as to which the employee has a reasonable expectation of privacy."[168] The focus of section 7.03 is on the employee's interest in keeping his or her physical person, certain physical functions, personal possessions, and activities in certain physical and electronic locations private from employer intrusion.[169] The approach expressed by section 7.03 is that when it comes to personal property or locations that the employee owns or has access to outside of the workplace, employees will generally enjoy the same expectations of privacy against employer intrusions as

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161. *Id.* at 395.
162. Dr. Shlomit Yanisky-Ravid, *To Read or Not to Read: Privacy Within Social Networks, the Entitlement of Employees to A Virtual "Private Zone," and the Balloon Theory*, 64 Am. U.L. Rev. 53, 90—91 (2014).
163. *Id*. at 91.
164. Restatement (Third) of Employment Law ch. 7 (Am. Law Inst. 2014).
165. *Id*. § 7.01.
166. *Id*. § 7.01 cmt. b.
167. *Id*.
168. *Id*. § 7.03 (a)(2).
169. *Id.* § 7.03 (a).

they do with respect to other third-party intrusions.[170] By the same token, the employer is not privileged to intrude upon an employee's privacy outside the workplace simply because the employer is otherwise pursuing a legitimate business interest.[171]

Employers should pay heed to the fact that monitoring workplace telephone calls of any employee should be undertaken only in circumstances that justify the need for such monitoring from a business perspective. If the employee is pursuing a legal claim against the employer, this is not a sufficient business perspective excuse, standing alone, to monitor the employee's workplace telephone calls. Monitoring should only be employed when there are facts the employer becomes aware of that a particular employee is violating its policy or when that employee is suspected of discussing confidential business matters with third parties. Furthermore, the employer must check with counsel to make sure that state law permits such monitoring. It is paramount that the employer has previously disseminated a policy providing advance notice to all employees that such telephone monitoring can occur at any time without further notice or permission. If an employer does not, the employer could be subject to a claim for invasion of privacy under tort law. Several of the subsequent cases have dealt with electronic communications in the workplace in recent years.

Burlington Industries, Inc. v. Ellerth[172], and its companion case *Faragher v. City of Boca Raton*[173], spawned greater pressure on employers to prevent and correct promptly any sexually harassing behavior. In turn, the product of these cases placed greater pressure on employers to monitor employee behavior.[174] In *Ellerth*, Justice Clarence Thomas, with whom Justice Antonin Scalia joined dissenting, raised caution about the privacy concerns of employees and the impracticable burden on employers.[175] Justice Thomas noted that, "sexual harassment is simply not something that employers can wholly prevent without taking extraordinary measures—constant video and audio surveillance, for example—that would revolutionize the workplace in a manner incompatible with a free society."[176] It is to little surprise that these Justices diverted on privacy issues in employment cases from their stance on privacy in Fourth Amendment cases. The aftermath of these cases resulted in the

170. Restatement (Third) of Emp. L.: Emp. Priv. and Autonomy § 7.03 cmt. g (A.L.I. 2015).

171. *Id*. note 138 at 229—30.

172. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998)

173. Faragher v. Boca Raton, 524 U.S. 775 (1998).

174. Ellerth, 524 U.S. at 770.

175. *Id*.

176. Ellerth, 524 U.S. at 770 (Thomas, J., dissenting, quoting Posner, J., dissenting), *aff'd*, 524 U.S. 742 ("It is facile to suggest that employers are quite capable of monitoring a supervisor's actions affecting the work environment. Large companies have thousands of supervisory employees. Are they all to be put under video surveillance?").

competing theories and intersect between employee privacy in the workplace and employer protection.

In *Anicich v. Home Depot U.S.A., Inc*., the Seventh Circuit Court of Appeals applied *Ellerth* in holding that the employer, Home Depot U.S.A., could potentially be civilly liable for a supervisor murdering a co-worker because Home Depot had an agency relationship with the supervisor, which he abused.[177] The Seventh Circuit found that the supervisor's "threats to fire Alisha or cut her hours were exactly what the *Ellerth* court addressed: threats to take tangible employment actions that were not carried out, because the threat worked."[178] Further, the court went on to state, "under the principles of the Restatement of Employment Law, Anicich would be able to pursue a claim under §§ 4.03 and 4.06."[179]

In *Stengart v. Loving Care Agency, Inc*., the New Jersey Supreme Court concluded that an employee had a reasonable expectation of privacy in email communications sent to her attorney through a private, password-protected, web-based email account, although the employee accessed the account using her employer-provided laptop.[180] The court concluded the employee had "plainly [taken] steps to protect the privacy of those emails and shield them from her employer."[181] Importantly, the court also concluded that the employer's electronic communications policy did not address the use of personal, web-based email accounts accessed through company equipment.[182] In *Deal v. Spears*, the U.S. Court of Appeals for the Eighth Circuit held an employee did not impliedly consent to monitoring of her phone calls when her employer only told her that it might monitor phone calls.[183] Similarly, in *Lazette v. Kulmatycki*, the U.S. District Court for the Northern District of Ohio concluded that there was no reason for the plaintiff to predict that her employer would monitor future email messages sent from her personal Gmail account.[184]

Along the same lines, *Holmes v. Petrovich Development Co*., also involved an employee sending her attorney email messages using the employer's computer system.[185] In *Holmes*, however, the employer's policy clearly stated that employees using company computers to create or maintain personal information or messages "have no right of privacy with respect to

177. *Anicich v. Home Depot U.S.A., Inc*., 852 F.3d 643 (7th Cir. 2017), as amended (Apr. 13, 2017).
178. *Id*. at 653.
179. *Id*.
180. Stengart v. Loving Care Agency, Inc., 990 A.2d 650, 664 (N.J. 2010).
181. *Id*. at 663.
182. *Id*.
183. Deal v. Spears, 980 F.2d 1153, 1157 (8th Cir. 1992).
184. Lazette v. Kulmatycki, 949 F. Supp. 2d 748, 757 (N.D. Ohio 2013).
185. Holmes v. Petrovich Dev. Co., LLC, 191 Cal. App. 4th 1047, 119 Cal. Rptr. 3d 878 (2011).

that information or message."[186] The California Court of Appeals concluded that by using the company's computer to communicate with her lawyer, knowing the communications violated company computer policy and could be discovered by her employer due to company monitoring of email usage, the employee's communications were not privileged.[187]

In *Ehling v. Monmouth-Ocean Hospital Service Corp*., Ehling, a nurse and paramedic, was fired by her employer, Monmouth-Ocean Hospital Service Corporation, after its management became aware of certain information Ehling had posted on her personal Facebook page.[188] The plaintiff argued that "she had a reasonable expectation of privacy in her Facebook posting because her comment was disclosed to a limited number of people who she had individually invited to view a restricted access webpage."[189] The defendants argued that there cannot be a reasonable expectation of privacy in a comment disclosed to many people.[190] The court ruled that the plaintiff had a reasonable expectation that her Facebook posting was private because she ensured her privacy settings protected her page from public view.[191]

In *Steve Jackson Games, Inc. v. United States Secret Service*, the Secret Service seized a computer to intercept email communication stored on a private email system and the court held that the seizure of the unread email did not constitute an interception.[192] The court determined that the use of the word "intercept," as opposed to the omitted term "transfer," does not apply to emails that are in "electronic storage."[193] The U.S. District Court in Delaware, in *Wesley College v. Leslie Pitts*, defined the term "intercept" under the ECPA as inapplicable when an email message is read on a computer screen.[194] The District Court of Nevada stated that the ECPA is not violated when the employer reads email messages that have been stored or already sent.[195]

Privacy issues naturally arise when it comes to monitoring an employee's email. However, these judicial decisions turn on whether there is a "reasonable expectation of privacy" as defined in the Fourth Amendment of the United States Constitution.[196] Depending on the employer's stated policy

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186. *Id*. at 1051.

187. *Id*.

188. Ehling v. Monmouth-Ocean Hosp. Serv. Corp., 872 F. Supp. 2d 369, 373–74 (D.N.J. 2012).

189. *Id*. at 374.

190. *Id*.

191. *Id*.

192. Steve Jackson Games, Inc., et al. v. U.S. Secret Service, et al., 36 F.3d 457, 460 (5th Cir. 1994).

193. *Id*. at 461-62.

194. 974 F. Supp. 375, 384-385 (1997).

195. Bohach v. City of Reno, 932 F. Supp. 1232, 1236-37 (D. Nev. 1996).

196. *See* Leventhal v. Knapek, 266 F.3d 64, 73 (2d Cir. 2001) (where the court held that the employee had a reasonable expectation of privacy in his office computer, but the agency

regarding internal emails, the employee may be held not to have a "reasonable expectation of privacy" when using the email on the employer's system.[197] Nevertheless, any actions by the employer that create a reasonable expectation of privacy, such as encryption or a policy which states that they will not monitor email within the company, may give rise to a reasonable expectation of privacy and thus, liability for the employer.[198]

An employer can reduce the employee's legally recognized "legitimate expectation of privacy," if the employer has previously implemented and has regularly communicated policies that establish the employer's right to monitor certain workplace conduct of the employee. This is another area in which the employer must tread carefully and consistently, because unduly monitoring, for example, a currently employed plaintiff pursuing a discrimination claim against the employer, could easily raise the possibility of a retaliation claim. Employers must have policies that are regularly enforced and procedures that clearly communicate to employees their lack of expectation of privacy regarding their digital conduct while employees are situated on company property, while utilizing company property, systems, or equipment. Employers should take steps to ensure that such monitoring of policy enforcement is never specifically targeted to a plaintiff employee but rather is consistently applied to all employees fairly and equally.

B. Discovery of Emails

In December 2006, the Federal Rules of Civil Procedure (hereinafter "FRCP") were amended to provide for more extensive discovery of electronically stored information (hereinafter "ESI").[199] ESI includes electronic copies of documents, emails and other data generated by and stored within computer applications common in today's workplace.[200] There are four types of electronic data: (1) active data, (2) cloned data, (3) back-up data, and (4) residual data.[201] It is important to understand that each type of data presents a unique discovery issue.[202] The amended FRCP provides guidelines on what is expected of employers and others who possess ESI, and have altered the manner

possessed individualized suspicion to search because of "non-standard" software band that the public employer's objectives for the search determined its reasonable limits).

197. *Id*.

198. See Watkins v. L.M. Berry & Co., 704 F.2d 577, 581-82 (11th Cir. 1993); The Federal Wiretap Act, 18 U.S.C. § 2511(1).

199. Russell J. McEwan, Frank A. Custode, *Employment Law Counseling in the Age of E-Discovery: Understanding the Importance of Computer Use and Document Retention Policies*, 255 N.J. Law. 15 (December 2008).

200. *Id*.

201. Stuart Miller & Stephanie Irby Randall, *A Primer on Electronic Discovery for the General Practitioner*, 39 Ark. Law. 16 (Fall 2004).

202. *Id*.

in which employers monitor their employees' use of company computers.[203] As a result of these amendments, it is essential that corporate clients are advised by counsel on how potentially damaging ESI is created through common workplace practices, the law governing the preservation of ESI, and how to minimize potential liability in the event of an employment lawsuit. Nevertheless, email records are commonly stored on an employer's digital system and as such, are discoverable in litigation.[204] Further, it is worth noting that the cornerstone of electronic discovery is rests on the notion that computerized data is discoverable if relevant."[205] The answer is simple, as courts have routinely treated computer data as a "document."[206] This usage, in turn, implicates various rules of procedure governing Arkansas and federal civil discovery.[207] While the following cases predate the amendments, they are nonetheless relevant to discovery of emails in civil litigation. Recent New Jersey case law demonstrates that employers have been exposed to liability for failure to properly monitor their employees' electronic communications in the workplace.[208]

In *Blakey v. Continental, Inc*., the New Jersey Supreme Court held that a female employee had a valid sexual harassment claim when allegedly defamatory and sexually harassing material was posted on an electronic bulletin board.[209] Although the employer, Continental, did not maintain the bulletin board and employees could only access it through the Internet, the court found that Continental had notice of the sexual harassment and that the electronic bulletin board was integrated into the workplace to such a degree that Continental had a duty to correct off-site sexual harassment by coworkers.[210] *Blakey* stressed that an employer's responsibility to prevent sexual harassment and hostile work environments extends to both the physical and digital workplace.[211] Under *Blakey*, once an employer has knowledge of employee-to-employee digital sexual harassment, the employer must take affirmative steps to halt the sexual harassment.[212]

The *Blakey* court, however, did not place an affirmative obligation on employers to prevent sexual harassment by monitoring digital

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203. *McEwan & Custode, supra note* 183, at 16—18.

204. Hannoon v. Fawn Engr. Corp., 324 F.3d 1041, 1048 (8th Cir. 2003) (where the email, which the employer forwarded to others, requesting a "translation" was admissible in evidence regarding employee's Title VII suit).

205. Miller & Randall, *supra* note 185, at 17.

206. *Id*. at note 185.

207. *Id*. at note 185.

208. *Id*. at note 183.

209. Blakey v. Contl. Airlines, Inc., 751 A.2d 538, 549 (N.J. 2000).

210. *Id*. at 552.

211. Daniel B. Garrie, *Limiting the Affirmative Defense in the Digital Workplace*, 19 Mich. J. Gender & L. 229, 239 (2012).

212. *Id*.

communications.[213] The court stated that although "employers do not have a duty to monitor private communications of their employees," they "do have a duty to take effective measures to stop co-employee harassment when the employer knows or has reason to know" of the sexual harassment.[214] The court limited the scope of its holding due to "grave privacy concerns."[215] However, legislative enactments have reduced these concerns. Congress enacted the Electronic Communications Privacy Act of 1986 (ECPA) and the Stored Communications Act (SCA), both of which grant employers the right to monitor employees' email communications as long as the monitoring occurs in the ordinary course of business.

Although email offers obvious benefits for employers, it also leaves employers susceptible to liability given the often informal nature of its use.[216] Similarly, internet use in the workplace, while an essential tool for many businesses, has undoubtedly opened the door to a whole new class of problems for employers, the likes of which were unimaginable even twenty years ago.[217] Given the widespread reliance on electronic discovery in litigation, employers defending discrimination suits can easily expect to be served with document requests to produce all email communications to, from, regarding the plaintiff, or relating to the issues in the litigation. Consequently, the employer should secure a copy of the employee's email and computer hard drive, even if the employer does not access such information for purposes of the litigation. Further, an employer's restoration and production of email backup tapes could be required during discovery.[218]

VI. WHAT EMPLOYERS SHOULD DO TO LIMIT LIABILITY BY INCREASING THE PERSONNEL THAT TAKE COMPLAINTS

Employers should set up anti-harassment policies and procedures to allow employees to report and resolve complaints of sexual harassment. This is important to cure such sexual harassment within the workplace and to provide the employer with an affirmative defense to hostile environment claims by showing the employer acted reasonably in its response to the complaint and that the plaintiff employee did not take advantage of the complaint procedures. An employer's policy against sexual harassment in the workplace must identify individuals whom the employees can bring complaints to and defines

213. *Id*.
214. *Id*. at 239–240.
215. *Id*. at 240.
216. McEwan & Custode, *supra* note 183, at 18.
217. *Id*. at 16.
218. *McPeek v. Ashcroft*, 202 F.R.D. 3, 34 (D.D.C. 2001) (deciding that the Department of Justice had to provide the court would one year's worth of email backup for employee who filed a sexual discrimination claim).

who can answer an employee's questions about the employer's policy. The policy should name multiple individuals in various departments within the company to avoid situations, including conflict of interest, intimidation, or the individual being the alleged harasser. Outside of increasing personnel that take complaints, an employer must have a retention policy to preserve and protect ESI to minimize potential liability.[219] Spoliation of electronic evidence is complex enough to warrant an entire article, but as a practical matter, all electronic data should be preserved at the time of filing of the complaint, to include the cessation of routine deletion of email or duplicate copies of information.[220] As with the destruction of written evidence relevant to the case at hand, monetary sanctions may result from the deletion or destruction of electronic data after the commencement of a lawsuit.[221]

The *Ellerth Faragher* defense is not available if a supervisor's harassment results in "tangible employment action."[222] To analyze the *Ellerth Faragher* defense, the court must determine whether the plaintiff suffered any adverse employment action, whether the plaintiff complained about the harassment, whether the employer exercised reasonable care under a negligence standard to prevent the harassment and to correct the harassment that the employer knew or should have known existed.[223] Therefore, part of the analysis of an *Ellerth Faragher* defense may include the avenues for complaints of harassment that the employer established and that were available for the employee to use. This demonstrates the importance of an employer having ample personnel to take complaints.

In *Kolstad*, the Supreme Court addressed when the principles of agency will impute an employee's conduct to his employer for purposes of a court awarding punitive damages.[224] The Supreme Court relied on the Restatement (Second) of Agency Section 217, which provides for a putative damage award and states: "punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if: (a) the principal authorized the doing and the manner of the act, or (b) the agent was unfit and the principal was reckless in employing him, or (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or (d) the principal or a managerial agent of the principal ratified or approved the act."[225] In essence, the Supreme Court modified section (d); the "scope and employment" rule for agents that are employed in managerial capacities to

219. McEwan & Custode, *supra* note 183, at 17.
220. Miller & Randall, *supra* note 185, at 20.
221. *Id*.
222. *See* Ellerth, 524 U.S. at 765.
223. *Id*.
224. Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999).
225. *Id*. at 543.

create a defense for employers who can demonstrate good faith efforts to comply with Title VII.

The Eighth Circuit applied the good faith effort analysis in *Ogden v. Waxworks, Inc.*[226] In *Ogden* the employee sued her employer for hostile work environment created by her district manager for two years making unwelcome physical advances and propositions to her at work and finally withholding her annual raise.[227] The turning point to this case was grounded in the fact that the employer's district manager's immediate supervisor, the regional manager, admitted knowing about the district manager's affairs with other employees and agreed to investigate.[228] The vice president of the company also admitted he heard about the inappropriate relationships with other employees.[229] When the district manager characterized the employee's problems as "personality conflict," the investigation began to focus on her performance and not his conduct.[230] In *Ogden*, the Eighth Circuit analyzed the *Ellerth Faragher* defense, but held that the defense was not available because the employer constructively discharged the employee.[231] In rendering its ultimate holding, the Eighth Circuit explained that the jury reasonably rejected the affirmative defense of good faith effort because there was substantial evidence that the employer never conducted a thorough investigation nor did it take appropriate actions as promised by its sexual harassment policy.[232] The court found that the employer minimized the employee's complaints and only performed a cursory investigation which basically focused on the employee's performance rather than the employer's conduct.[233] Notably, the Eighth Circuit held that the quality of the investigation and the failure of the employer to discipline the district manager carried more weight than the employer's written sexual harassment policy that instructed the employee to contact the home office.[234] The employee here never called the home office, but did report the harassment to the regional manager, bypassing the harassing supervisor.[235]

In *Henderson v. Simmons Food, Inc.,* the Eighth Circuit addressed the *Kolstad* standard of reckless indifference.[236] In this case, the employee was being harassed by a co-worker, and after she had complained, the employer transferred the co-worker after a year to a different unit.[237] A year and one-

226. Ogden v. Wax Works, Inc., 214 F.3d 999 (8th Cir. 2000).
227. *Id*.
228. *Id*.
229. *Id*.
230. *Id*. at 1002–04.
231. *Id*. at 1007.
232. *Id*. at 1006.
233. *Id*. at 1009.
234. *Id*.
235. *Id*.
236. Henderson v. Simmons Foods, Inc., 217 F.3d 612 (8th Cir. 2000).
237. *Id*. at 612.

half later, he returned to the same production line where the employee worked and she again complained to her supervisor.[238] She reported verbal sexual harassment to her supervisor and to the human relations manager, who told her that if the allegations had no merit they might fire her. She also complained to the company nurse. After that, another male co-worker started harassing her. The employee said that two female co-workers overheard the harassment, but they denied seeing the harassment. The human relations manager warned both male employees, who then stopped their verbal harassment, but one continued making obscene hand jesters towards the employee. The employer reported his actions again, but the employer did nothing else.[239] The Eighth Circuit affirmed on appeal.[240] The court cited *Kolstad*, noting that "the terms of 'malice' or 'reckless indifference' pertained to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination."[241] The Eighth Circuit referred to the burden for a plaintiff seeking punitive damages and hostile working environment as "formidable" and stated that the employee met the burden because of the manner in which the employer responded to her numerous complaints.[242]

In *Henderson*, the Eighth Circuit Court of Appeals distinguished the case *Varner v. National Super Markets, Inc.*, a case in which the male employee harassed a 17-year-old female worker with sexually graphic remarks and sexual assault.[243] In *Varner*, the employee never filed complaints following the assaults, but told her fiancé, who then complained to her employer.[244] The supervisor ignored both complaints and stated that the company policy was not to allow him to act until the employee personally complained.[245] The Eighth Circuit had concluded that although the employer was on notice because of the complaints of the fiancé' there was no deliberate indifference to support punitive damages because the sexual harassment policy did in fact require supervisors not to address the sexual harassment themselves, but to refer aggrieved employees to the human relations department.[246]

In sum, a sexual harassment complaint procedure that has multiple individuals who can take reports and complaints of harassment is the proffered standard for an employer. The policy should be dynamic by providing several different ways for employees to file complaints. Such a policy should be facilitated by several departments and increased personnel. If properly

238. *Id*. at 613.
239. *Id*.
240. *Id*.
241. *Id*. at 617 (citing Kolstad, 527 U.S. at 535).
242. *Id*. at 617.
243. Henderson v. Simmons Foods, Inc., 217 F.3d 612 (8th Cir. 2000).
244. Varner v. Nat'l Super Markets, Inc., 94 F.3d 1209 (8th Cir. 1996).
245. *Id*.
246. *Id*.

administered, a court will likely find that the employee acted unreasonably when that employee does not take advantage of multiple ways to file a complaint with the employer. Finally, and most critically, this method of multiple avenues for complaints would also allow the employer to take advantage of any affirmative defenses that are not allowed under constructive discharge, because constructive discharge would be difficult to establish based on an action by the employer when there were multiple ways to complain to the employer.

VII. CONCLUSION

Employers must understand the implications of the digital age. Employers need to stay abreast of the technological measures needed to prevent digital harassment in the workplace. Furthermore, employers must have policies and procedures that properly address digital harassment as well as measures in place to properly respond to complaints by increasing personnel. As the digital age progresses, so will the need for appropriate policies and procedures to combat Title VII claims in employment law.

STATE TAKEOVER: HOW THE LEARNS ACT LIMITS LOCAL SCHOOL BOARD POLICY CONCERNING TEACHER TERMINATIONS AND RENEWALS

I. INTRODUCTION

Late on Monday February 20, 2023, Senator Breanne Davis filed Arkansas Senate Bill 294, the one hundred forty-four-page bill that would shortly become the LEARNS Act.[1] This omnibus legislation impacted large swaths of Arkansas education law: rules regarding school vouchers, teacher pay, school transformation contracts, hiring standards, and more were affected by the bill.[2] Immediately, challengers targeted the speed at which proponents planned to push the bill through the General Assembly, specifically citing the need to adequately discuss and address the potential impact of the law.[3] That did not happen.[4] Instead, the Act was signed into law on March 8, 2023, sixteen days after the bill's initial filing.[5]

One of the many changes made by the LEARNS Act was the repeal of the Arkansas Teacher Fair Dismissal Act (TFDA).[6] Additionally, the Act denies funding for teacher salaries to schools that provide more rights to personnel than those provided under state law.[7] Together, these two changes created problems for school districts trying to comply with the law as employee contracts can no longer be automatically renewed nor can local board policies permit written notice of the district's intent to non-renew a contract for the upcoming year.[8] As a result, school districts have struggled to determine what provisions they can include in termination and renewal policies.[9]

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1. Ali Noland, *Loads of Questions Demand Answers Before Arkansas LEARNS Goes Up for a Vote,* ARKANSAS TIMES (Feb. 2, 2023, 12:34 PM), https://arktimes.com/arkansas-blog/2023/02/21/loads-of-questions-demand-answers-before-arkansas-learns-goes-up-for-a-vote.

2. LEARNS Act, No. 237, 2023 Ark. Acts 975, 979, 994, 1061, & 1076.

3. Ali Noland, *supra* note 1.

4. *See* Josh Snyder, *What You Need to Know About the Arkansas LEARNS Act,* ARKANSAS DEMOCRAT GAZETTE (Mar. 10, 2023), https://www.arkansasonline.com/news/2023/mar/10/what-you-need-to-know-about-arkansas-learns/.

5. LEARNS Act, No. 237, 2023 Ark. Acts 975, 1155.

6. *Id.* at 1048.

7. *Id.* at 1065.

8. Jim Ross, *Little Rock School Board Approves First List of Employee Renewals, as per New LEARNS Mandate,* ARKANSAS TIMES (Mar. 29, 2024 1:41 PM), https://arktimes.com/arkansas-blog/2024/03/29/little-rock-school-board-approves-first-list-of-employee-renewals-as-per-new-learns-mandate.

9. *See* Cynthia Howell, *Little Rock District Asks Whether New State Law Lets Teachers Appeal Dismissals to School Board*, ARKANSAS DEMOCRAT GAZETTE (Apr. 15, 2024),

While many districts have enacted policies based upon model board policies that are compliant with state requirements, the implementation of those policies has created a large administrative burden on school districts.[10] This note argues that school districts could include more explicit protections in termination and renewal policies than included in model school board policy without implicating funding under LEARNS. However, even the most protective termination and renewal policy possible under current law is insufficient to meet the needs of school districts. Accordingly, the General Assembly should either reinstate TFDA, adopt equivalent legislation, or repeal the prohibition on providing more local protections than are available in state law.

Section II of this note describes the historical development of TFDA, the changes to those provisions as required by the LEARNS Act, and the impact of new dismissal policies on school districts in Arkansas.[11] Section III describes the legal protections districts are permitted to provide in board policies per state and federal law.[12] Section IV explains why the most protective board policies allowed are insufficient to meet the needs of school districts.[13] Finally, section V offers potential solutions to address these problems.[14]

II. BACKGROUND

A. Teacher Dismissal Prior to LEARNS

1. Arkansas's Early Protections of Teacher Contracts

For much of Arkansas's history, teachers did not have any statutory protection in their jobs.[15] In early court cases concerning teacher contracts, teachers brought suits under contract common law theories.[16] The first statutory provision impacting teacher contracts was the Continuing Contract Law of

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https://www.arkansasonline.com/news/2024/apr/15/little-rock-district-asks-whether-new-state-law/.

10. *See, e.g.*, Josie Lenora, *Little Rock School District Continues Contract Non-Renewals*, LITTLE ROCK PUBLIC RADIO (May 31, 2024 4:06 PM), https://www.ualrpublicradio.org/local-regional-news/2024-05-31/little-rock-school-district-continues-contract-non-renewals.

11. *Infra* Section II.

12. *Infra* Section III.

13. *Infra* Section IV.

14. *Infra* Section V.

15. Paul Blume, *The Arkansas Teacher Fair Dismissal Act: A Primer*, ARK. LAW., WINTER 2002, at 13.

16. *See, e.g.*, McDougald v. Special Sch. Dist. No. 43, 174 Ark. 963, 298 S.W. 193, 194 (1927) (holding that McDougald was entitled to recovery of unpaid wages on her employment contract because the unsigned contract was ratified by 3 months of payment and performance).

1969, which automatically renewed teachers' contracts for the following school year unless the teacher was notified otherwise.[17]

In 1970, the Arkansas General Assembly enacted its first direct statutory protection of teacher contracts in the form of the Public School Employment and Dismissal Practices Act.[18] This act required schools districts to provide notice and hearing within a specified time period to teachers who were to be terminated or whose contract was not to be renewed.[19] However, nothing in the law required a written statement for the reasons of dismissal or non-renewal.[20]

2. Adopting the Teacher Fair Dismissal Act

Then, in 1979, the Arkansas General Assembly enacted a more comprehensive teacher dismissal act, TFDA of 1979.[21] That law incorporated both the procedural protections of the Public School Employment and Dismissal Practices Act and the automatic renewal of teacher contracts of the Continuing Contract Law.[22] However, it did not define a standard of adherence to these procedures.[23] The Supreme Court later held that the statute only required substantial compliance unless the teacher made a showing of prejudice caused by the lack of substantial compliance.[24]

This law also created different standards for "probationary teachers," defined as teachers who were employed by a single district for less than three consecutive years.[25] Probationary teachers had no right to a hearing if their contracts were not renewed and could not appeal dismissal to the circuit court.[26] Furthermore, only non-probationary teachers were entitled to an automatic statement of the grounds for their non-renewal.[27] However, the act did require administrators to provide annual evaluations and attempt to correct problems that could lead to termination or nonrenewal of teacher contracts.[28]

This law also introduced substantive protections for teachers facing termination. Namely, the law limited the termination of teacher contracts to causes that were "not arbitrary, capricious, or discriminatory."[29] While the

17. Blume, *supra* note 15, at 13.
18. Public School Employment and Dismissal Practices Act, No. 74, 1970 Ark. Acts 242.
19. *Id.* at 242–43.
20. Public School Employment and Dismissal Practices Act.
21. The Teacher Fair Dismissal Act of 1979, No. 766, 1979 Ark. Acts 1705.
22. *Id.* at 1706.
23. Fullerton v. Southside Sch. Dist., 272 Ark. 288, 290 613 S.W.2d 827, 829 (1981).
24. Lee v. Big Flat Pub. Sch., 280 Ark. 377, 378, 658 S.W.2d 389, 390 (1983).
25. The Teacher Fair Dismissal Act of 1979, at 1705.
26. *Id.*
27. *Id.* at 1706.
28. *Id.* at 1707–8.
29. *Id.* at 1706.

law did not define those terms, the Arkansas Supreme Court later defined arbitrary and capricious actions as those "not supportable on any rational basis."[30] The Arkansas Supreme court also determined that there must be "a showing of clear and intentional discrimination" to state a claim under fair dismissal's prohibition against discrimination.[31]

3. Amending the Teacher Fair Dismissal Act

In 1983, the General Assembly amended TFDA, though most of the changes were relatively minor.[32] One of the most significant changes made was to give probationary teachers the same procedural protections as non-probationary teachers, absent the ability to appeal to the circuit court.[33] This act also changed the definition of probationary teacher such that teaching for three years in any given school district satisfied the probationary period, although school districts could require a single additional year of probation for teachers who changed districts.[34] The amended act also moved the date by which notice of non-renewal was required to May 1st of each year.[35]

TFDA was amended again in 1989, this time adding a statutory requirement for strict compliance.[36] After the amendment, the courts reversed many decisions by local school boards because strict compliance left zero room for deviations or any opportunity to correct those errors, regardless of the substantive reasons for dismissal.[37] After extensive criticism, the General Assembly again amended TFDA in 2001, returning the standard to one of substantial compliance.[38] The 2001 amendment also changed the substantive requirement for termination from "any cause which is not arbitrary, capricious, or discriminatory" to "incompetent performance, conduct which materially interferes with the continued performance of the teacher's duties, repeated or material neglect of duty, or other just and reasonable cause."[39]

30. Lamar Sch. Dist. No. 39 v. Kinder, 278 Ark. 1, 3–4, 642 S.W.2d 885, 887 (1982).
31. McClelland v. Paris Pub. Sch., 294 Ark. 292, 298, 742 S.W.2d 907, 910 (1988).
32. The Teacher Fair Dismissal Act of 1983, No. 936, 1983 Ark. Acts 2283, 2290.
33. *Id.* at 2287-89.
34. *Id.* at 2284.
35. *Id.* at 2284-85.
36. Act of Mar. 16, 1989, No. 625, 1989 Ark. Acts 1401, 1401.
37. *See* Spainhour vs. Dover Public School District, 331 Ark. 53, 56, 958 S.W.2d 528, 530 (1998).
38. Act of Apr. 18, 2001, No. 1739, 2001 Ark. Acts 7574, 7575.
39. *Id.*

B. LEARNS Act and Teacher Fair Dismissal

As stated previously, the LEARNS Act repealed TFDA in its entirety.[40] Even before the full details of the bill were released, when Governor Sanders' provided an overview that indicated LEARNS would overturn TFDA, many groups spoke up in favor of TFDA.[41] Proponents of TFDA argued it was necessary to protect educators from losing their jobs without due process.[42] Conversely, those who supported repealing TFDA argued it made it too difficult to fire bad teachers.[43] Some administrators expressed concerns with the required timelines allowing people who should have been terminated to stay because of loopholes.[44]

It was not until the entire text of LEARNS was released that the full impact of repealing TFDA became apparent.[45] Additionally, the LEARNS Act prohibited school districts from adopting personnel policies "that provide more rights to personnel than those provided under state law."[46] This prevents local school districts from adopting policies similar to TFDA as part of their local board rules and procedures.[47] Critics of LEARNS were quick to point out the potential problems of these two provisions.[48] Ali Noland, a Little Rock attorney and then board member of the Little Rock School District (LRSD), warned that repeal of TFDA combined with restricting local districts would lead to "confusion and chaos."[49] She highlighted the risk that districts would struggle to "reestablish reasonable, orderly procedures to govern employee discipline and termination."[50]

To address concerns over the connection between the repeal of TFDA and the prohibition on additional protections in local policies, LEARNS was amended prior to enactment, adding an explicit protection for due process rights.[51] Specifically, after the section prohibiting additional local protections,

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40. LEARNS Act, No. 237, 2023 Ark. Acts 975, 1048.

41. Austin Gelder, *Add the NAACP and LREA to a Growing List of Opponents to Gov. Sanders' School Voucher Plan*, ARKANSAS TIMES (Feb. 10, 2023 11:19 AM), https://arktimes.com/arkansas-blog/2023/02/10/add-the-naacp-and-lrea-to-a-growing-list-of-opponents-to-gov-sanders-school-voucher-plan.

42. *Id.*

43. David Ramsey, *How Does Arkansas LEARNS Impact Teachers? We Have Answers (Part 2)*, ARKANSAS TIMES, (Jan. 8, 2024 3:02 PM), https://arktimes.com/arkansas-blog/2024/01/08/how-does-arkansas-learns-impact-teachers-we-have-answers-part-2.

44. *Id.*

45. Noland, *supra* note 1.

46. LEARNS Act, No. 237, 2023 Ark. Acts 975, 1065.

47. Noland, *supra* note 1.

48. *Id*.

49. *Id*.

50. Noland, *supra* note 1.

51. Josie Lenora, *Arkansas LEARNS Amendment Faces Shortened Debate in Senate Committee*, LITTLE ROCK PUBLIC RADIO (Mar. 7, 2023), https://www.ualrpublicradio.org/local-

the act as amended states that the previous provision will not be interpreted as "denying personnel rights provided by other laws, including without limitation due process."[52] Senator Linda Chesterfield, a former teacher, raised concerns during debate over the amendment that including that language, with its general reference to due process, was not the same level of protection as the just cause requirements of TFDA.[53] These concerns did not prevent the amendment from being adopted or LEARNS from taking effect.[54]

C. Updating Local Board Policies

After LEARNS was enacted, school districts were charged with updating local policies to accommodate the changes to state law.[55] For a variety of reasons, including the complicated nature of the law and the time-intensive nature of attempting to draft new policies or make substantial amendments to existing documents, many school districts across the state rely on external organizations such as the Arkansas School Boards Association ("ASBA") to help maintain compliance with state law requirements.[56] The ASBA drafts model policies that are made available to member districts that subscribe to the service.[57] Subscribers receive updates to the polices as state and federal education laws change to ensure districts are in compliance with all mandatory requirements.[58]

While not every district in the State subscribes to the ASBA school board policies, the policies provide a good example of how districts have incorporated the requirements of LEARNS into their board policies. The ASBA incorporated changes from the LEARNS Act and other legislation passed during the 2023 legislative session in its May 2023 updates to suggested board policies.[59] One of the policy sections that underwent extensive changes was the provision relating to licensed personnel dismissal and non-renewal.[60] Prior

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regional-news/2023-03-07/arkansas-learns-amendment-faces-shortened-debate-in-senate-committee.

52. LEARNS Act, No. 237, 2023 Ark. Acts 975, 1162.

53. Lenora, *supra* note 51.

54. *See* Snyder, *supra* note 4.

55. *See* Ashley Godwin, *Little Rock School District Takes Steps for New Pronoun Law, LEARNS Act* (May 18, 2023, 10:36 PM), https://www.thv11.com/article/news/education/little-rock-school-district-implement-learns-act/91-e107f7b4-913d-40ee-8379-1814f8ba4463.

56. *See Model Policies*, ARKANSAS SCHOOL BOARDS ASSOCIATION, https://www.arsba.org/page/model-policies (last accessed Mar. 17, 2023).

57. *Id.*

58. *Id.*

59. Cover Letter from Ark. Sch. Bds. Ass'n to Model Policy Subscribers (May 1, 2023), https://www.arsba.org/page/model-policies-updates (choose "2023" under the policy updates by year; then follow "Cover Letter" hyperlink under May 1, 2023).

60. Ark. Sch. Bds. Ass'n Model Board Policy 3.36 update (May 1, 2023), https://www.arsba.org/page/model-policies-updates (choose "2023" under the policy updates

to the May 2023 update, this section simply stated that termination and non-renewal of teachers was governed by the Arkansas TFDA and the Teacher Excellence and Support System.[61] After the update, the section was restyled as "licensed personnel renewal and termination."[62]

Under the "renewal" section, the model policy states that the superintendent will recommend renewal of employees' contracts to the district's board of directors based upon on employee effectiveness, performance, and qualifications.[63] It also states that seniority will only be considered if employees are otherwise equal.[64] The section also explicitly requires superintendents to not recommend renewal if there is probable cause than an employee engaged in sexual misconduct with a minor.[65] Lastly, this section notes that after the superintendent's recommendation for renewal and approval by the board, the next year's contract will be provided to each employee.[66]

Under the "termination" section, the model policy states that the superintendent is empowered to recommend termination if an employee violates district policies, state or federal laws, state rules, or federal regulations.[67] It then outlines a procedure and timeline for providing written notice that includes the grounds for the recommendation and for a hearing before the school board.[68]

D. Impact of New Termination and Renewal Policies

The largest difference between termination and renewal under TFDA and under LEARNS is in the renewal process. As described above, under TFDA, teacher contracts were automatically renewed unless notice of non-renewal was sent to the teacher before May 1st of each year.[69] However, with the repeal of TFDA, there is no automatic renewal provision in state law.[70] Accordingly, school board policies, including the ASBA model polices, have changed to require school boards to individually renew each contract following the metrics described in state law for personnel decisions.[71]

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by year; then follow "Policy Updates" hyperlink under May 1, 2023; click "3.36.Update_5-1-23").

61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *See* Ark. Sch. Bds. Ass'n Model Board Policy 3.36 update, *supra* note 60.
67. *Id.*
68. *Id.*
69. ARK. CODE ANN. § 6-17-1506 (2022).
70. LEARNS Act, no. 237, 2023 Ark. Acts 975, 1050.
71. *See* Ark. Sch. Bds. Ass'n Model Board Policy 3.36 update, *supra* note 60.

This change has placed a huge administrative burden on many school districts.[72] Districts were left uncertain how to best implement new board polices that were compliant with LEARNS without violating the requirement to not offer more protections than under state law.[73] For example, at an April 2024 LRSD board meeting, the board required outside counsel to advise the board members on what rights teachers still had.[74] The focus of the meeting was determining if teachers who were recommended for non-renewal still had a right to a hearing before the school board.[75] The outside counsel was unsure if granting those teachers a hearing would violate the provision barring additional protections.[76]

Not long after that meeting, State Senator Clarke Tucker, on behalf of the LRSD, asked the state Attorney General Tim Griffin to issue guidance on this issue.[77] While the specific request for guidance from Griffin arose out of questions from the LRSD, according to the Arkansas Education Association teachers union President April Reisma, the problem was not limited to just the LRSD.[78]

A few days later, Griffin issued a formal opinion in response.[79] According to Griffin, State law now requires a hearing if the employee is recommended for termination, but it does not provide the right to a hearing for non-renewal.[80]Additionally, if an employee is a teacher on "intensive support status" under the Teacher Excellence and Support System,[81] then that employee is required to receive notice of their non-renewal.[82] However, other teachers are not entitled to receive notice of non-renewal. On the other hand, since LEARNS did not repeal the statutory requirement that employees be provided with a grievance policy, an employee could file a grievance under district policy if they are recommended for non-renewal so long as they are aware of their non-renewal status.[83]

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72. *See* Jim Ross, *LRSD Board Wrangles with New Teacher Contract Law Under LEARNS,* ARKANSAS TIMES (Apr. 12, 2024 10:54 AM), https://arktimes.com/arkansas-blog/2024/04/12/lrsd-board-wrangles-with-new-teacher-contract-law-under-learns.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. Howell, *supra* note 9.

78. *Id*.

79. Ark. Op. Att'y Gen. No. 2024-042 (Apr. 19, 2024).

80. *Id.* at 2.

81. The Teacher Excellence and Support System is the state mandated teacher evaluation system. For a more detailed description, see infra Section III.B.

82. *Id.*

83. *Id.* at 3.

Following the release of this letter, the LRSD allowed employees whose contracts were non-renewed to grieve those non-renewals.[84] The hearings were long and contentious, but some employees were successful in having their non-renewals reversed by the board.[85] Due in part to the time required to complete each hearing and the number of non-renewal hearings requests, non-renewal hearings continued throughout the summer.[86] As the hearings have continued, the LRSD has continued to grapple with what the law requires them to include in its policies and what it cannot require.[87] It is unlikely that the LRSD is the only district facing such issues.

III. LEGAL PROTECTIONS REQUIRED BY LAW

In order to understand the limits on school districts imposed by the restriction on providing more protections than are available under state and federal law, it is necessary to examine what protections are included in state and federal law.[88] Under Arkansas Code Annotated § 6-17-201, school districts are required to have certain personnel policies.[89] That statute lists thirteen sections that must be included within a districts personnel policies, but also states that policies are not limited to those categories.[90] Several of the required polices are relevant to understanding what protections are provided for teachers under the law, namely grievances, methods of evaluations, dismissal or non-renewal, and reduction in force.[91] At the Federal level, the due process requirement of the Fourteenth Amendment provides certain protections to teachers in terms of termination of their contracts.[92]

A. State Grievance Policy

Under state law, all school districts must have a grievance policy.[93] State law specifies that "all school employees shall have the right to file grievances

84. Lenora, *supra* note 10.
85. *Id.*
86. *See* Little Rock Sch. Dist., Hearings for Non-Renewal Recommendations - Jun 18 2024 Agenda (June 18, 2024), https://lrsd.diligent.community/Portal/MeetingInformation.aspx?Org=Cal&Id=125; Little Rock Sch. Dist., Hearing for Non-Renewal Recommendation - Aug 8 2024 Agenda (Aug. 8, 2024), https://lrsd.diligent.community/Portal/MeetingInformation.aspx?Org=Cal&Id=153.
87. *See* Little Rock Sch. Dist., Agenda Meeting - Mar 13 2025 Agenda, (Mar. 13, 2025), https://lrsd.diligent.community/Portal/MeetingInformation.aspx?Org=Cal&Id=143.
88. ARK. CODE ANN. § 6-17-2403.
89. ARK. CODE ANN. § 6-17-201.
90. *Id.*
91. *Id.*
92. *See* Cnty. of Sacramento v. Lewis, 523 U.S. 833, 840 (1998).
93. *Id.*

and have those grievances heard."[94] The law defines grievance broadly as "any concern related to personnel police, salary, federal laws and regulations, state laws and rules, or terms or conditions of employment raised by an employee."[95] As noted by Attorney General Griffin, this language clearly encompasses nonrenewal of a contract before the expiration of the employee's existing contract.[96]

Arkansas law requires grievance policies to include procedures for multi-level grievances, including an informal resolution with the employee's immediate supervisor and appeals to the superintendent and the school board.[97] At all levels of the process, employees are entitled to be represented by a person of their own choosing so long as the representative is not an immediate family member.[98] The law also includes other specific requirements for the structure of the hearing before the school board that ensure employees are able to present a complete argument and defense.[99]

B. Teacher Evaluation: the Teacher Excellence and Support System

Arkansas law also has specific requirements relative to the evaluation process for teachers.[100] In 2011, the Arkansas General Assembly established the Teacher Excellence and Support System (TESS) in order to restructure teacher evaluation in Arkansas.[101] TESS introduced a consistent rubric under which teachers are evaluated annually to facilitate consistent and effective evaluation and promote opportunities for growth for educators.[102] When TESS was initially created, it incorporated requirements that were part of TFDA to provide evaluations and notice of problems that could lead to dismissal.[103] While the LEARNS Act removed the explicit references to TFDA, some of that framework remains.[104]

TESS requires teachers to collaboratively create professional growth plans to facilitate their professional development.[105] In turn, teachers are evaluated based in part upon the goals listed in their growth plans and the TESS

94. ARK. CODE ANN. § 6-17-208.
95. *Id.*
96. Ark. Op. Att'y Gen. No. 2024-042, at 3, (Apr. 19, 2024).
97. ARK. CODE ANN. § 6-17-208.
98. *Id.*
99. *Id.*
100. *See* ARK. CODE ANN. § 6-17-2802.
101. Act of Apr. 5, 2011, No. 1209, 2011 Ark. Acts 5618, 5618.
102. ARK. DEPT. OF EDUC., *The Arkansas Teacher Excellence and Support System*, https://dese.ade.arkansas.gov/Files/TESS_page_flyer_rv_20210525160912.pdf.
103. Act of Apr. 5, 2011, No. 1209, 2011 Ark. Acts 5618, 5635.
104. *See* LEARNS Act, No. 237, 2023 Ark. Acts 975, 1068–69.
105. 005-16-012 ARK. CODE R. § 10.0 (LexisNexis 2025).

rubric.[106] However, teachers who are rated poorly may be placed in intensive support status.[107] If a teacher is placed in intensive support status, they receive extra support from administrators and also obtain certain statutory protections.[108] Significantly, the district is required to provide notice to teachers in intensive support status if the district wishes to non-renew their contracts.[109]

C. Dismissal and Reduction in Force

While LEARNS repealed most of the statutory requirements for dismissal, it left intact the statutory requirement for districts to have a board policy concerning reduction in force. Under state law, a district's reduction in force policy applies when a district experiences an "unavoidable reduction in the workforce beyond normal attrition."[110] Per state law, this policy must, at a minimum, address merit, ability, attendance, performance and effectiveness.[111] After LEARNS, this policy must also comport with the requirement to base all employment related decisions upon effectiveness, performance, and qualifications, but not using seniority as the primary criterion.[112] With the repeal of TFDA, this language represents the most clear statutory guidance on requirements for dismissal and renewal.[113]

D. Protections Required Under Due Process

In addition to state law, districts also have an obligation to honor due process rights in their board policies concerning termination and non-renewal.[114] The Fourteenth Amendment prohibits states from abridging due process rights.[115] Procedural due process requires both adequate notice and an opportunity to be heard before the state can deprive any person of property.[116] Additionally, the Fourteenth Amendment forbids certain state action, "regardless of the fairness of the procedures used to implement them."[117] The Supreme Court has held that substantive due process prohibits behavior that is "arbitrary, or conscience shocking, in a constitutional sense."[118] In the

106. *Id.*
107. *Id.*
108. *Id.*
109. ARK. CODE ANN. § 6-17-2807.
110. *Id.* § 6-17-2407.
111. *Id.*
112. *Id*. § 6-13-636.
113. *See id.*
114. *Id.* § 6-17-2403.
115. Cnty. of Sacramento v. Lewis, 523 U.S. 833, 840 (1998).
116. Armstrong v. Manzo, 380 U.S. 545, 550 (1965).
117. *Cnty. of Sacramento*, 523 U.S. at 840.
118. *Id.* at 847.

education context specifically, the Eighth Circuit has held that substantive due process includes the right to be "free from discharge for reasons that are arbitrary and capricious, or in other words, for reasons that are trivial, unrelated to the education process, or wholly unsupported by a basis in fact."[119] Additionally, the challenged conduct often must intend to inflict harm in a manner that is shocking to the conscience.[120]

Due process rights attach when a state actor deprives someone of a state-created property interest.[121] The Supreme court has held that public employees, including state educators, have a property interest in their existing contract so long as the employee has expectation of continued employment that is "more than mere abstract need or desire."[122] Accordingly, due process requirements apply to teachers who are terminated from their teaching contracts.[123] Because teachers have a reasonable continuing expectation of employment under their existing contract, teachers do have a state-created property interest during the term of their contract.[124] Arkansas courts have also held specifically that teaching contracts "may not be terminated before the end of the term, except for cause or by mutual agreement, unless the right to do so is reserved in the contract."[125]

However, without the automatic renewal procedure included in TFDA, the same requirements no longer apply to non-renewals as there is no longer an expectation that contracts will be renewed.[126] Accordingly, without a continuing expectation of employment, teachers are no longer entitled to due process protections if their contracts are not renewed.[127]

IV. THE MOST PROTECTIVE TERMINATION AND RENEWAL POLICY POSSIBLE UNDER CURRENT LAW IS INSUFFICIENT

A. Protections Available Beyond the Model Policy

As stated previously, many districts in Arkansas utilize the model board policies provided by ASBA.[128] While these policies are compliant with current state law, they do not necessarily represent the most protective policies

119. Herts v. Smith, 345 F.3d 581, 587 (8th Cir. 2003).
120. *Id.*
121. *See* Rogers v. Masem, 788 F.2d 1288, 1294 (8th Cir. 1985).
122. Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).
123. *See* Jasper Sch. Dist. No. 1 of Newton Cnty. v. Cooper, 2014 Ark. 390, at 8–9, 12, 441 S.W.3d 11, 16, 18 (2014).
124. *See Rogers*, 788 F.2d at 1294.
125. Greenwood Sch. Dist. v. Leonard, 102 Ark. App. 324, 328, 285 S.W.3d 284, 288 (2008).
126. *See* Ark. Op. Att'y Gen. No. 2024-042 (Apr. 19, 2024).
127. *Id.*
128. *See supra* Section II.C.

school boards could implement.[129] This is a logical decision: policies that push the edge of what is protected could open the district to losing state funding for salaries.[130] However, that does not mean that there is not a basis in state and federal law for more protections than the model policies currently provide.

For example, under the model board policy, termination is allowed for violating district policies, state or federal laws, state rules, or federal regulations.[131] However, as discussed above, when a teacher is terminated, they are entitled to both procedural and substantive due process protections.[132] Substantive due process requires that teacher contracts cannot be terminated for "reasons that are arbitrary and capricious."[133] Recall that the Arkansas Supreme Court held that the requirement in the initial version of TFDA that restricted terminations to those that were not "arbitrary and capricious" meant that the cause for termination must have a rational basis.[134] This should therefore mean that requiring a rational basis for terminations is the equivalent of preventing arbitrary and capricious terminations under Arkansas law. Accordingly, requiring a rational basis for terminations would be well within the protections afforded by federal and state law although it is not referenced in the model policy.

Additionally, the ASBA model policy does not reference any right to a notice or hearing for nonrenewal.[135] However, districts could connect their renewal policies to their grievance policies to ensure adequate hearing opportunities for teachers. State law broadly defines grievances in a way that encompasses any concern relating to the terms or condition of employment.[136] As Attorney General Griffin noted in his opinion, this language would cover contract non-renewals so long as employees know they are being non-renewed. [137] In order to ensure consistency in hearings provided for employees who are non-renewed, districts could explicitly reference their grievance policy within their non-renewal policy. While this would not address the concern of employees knowing about their status of being non-renewed, it would ensure both administrators and employees expect consistent treatment during any hearing before the board. Additionally, if districts adopt an informal policy or otherwise encourage administrators to inform employees when they are

129. *See* Ark. Sch. Bds. Ass'n Model Board Policy 3.36 update, *supra* note 60.

130. *See* Little Rock Sch. Dist. Board Meeting (June 22, 2023), at 3:32:11-3:33:00, https://lrsd.diligent.community/document/7406/?splitscreen=true&media=true.

131. *See* Ark. Sch. Bds. Ass'n Model Board Policy 3.36 update, *supra* note 60.

132. *See supra* Section III.D.

133. Herts v. Smith, 345 F.3d 581, 587 (8th Cir. 2003).

134. *See* Lamar Sch. Dist. No. 39 v. Kinder, 278 Ark. 1, at 3–4, 642 S.W.2d 885, 887 (1982).

135. *See* Ark. Sch. Bds. Ass'n Model Board Policy 3.36 update, *supra* note 60.

136. ARK. CODE ANN. § 6-17-208.

137. Ark. Op. Att'y Gen. No. 2024-042 (Apr. 19, 2024).

not going to be renewed, this policy would provide important rights to those employees who do understand the connection between the grievance policy and non-renewal.

While most employees cannot be given formal written notice of non-renewal, school districts are obligated to provide notice to teachers who are in intensive support status per TESS.[138] This means non-renewal policies do have an avenue for providing non-renewal notice to teachers, should districts wish to do so. Districts could implement a policy requiring strict adherence to the TESS framework, specifically mandating administrators place teachers who are experiencing difficulties such that they are at risk of being non-renewed in intensive support status. Once this is done, those teachers would have a right to be provided with notice of their non-renewal.[139] After receiving notice, those teachers would also have the right to a hearing through the district's grievance policy.[140]

B. Districts Are Not Incentivized to Adopt More Protective Policies

While there are more protections available under state and federal law, the reality is that districts are not incentivized to adopt those policies.[141] Once TFDA was repealed, many districts struggled to determine what was permissible for them to include in their board policies.[142] Accordingly, many districts adopted policies like the model board policies even when offered alternatives from local personal policy committees.[143] As LRSD board member Greg Adams put it, adopting a policy based off the ASBA model policy is the "safest thing" for the Board to do, especially as he feared that the State will not grant the district any mercy if polies are determined to go beyond the protections in state law.[144]

However, this has led to continuing problems in defining district non-renewal, termination, and grievance policy. As recently as March 20, 2025, the LRSD School Board indicated a need for work session dedicated to addressing issues related to the district policy on grievances and non-renewals.[145] The district has also faced lawsuits, challenging the process and result of non-renewals, which in turn has increased districts costs.[146]

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138. ARK. CODE ANN. § 6-17-2807.
139. *See id.*
140. Ark. Op. Att'y Gen. No. 2024-042 (Apr. 19, 2024).
141. *See* Little Rock Sch. Dist. Board Meeting, *supra* note 130.
142. *See* Cynthia Howell, *supra* note 9.
143. *See* Little Rock Sch. Dist. Board Meeting, *supra* note 130.
144. *Id.*
145. *See* Little Rock Sch. Dist. Board Meeting (Mar 20, 2025), at 2:40:11-2:44:50, https://lrsd.diligent.community/document/22866/?splitscreen=true&media=true.
146. *See, e.g.,* Complaint, Robert Robinson v. Little Rock Sch. Dist., 60CV-24-4757, (June 12, 2024).

C. Problems Persist Under More Protective Policies

Even if school districts did adopt policies that implemented the additional provisions as suggested above, they would not be allowed to provide a universal right to a hearing for non-renewed contracts.[147] This creates several problems. For instance, because districts have to renew each contract individually, some districts are processing renewals in batches.[148] Accordingly, some teachers know their contract is being renewed before others.[149] This understandably creates confusion as teachers may be unsure whether they need to begin job searching or if they have employment for the upcoming school year.[150] This confusion is compounded by the lack of a consistent deadline by which decisions about renewal or non- renewal must be finalized.

Furthermore, because of the requirements under TESS to provide notices for teachers in intensive support status notice of their non-renewals, there is a division in requirements that may lead to confusion for administrators: administrators must provide written notice for certain employees, but cannot provide written notice to others. [151] This divergent policy is problematic as it creates multiple required processes that must be simultaneously implemented. This is not efficient for school districts.

Additionally, school districts have expressed a desire to provide notice of non-renewals.[152] Some administrators and legal experts have gone so far as to say it is the right thing to do.[153] Accordingly, some school districts are encouraging building level administrators to verbally indicate to teachers that they will not be renewed.[154] While the intent behind this policy comes from a good place, it also could lead to problems. If teachers in one school are provided notice, but teachers in another school within the same district are not, those teachers are not receiving equal treatment which may ultimately lead to liability in the event of litigation.

V. PROPOSED SOLUTIONS

While it is clear that school districts are struggling to implement consistent, efficient policy under current state law, the problems that districts are

147. *See* Ark. Op. Att'y Gen. No. 2024-042 (Apr. 19, 2024).

148. Austin Gelder, *Few LRSD Teachers in Good Standing Will Lose Jobs, Even with Budget Cuts*, ARKANSAS TIMES (May 30, 2024, 9:04 PM), https://arktimes.com/arkansas-blog/2024/05/30/few-lrsd-teachers-in-good-standing-will-lose-jobs-even-with-budget-cuts.

149. *See id.*

150. *See id.*

151. *See* ARK. CODE ANN. § 6-17-2807.

152. *See* Little Rock Sch. Dist. Agenda Meeting (Mar 13, 2025), at 1:46:10-1:48:34, https://lrsd.diligent.community/document/22779/?splitscreen=true&media=true.

153. *Id.*

154. *Id.*

currently experiencing could be easily addressed by the Arkansas General Assembly. The first option available to the General Assembly would be to reinstate TFDA or another equivalent law. Alternatively, the General Assembly could remove the restriction on allowing local districts to provide more protections than are provided for in state and federal law. If a blanket removal of the restriction on greater teacher protections is regarded as too sweeping, it would be helpful to simply allow local districts to provide more procedural protections in the event of dismissals or non-renewals.

Many of the current concerns would be addressed if the General Assembly reinstated TFDA or adopted another law outlining clear procedural requirements for terminations and non-renewal of contracts. The primary concern that districts currently face is the lack of clear guidelines on what can be included within their policies. If the General Assembly were to provide a clear statutory basis outlining the required policies, this could provide a framework within which districts could develop board policy. Moreover, it would also remove concerns about consistent, fair treatment of teachers so long as the new law provided consistent rules and procedures for teacher termination and renewals. Specifically, granting districts the ability to automatically renew contracts for all teachers who have not been given notice by a certain date would reduce the administrative burden on districts and provide consistent expectations for district employees.

Regrettably, the General Assembly does not appear to be supportive of this particular solution. Representative Jessie McGruder filed a bill that would have reinstated the TFDA during the 2025 legislative session prefiling period.[155] However, the Bill failed to make it out of the House Education Committee.[156]

Alternatively, the General Assembly could repeal the prohibition on school districts providing more protections than are available in state law. This would alleviate all the concerns districts face in regards to uncertainty over policies they adopt. Currently, the fear of losing funding for teacher salaries greatly restricts local boards' ability to adopt policies best suited to their local district.[157] Repealing this provision would also remove the disincentive to provide clear procedures within both the renewal and termination policies that currently are causing issues for many school districts.

Again, even a more tailored repeal of the limitation could work. The General Assembly could provide that local school districts are free to adopt greater or additional procedural protections for teachers who are being

155. H.B. 1025, 95th Gen. Assembly Reg. Sess. (Ark. 2025).

156. Mar. 11, 2025, H. Comm. on Educ., 95th Gen. Assemb., Reg. Sess., at 11:05:10–11:05:32 (Ark. 2024), https://arkleg.state.ar.us/Calendars/Meetings, (select 3/11/2025 for start and end date, select "video" button next to "Education Committee-House").

157. *See* Little Rock Sch. Dist. Board Meeting, *supra* note 129.

dismissed or whose contracts are not being renewed. This would remove the risk that a school district might find that it has lost access to state funds by trying to do the right thing for its employees.

VI. CONCLUSION

School districts across the state are struggling to draft dismissal policies that adequately address their needs. The repeal of TFDA and the restrictions against providing additional protections that are available in state and federal law has hampered local school boards' ability to carry out their job to efficiently manage their respective school districts. The General Assembly should act to either reinstate TFDA or repeal the restriction on providing additional protections, particularly in the context of teacher dismissals and nonrenewals, to ensure local districts are able to efficiently hire and retain teachers capable of providing a high-quality public education to all students.

CONSTITUTIONAL LAW—FELON: DISCONTINUING ABSOLUTE IMMUNITY FOR PRESIDENTIAL CANDIDATES CONVICTED OF FELONIES AS FIRST REVIEWED IN *TRUMP V. UNITED STATES*.

I. INTRODUCTION

If presidents are granted broad immunity for actions beyond the outer perimeters of presidential immunity, at what point does a president become above criminal prosecution under the laws of the Constitution of the United States? Should the Supreme Court of the United States determine a set standard for deciding which specific acts fall within immunity for presidents by reviewing content, form, and context through textual, historical, and case-based support? These are the questions courts across the country are grappling with today for the first time in history after the recent decision by the Supreme Court in *Trump v. United States*.[1] The Court attempted to determine if President Trump violated his constitutional powers during his first term.[2] The Court reviewed United States Constitution Article I and II when deciphering if the President's acts during and after his first term in office were categorized under some level of immunity.[3] The Court remanded all but one allegation[4] back to the lower courts with instructions to re-evaluate whether the acts were classified under official or unofficial immunity or whether the President could be held criminally liable for each individual act.[5] However, left with such uncertainty on whether a definitive standard should be used when deciding if presidential acts qualify for immunity, dissenting Justices in this case collectively argued there were three ways in which the Supreme Court could have, and should have, made more solidified determinations on the individual acts as to whether each fit under immunity or not).[6]

The Supreme Court has decided three previous cases in which it considered similar concerns regarding immunity and the criminal and civil prosecution of a president.[7] *United States v. Burr*,[8] *United States v. Nixon*,[9] *Nixon v.*

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1. *See generally,* Trump v. U.S., 144 S. Ct. 2312 (2024).
2. *Id*.
3. U.S. CONST. art. I; U.S. CONST. art. II.
4. *See infra,* Trump, 144 S. Ct. at 2312 (discussing the allegations in the Court's opinion).
5. Trump, 144 S. Ct. at 598.
6. *Id.*
7. *See generally*, U.S. v Nixon, 418 U.S. 683 (1974); *See generally* Clinton v. Jones, 520 U.S. 681 (1997); *See generally* Nixon v. Fitzgerald, 457 U.S. S. Ct. 731 (1982).
8. *See generally*, U.S. v Burr, 25 F. Cas. 30 at 33 (C.C.D. Va. 1807).
9. *See generally*, U.S. v Nixon, 418 U.S. 683 (1974) (regarding criminal prosecution as related to Presidential immunity).

Fitzgerald,[10] and *Clinton v. Jones*[11] provided precedent for the Court to apply when determining: (1) which allegations in *Trump v. United States* fell within presidential immunity, and (2) which were applicable for criminal prosecution and civil liability.[12] Instead of providing guidance or setting a standard, the Court remanded the case to the lower courts to first decide the issue.[13] The Court discussed these cases as it considered each allegation and justified remanding the issue of whether the President during his first term had immunity from criminal prosecution for the District Court to determine.[14]

However, leaving the law without a clear doctrine to guide the application of presidential immunity opens the doors to ambiguity and misapplication.[15] This Note emphasizes the Supreme Court has had opportunities to set clear guidelines regarding the unwritten, un-named doctrine, even with the explicit absence of presidential immunity in the Constitution.[16] In declining to do so in *Trump v. United States*, the Supreme Court has emboldened the President to undermine the Constitution and place himself above the law.[17] This Note explores the process under which presidential immunity is determined,[18] and the direct impact of presidential immunity in America today.[19] Additionally, in Section II, this Note also discusses the evolution of presidential immunity in America and the Separation of Powers.[20] Section III argues broad presidential immunity contradicts the intent of the Framers.[21] In conclusion, this Note will propose solutions to the issue of broad presidential immunity established by *Trump v. United States*.[22] America will face severe repercussions if Presidents are exempted from criminal prosecution because no set standard exists to determine when a president disqualifies for immunity for acts outside of a president's constitutional powers.[23]

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10. *See generally*, Nixon, 457 U.S. S. Ct. 731 (1982) (affirming a president's entitlement to absolute immunity for official acts).

11. Clinton, 520 U.S. 681 at 692 (1997) (concluding unofficial acts do not immunize a president).

12. *Id.*

13. *Id.*

14. *See generally*, Trump v. U.S., 144 S. Ct. 2312 (2024).

15. *Id.*

16. *See, infra* Section II.

17. *See, infra* Section III.

18. *See infra,* Section II.

19. *See infra,* Section III.A.3a.

20. *See infra,* Section II.C. In addition, this section reviews an important Supreme Court case involving a never-before encountered president convicted of felonies.

21. *See infra,* Section III.A.

22. *See infra,* Section IV.; *See generally* Trump v. 144 S. Ct.

23. *See infra,* Section III.B.

II. THE EVOLUTION OF PRESIDENTIAL IMMUNITY IN AMERICA

The primary purpose presidential immunity exists is to encourage presidents to administer their executive power without fear of prosecution.[24] This section explains when a president should be given only limited absolute and presumptive immunity, an analysis which focuses on the enumerated powers in the United States Constitution Articles I and II.[25] First, this section will define how the judiciary interprets Articles I and II of the Constitution applies limited immunity for Presidents.[26] Second, this section defines presidential immunity and how courts analyze it.[27] Third, this section will review the direct impact on real world events resulting from the expansive view of presidential immunity articulated in *Trump v. United States*.[28] Finally, the last section will focus directly on the importance of the *Trump v. United States* case and its relevance moving forward for determining when and under what circumstances presidential immunity applies as intended by the Framers of the Constitution.[29]

A. Immunity as Interpreted by the Judiciary Derived from Articles I and II of the United States Constitution

Unfortunately, the United States Constitution does not have a clause dedicated to presidential immunity or the Separation of Powers.[30] Due to this absence, understanding how immunity is determined by the judiciary is important.[31] When distinguishing the Separation of Powers Courts refer to Articles I and II of the Constitution when analyzing presidential immunities and presidential powers.[32] Article II, Section 1, Clause 1, states that a president's power is "vested" in the Executive Branch.[33] Article II, Section 3 says that the President must ensure the laws are "faithfully execute[d]," and Article II states that a president may be impeached or removed for "treason, bribery, or other high crimes."[34] Just as importantly, the Constitution discusses the

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24. Theodore P. Stein, *Nixon v. Fitzgerald: Presidential Immunity as a Constitutional Imperative*, 32 Cath. Univ. L. Rev. 759, at 760 (1983) (citing Nixon, 457 U.S. S. Ct. 731 (1982)).
25. *See,* U.S. CONST. art. I; U.S. CONST. art. II.
26. *Id.*
27. Stein, *supra* note 24, at 761 (citing Nixon, 457 U.S. S. Ct. 731 (1982)).
28. *See generally,* Trump v. U.S.,144 S. Ct. 2312 (2024).
29. *Id.*
30. *Id.* Although the Separation of Powers is implied throughout the United States Constitution, there is not an actual clause in the Constitution directly addressing it.
31. *Id.*
32. *See generally, Trump*,144 S. Ct.
33. U.S. CONST. art. II, §1, cl. 1.
34. *Id.*; U.S. CONST. art. II, §3; U.S. CONST. art. II.

Separation of Powers in Article I.[35] Under Article I, Section 3, the Constitution specifically states that a president under impeachment or removal from office is "subject to indictment, trial, judgment and punishment, according to law," and discusses the separation between legislative and executive responsibilities.[36] Although there are Articles in place to support the interpretation of the Separation of Powers, Article I and II make it clear the Constitution never intended for presidential immunity to shield a president from legal punishments for criminal acts.[37] When reviewing cases, such as *Trump v. United States*, courts use Constitutional Articles and case law in order to implement an implied doctrine when determining if the President has immunity.[38] Previous court cases answered whether some form of presidential immunity applied in particular circumstances for public officials in the Executive Branch.[39] Additionally, presidential immunity is a common law concept demonstrated through the following cases.[40]

1. United States v. Burr

In *United States v. Burr*, the Court charged Vice President Aaron Burr with conspiring to commit treason against the United States of America.[41] Burr motioned for dismissal arguing a president could not be subpoenaed.[42] At trial, the Supreme Court's Chief Justice Marshall reasoned that "the law does not discriminate between the president and a private citizen."[43] Further, Marshall held that presidents are not "exempt" from the Constitution and must therefore undergo trial, and that the accused have the right to subpoena witnesses.[44] Therefore, the Court required President Thomas to attend the trial as a subpoenaed witness.[45] Marshall also required physical evidence of treason to prosecute Burr, and because no evidence existed, the jury acquitted Burr.[46] In contrast, the cases surrounding President Trump's actions before and during his first term of presidency did present evidence of treason that could be used to prosecute him.[47]

35. U.S. CONST. art. I, §1.
36. U.S. CONST. art. I, §3.
37. U.S. CONST. art. I; and U.S. CONST. art. II.
38. *See generally,* Trump v. U.S., 144 S. Ct. 2312 (2024).
39. *Id.*
40. *See generally, Trump,* 144 S. Ct.
41. U.S. v Burr, 25 F. Cas. 30, 33 (C.C.D. Va. 1807).
42. *Id.* at 32.
43. *Id.* at 34.
44. *Id.*
45. *Id.* at 36. (ruling by the Court that it does have the power to subpoena a president).
46. *Id.*
47. Trump v. U.S., 144 S. Ct. 2312 (2024).

In *Burr,* the court held that no Executive member, including the President, was above the laws of the country.[48] Any person acting in the roll of the United States President must be upheld to the same laws under the Constitution as all other American citizens are required to follow.[49] Just as importantly, both a private citizen and a president who have committed illegal acts, by law, are required to undergo trial.[50] This distinction has been true since 1807 and remains true now.[51]

2. United States v. Nixon

In 1974, in the case *United States v. Nixon*, President Nixon underwent investigation for conspiracy and obstruction of justice.[52] The prosecutor subpoenaed Nixon to produce evidence including tape recordings of his meetings with advisers.[53] His attorneys filed a motion to quash due to his executive privilege, but the Court denied the motion in light of Burr.[54] The Supreme Court affirmed the dismissal and rejected the claim of absolute privilege[55] and ordered Nixon to produce the documents because the prosecutor showed a specific reason why they needed the evidence.[56]

This case presented the opportunity for the court to review when a president had immunity for unofficial acts, and when evidence of those acts could be reviewed by the Court.[57] The Court determined the importance of the information outweighed any privacy concerns the President may have had.[58] This same court would later review the *Trump v. United States* case where the opportunity to apply the same analysis would reappear.[59]

3. Nixon v. Fitzgerald

In 1982, in the case *Nixon v. Fitzgerald*, Ernest Fitzgerald sued former President Nixon for unlawfully discharging Fitzgerald from his occupancy in the Air Force unfairly.[60] Nixon responded by filing a motion to dismiss under

48. U.S. v Burr, 25 F. Cas. 30, 36 (C.C.D. Va. 1807). Even in 1807, the Supreme Court held presidents were not above the average laws of a citizen.
49. *Id.*
50. *Id.* at 34.
51. *See generally,* U.S. v. Burr, 159 U.S. 78 (1895).
52. U.S. v. Nixon, 418 U.S. 683, 686 (1974).
53. *Id.*
54. *Id.*
55. *Id.* at 707.
56. *Id.* at 713.
57. *Id.*
58. U.S. v. Nixon, 418 U.S. 683, 713 (1974).
59. *See generally,* Trump v. U.S., 144 S. Ct. 2312 (2024).
60. Nixon v. Fitzgerald, 457 U.S. 731 at 733 (1982).

a claim of absolute immunity.[61] The lower court denied the motion and Nixon appealed the decision.[62] On appeal, the Supreme Court reviewed whether the President is entitled to absolute immunity from damages liability for official acts.[63] The Court reasoned that since the presidency began after the enforcement of the common law, the Court must base the evidence of the case on what the Constitution actually said.[64] Further, the Court held absolute immunity did not place a president above the law, but it would protect a president against any official acts that would normally qualify for damage liability.[65] Therefore, the Court did not hold Nixon liable for the actions that caused Fitzgerald to lose his job.[66]

From this case, the Court determined that a president has absolute immunity for any presidential acts taken within an outer perimeter of his or her presidential duties.[67] However, the Court did not determine whether a president would receive absolute immunity from criminal prosecution in future cases.[68] This case established a president needed some protection for acts that were taken in an effort to perform duties for the benefit of the country.[69]

4. Clinton v. Jones

In 1997, in the case *Clinton v. Jones*, private citizen Paula Jones sued President Bill Clinton for actions that took place before the President had been voted into office.[70] Jones alleged President Clinton had made sexual advances toward her while working for President Clinton during his time as the Governor of Arkansas.[71] President Clinton motioned to dismiss the case arguing the Constitution supported delaying cases against a United States President until the end of his or her presidential term.[72] The District court denied the President's motion to dismiss and upheld the motion to delay the case.[73] Jones appealed to the United States Court of Appeals which reversed the order to delay the trial.[74] To determine the issue, the Court reviewed the Separation of

61. *Id.* at 742.
62. *Id.*
63. *Id.* at 744.
64. *Id.* at 749.
65. *Id.*
66. Nixon v. Fitzgerald, 457 U.S. 731, 758 (1982).
67. *Id.* at 756.
68. *Id.* at 760.
69. *Id.*
70. Clinton v. Jones, 520 U.S. 681, 684 (1997).
71. *Id.* at 684-85.
72. *Id.* at 684.
73. *Id.*
74. *Id.* at 687.

Powers and the scope of immunity under a Functional Approach.[75] The Court ruled the Separation of Powers supported allowing trials against the President outside of certain exceptions, and therefore. Jones could sue President Clinton.[76]

Clinton distinguished the application of the Separation of Powers to acts outside of presidential immunity.[77] The Court found there to be no immunity for unofficial acts committed by the President.[78] A president is not untouchable and must perform under the same laws as all American citizens; even if the law requires the parties to go to trial.[79] If private citizens filed lawsuits against the President it would place the President above the law which would be unfair and unjust to the damaged party who filed the case.[80]

B. The Current Method Courts Use to Determine Presidential Immunity

Historically, a framework was used where the courts determined that to provide immunity to a president, the President's acts have to fall within the scope of both statutory and constitutional authority.[81] In order to extend immunity for certain acts to the Executive Branch of the government, courts specifically have to look at the scope of discretion and the responsibilities of the branch.[82] Certain acts that fall within the outer perimeter of the President's official responsibilities do qualify for immunity.[83] To decide what falls within the outer perimeter, the Supreme Court views the acts using a broad meaning of the scope of authority, therefore it does not categorize unlawful behavior outside of the scope of official authority if the acts done were "generally authorized by statute or the Constitution" of the United States.[84]

Historically, under the Constitution, immunity has been granted for three policy reasons: 1) unjust enforcement of liability on Presidents required to exercise discretion when acting; 2) the threat of civil liability against the President could potentially deter the President from acting decisively when needed for the country's benefit; and 3) civil liability upheld against a president for

75. Clinton v. Jones, 520 U.S. 681, 684 (1997). The Functional Approach will be discussed further below.

76. *Id.* at 710.

77. *Id.* at 705.

78. *Id.* at 695.

79. *Id.* at 696.

80. *Id.*

81. *See generally,* Clinton v. Jones, 520 U.S. 681 (1997); Stein, *supra* note 24, at 759 (citing Nixon, 457 U.S. S. Ct. 731 (1982)).

82. Stein, *supra* note 24, at 759 (citing Nixon, 457 U.S. S. Ct. 731 (1982)).

83. *Id.*

84. *Id.*

all executive acts would be spending too much time and resources to fight civil lawsuits against the President at the expense of American citizens.[85]

There are two types of immunity: absolute immunity and qualified immunity which is also referred to as presumptive immunity.[86] Under absolute immunity, the President receives complete immunity from all acts taken while in office no matter what the President's motives were when acting.[87] Courts cannot ask a president what his or her motives were for either official or unofficial conduct.[88] This would risk the judicial examination of the Executive Branch's conduct which would intrude on Article II of the Constitution's purpose of protection under immunity in general.[89]

A president is granted qualified/presumptive immunity ("presumptive immunity") when the acts a president takes in good faith are done without malice and that he or she reasonably believes their conduct was legal.[90] On the other hand, completed acts, official or unofficial, in bad faith, would disqualify a president from receiving immunity.[91] In *Nixon v. Fitzgerald*, the court referenced the case *Wood v. Strickland* which observed two standards: the qualified immunity standard which created the malice requirement, and the subjective component standard which required a reasonable belief that the conduct from the act was legal.[92]

There are two separate approaches for determining whether a president can have absolute immunity and whether a president can have presumptive immunity: 1) the Functional Approach, and 2) a two-step analysis.[93] Under the Functional Approach, public policy may allow a blanket exception for absolute immunity, instead of singularly applying immunity due to the executive position itself.[94] The Supreme Court will use the Functional Approach when deciding if a president has absolute immunity.[95] In *Imbler v. Pachtman*, the Supreme Court re-shaped the approach to consider the jurisprudence of immunity and no longer automatically grant a president absolute immunity.[96]

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85. *Id.* at 760.
86. *Id.*
87. *Id.*
88. Trump v. U.S., (2024).
89. *Id.*
90. Stein, *supra* note 24, at 760 (citing Nixon, 457 U.S. S. Ct. 731 (1982)).
91. *Id.*
92. *See generally,* Nixon v. Fitzgerald, 457 U.S. 731 (1982); Wood v. Strickland, 420 U.S. 308, 321-22 (1975); Stein, *supra* note 24, at 766.
93. Stein, *supra* note 24, at 761; *see* Harlow v. Fitzgerald, 457 U.S. 800, 811, 823(1982).
94. Stein, *supra* note 24, at 767 (citing Nixon, 102 S. Ct. 2690).
95. *Id.* at 761; *see,* Harlow, 102 S. Ct. at 2734.
96. Stein, *supra* note 24, at 767 (citing Nixon, 102 S. Ct. 2690, 2693); *see generally,* Imbler v. Pachtman, 424 U.S. 409 (1976).

Thus, the function has to be the basis for granting absolute immunity, not the official position held in office.[97]

Presumptive immunity for a president has a two-step analysis.[98] First, the Court must determine if a statutory or Constitutional right was clearly established at the time the President committed the act.[99] Second, the Court must decide whether the President should have reasonably known the action was illegal under the application of the law.[100] Generally, if a law is clearly unambiguous, then the President is assumed to have reasonably known the purposes of the laws at the time of the act.[101]

Finally, the Separation of Powers doctrine is observed when determining immunity.[102] This doctrine is required in order to provide a political check on the three branches of government; ensuring each branches integrity is preserved.[103] By keeping a political check on how much power each branch of government has, the Executive Branch is also limited on what acts the President can participate in.[104] While this doctrine is not a perfect way to determine between absolute and presumptive immunity, courts still rely on its functions to guide them to a clearer determination.[105]

C. Trump v. United States

The Court used the relatively vague standards set forth above when confronted with the issue of presidential immunity in *Trump v. United States*.[106] In 2024, the Supreme Court held that immunity from criminal prosecution extends to official acts taken by the President which do not go "beyond [his] authority" granted under the Executive Branch.[107] It is important to note, the Justices were conflicted by the lack of precedent to guide the review of the case.[108] Additionally, no court has ever had to draw a distinction "in general or with respect to the conduct alleged in particular" when distinguishing

97. Stein, *supra* note 24, at 761; *see generally,* Imbler, 424 U.S. 409 (1976).
98. Stein, *supra* note 24, at 766.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*, at 771.
103. *Id.*
104. Stein, *supra* note 24, at 776.
105. *Id.* at 772; *see generally,* U.S. v. Burr, 25 F. Cas. 30 (C.C.D. Va. 1807); Marbury v. Madison, U.S. 137 at 166 (1803); s*ee also,* U.S. v. Nixon, 418 U.S. 683 at 711—12 (1974).
106. *See generally,* Trump v. U.S., 144 S. Ct. 2312 (2024). President Donald Trump has been involved in many legal proceedings over the last eight years including after his first term.
107. Trump, 144 S. Ct. 2312 at 2333; Blassingame v. Trump, 87 F. 4th 1, 13 at 14 (2023).
108. Trump, 144 S. Ct. 2312 at 2332.

between a president's official and unofficial acts.[109] Due to this lack of precedent, the Court decided it would not attempt to determine between absolute and presumptive immunity for official acts when determining if Trump was subject to criminal prosecution for any official acts outside of his core constitutional powers.[110]

In considering the issue, the Supreme Court reviewed the lower court's rejection of Trump's presidential immunity.[111] By doing so, the Court reviewed whether and to what extent a former President would be eligible for presidential immunity from criminal prosecution stemming from acts conducted while in office.[112] The Court concluded that under the interpretation of the Separation of Powers that courts have adopted as a theoretical model, a former President is given "some immunity" for official acts completed while in office.[113] Additionally, when discussing the exercise of his or her constitutional powers the former president is given absolute immunity.[114] However, the Court refrained from determining if absolute or presumptive immunity should apply for the remaining acts.[115]

The Court used a textualistic approach when considering the Constitution and reviewed Article II in its entirety.[116] There, the duties of a president are defined with clarity.[117] Some of those duties include 1) commanding the armed forces; 2) granting pardons for offenses against the United States; 3) appointing public ministers, Justices, and public officials; 4) contributing to foreign relations; 5) making treaties; 6) managing terrorism, and most importantly 7) "must take care that the laws be faithfully executed."[118] The President must execute the laws, bare responsibility, and sign or veto the bills passed by Congress.[119] From there, the Court focused primarily on the Framer's intentions for the presidency within the separation of powers and the limited criminal and civil case precedent.[120] The Courts understand the Framers to have wanted a vigorous execution of the laws in order to establish a good government.[121]

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109. Trump, 144 S.Ct. 2312 at 2320. The alleged conducts in this case had never been reviewed in previous presidential immunity cases, and therefore the court had never determined if these specific acts were official or unofficial acts.

110. *See, Id.* at 2327.

111. *Id.* at 2327-26.

112. *See generally,* Trump v. U.S., 144 S.Ct. 2312.

113. *Id.* at 2320.

114. *Id.*

115. *Id.* The Court has been faced with this same dilemma in prior cases, as well.

116. *Id.*

117. *Id.*

118. Trump v. U.S., 144 S.Ct. 2312 at 2327; U.S. CONST. art. II §1, cl. 1.

119. U.S. CONST. art. II §1, cl. 1.

120. *See,* Trump, 144 S. Ct. 2312 at 2329.

121. *Id.*

During the review, the Court expressed concern that if official acts were "routinely subjected" to criminal prosecution then the Executive Branch would be weakened.[122] The threat of prosecution led previous courts to enforce presidential immunity to prevent a president from being "chilled from taking the bold and unhesitating action required" by the position.[123] However, the Court made the important distinction that the President "is not above" the criminal laws he or she enforces.[124] While analyzing some of Trump's specific acts, the Court found it difficult to determine which acts committed by Trump were or were not an official act.[125] One of these acts included trying to get the Vice President to alter the election results during the January 6 attack.[126] To determine presidential immunity, the Court had to also decide if the acts were official or unofficial.[127] However, the Court lacked analysis of the context, form, and content to decide where the clear line should be drawn between official and unofficial, and therefore remanded the question of whether the acts conducted by Trump were official or unofficial to the District Court.[128]

In *Trump v. United States*, five Justices dissented agreeing the holding solved nothing and only left the lower courts with an abundance of confusion: the lack of a standard opens the door to a blanket immunity for presidents to get away with essentially everything.[129] Remanding the issues without a clear standard leaves the lower courts without an analysis to answer the issues under.[130] Upon dissent, Justice Sotomayor strongly stated that:

> Today's decision to grant former presidents criminal immunity reshapes the institution of the Presidency. It makes a mockery of the principle, foundation to our Constitution and system of Government, that no man is above the law. Relying on little more than its own misguided wisdom about the need for 'bold and unhesitating action' by the President, the Court gives former President Trump all the immunity he asked for and more. Because our Constitution does not shield a former President from answering for criminal and treasonous acts, I dissent.[131]

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122. Trump, 144 S.Ct. at 2331; U.S. v. Burr, 25 F. Cas. 30 at 34 (No. 14,692d); U.S. v. Nixon 418 U.S. 683 at 711—12 (1974).

123. Trump v. U.S., 144 S.Ct. 2312 at 2320 (citing Fitzerald 102 S. Ct 2690).

124. *Id.* at 2331; *see generally,* Trump v. Vance, 591 U.S. 786 (2020).

125. Trump v. U.S., 603 U.S. 593.

126. *Id.* at 604.

127. *Id.* at 605.

128. *Id.* at 657.

129. *Id.* at 690. There is currently no clarity of what should apply when determining official from unofficial acts as is supported by the dissents in Trump v. U.S.

130. *Id.*

131. Trump v. U.S., 144 S.Ct. 2312 at 2355.

In her dissent, Justice Sotomayor explains how the Framers never had any intention to include presidential immunity in the Constitution.[132]

Justice Jackson also dissented[133] and argued the model Chief Justice Roberts used is unclear on what the model actually entailed.[134] Two issues Justice Jackson was most concerned with was 1) "how . . . the Presidential accountability model work[s]", and 2) what clarity does the new model entail?[135] Justice Jackson questioned this "Presidential accountability model that creates immunity—an exemption from criminal law—applicable only to the most powerful official in our Government."[136] A model that would only exist for the President of the United States but would be unreachable for any other Government official or person holding an official state office.[137] In her opinion, this new, unclear model actually makes it harder to know when a president is subject to accountability for his or her criminal acts.[138]

Further, Justice Jackson felt the Court "unilaterally altered the balance of power between the three branches . . . of . . . government as it relates to the Rule of Law," by increasing the power of the Judicial and Executive Branch "to the detriment of us all."[139] She goes on to say:

> . . . . I think it highly unlikely that a sitting President would feel constrained by these remote possibilities.[140]
>
> . . . . Presidents alone are now free to commit crimes when they are on the job, while all other Americans must follow the law in all aspects of their lives, whether personal or professional. The official-versus-unofficial act distinction also seems both arbitrary and irrational, for it suggests that the unofficial criminal acts of a President are the only one's worthy of prosecution. Quite to the contrary, it is when the President commits crimes using his unparalleled official powers that the risks of abuse and autocracy will be most dire.[141] . . . .
>
> For my part, I simply cannot abide the majority's senseless discarding of a model of accountability for criminal acts that treats every citizen of this country as being equally subject to the law—as the Rule of Law requires[142] . . . .

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132. *Id.*
133. *Id.* at 2372. (Jackson, J., dissenting).
134. *Id.* at 2374.
135. *Id.*
136. *Id.*
137. *Id.*
138. Trump v U.S., 144 S.Ct. 2312 at 2378.
139. *Id.* at 2378.
140. *Id.* at 2381.
141. *Id.* at 2382.
142. *Id.*

> The majority . . . seems to have put their trust in our Court's ability to prevent Presidents from becoming Kings through case-by-case application of the indeterminate standards of their new Presidential accountability paradigm. I fear that they are wrong. But, for all our sakes, I hope that they are right.[143]

> In the meantime, because the risks (and power) the Court has now assumed are intolerable, unwarranted, and plainly antithetical to bedrock constitutional norms, I dissent.[144]

In her dissent, Justice Jackson makes it clear that the model *Trump v. United States* attempt to use has not addressed the issues at hand.[145] Most importantly, the unclear model leaves an unfair contradiction between how the laws apply to Americans and a president civilly and criminally.[146]

Justice Barrett dissented in part arguing the Constitution does not protect a president's conduct from being entered as evidence solely because it could be considered an official act.[147] Instead, Justice Barrett argues the conduct should be admitted into evidence for the jury to determine if the conduct is something a "President . . . *can* be held liable" for.[148] In the dissent, an example given is bribery of the President to act against the country.[149] In that circumstance, the holding of *Trump v. United States* would imply evidence of the bribery should be withheld solely because the president had committed the act while in office.[150]

Similarly, Justice Kagan dissented addressing the impact that the holding of *Trump v. United States* has had on America.[151] In her opinion, the holding has created a "law-free zone around the President, upsetting the status quo that has existed since the Founding."[152] Justice Kagan continued to address these concerns by stating:

> . . . . The President of the United States is the most powerful person in the country, and possibly the world. When he uses his official powers in any way, under the majority's reasoning, he now will be insulated from criminal prosecution. Orders the Navy Seal Team 6 to assassinate a political rival? Immune. Organizes a military coup to hold onto power? Immune.

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143. *Id.*
144. *Id.*
145. *Id.* at 2379. At the time of the country's founding, the Framers felt it was important to protect against a king who was above the laws (Nixon, 457 U.S. S.Ct. 759 (1982).
146. *Id.* at 2378.
147. *Id.* at 2354.
148. *Id.*
149. *Id.*
150. *Id.*
151. Trump v. U.S., 144 S.Ct. 2312 at 2355 (Sotomayor, J., dissenting).
152. *Id.*

> Takes a bribe in exchange for a pardon? Immune. Immune, immune, immune.
>
> Let the President violate the law, let him exploit the trappings of his office for personal gain, let him use his official power for evil ends. Because if he knew that he may one day face liability for breaking the law, he might not be as bold and as fearless as we would like him to be. That is the majority's message today.
>
> Even if these nightmare messages never play out, and I pray they never do, the damage has been done. The relationship between the President and the people he serves has shifted irrevocably. In every use of official power, the President is now a king above the law.[153] . . . .
>
> With fear for our democracy, I dissent.[154]

In her dissent, Justice Kagan makes it clear that the incorrect decision made in *Trump v. United States* will be detrimental for America and will allow for criminal conduct by President Trump to go unpunished.[155]

The decision of the case briefly addressed the dissenting opinions.[156] To support the holding, Chief Justice Roberts explained the Court today generally agrees "immunity extends" to conversations within the Executive Branch.[157] If that applies to the issues in the case, the case will then be remanded for lower courts to determine whether the remaining conduct of a president qualifies for presidential immunity.[158] While Chief Justice Roberts disagreed with the dissents of this case, the Justice stated that "[a]ll that our Nation's practice establishes on the subject is *silence*."[159] Even Justice Roberts admitted the issue had not been resolved.[160] This process still leaves the lower courts without a standard to use on re-analysis of whether immunity applied to the acts taken by a president.[161] If the lower courts could not determine that without a standard on the first attempt in *Trump v. United States*, then how could it suddenly determine it now?[162] The answer is simple: it cannot.[163] With four Justices dissenting and only one Justice concurring, Chief

153. *Id.*
154. *Id.* at 2372.
155. *Id.*
156. *Id.* at 2346. Trump, 144 S. Ct. at 153 (A weak attempt to disregard the reasoning behind the dissents by Chief Justice Roberts).
157. *Id.* at 2344.
158. *Id.* at 2346.
159. *Id.* at 2345 (emphasis added for effect).
160. *Id.*
161. *Id.*
162. Trump v. U.S., 603 U.S. 593 at 614-616 (Sotomayor, J., Kagan, J., Jackson, J., and Barrett, J., dissenting opinions).
163. *Id.*

Justice Roberts' best available argument stated that the issues were remanded to the lower courts, leaving only the Nation's silence on the matter to rely on as guidance.[164]

III. BROAD PRESIDENTIAL IMMUNITY IS DETRIMENTAL TO THE RULE OF LAW AND THE FRAMER'S INTENTIONS UNDER THE UNITED STATES CONSTITUTION

As previously mentioned, there is not an actual immunity clause specifically for Presidents in the United States Constitution.[165] However, courts have interpreted an unwritten clause that there is an immunity of some sort granted to the President of the United States.[166] This imaginary clause is so vague as it sits in its interpretation that it is useless for lower courts to use.[167] A vague presidential immunity wrongfully allows constitutional violations by presidents.[168] The Founding Fathers of the Constitution did not mention any type of immunity offered to Presidents in the Constitution.[169] However, the Founding Fathers did include other provisions in the Constitution that discussed immunity such as the Immunity Clause found in Article IV, Section 2, Clause 1.[170] The Immunity Clause specifically and purposefully granted all state citizens the right to share all "privileges and immunities" in every state in the United States of America.[171] This allowed all citizens to be free from discrimination by other states.[172] Therefore, if the Founding Fathers intended for a president to have immunity, the Founding Fathers would have written that immunity into the Constitution in the same manner they already did for the average citizens of the country.[173]

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164. *Id.* at 616, 618.
165. *Id.* at 637.
166. *Id.*
167. *Id.*
168. Michael L. Wells, Art.: ABSOLUTE OFFICIAL IMMUNITY IN CONSTITUTIONAL Litig., 57 Ga. L. Rev. 919 at 927, 931(2023). Concluding vague presidential immunity allows Trump to get away with insane criminal acts other average Americans would be held accountable for.
169. U.S. CONST. (The Constitution in its entirety does not mention presidential immunity).
170. U.S. CONST. art. IV, §2, Cl. 1.
171. *Id.*
172. *Id.*
173. Trump v. U.S.,144 S. Ct. 2312 at 671, 694 (2024) (Sotomayor, J., dissenting) (arguing that no historical evidence supported the majorities decision).

A. The Current Vague Idea of Presidential Immunity Undermines the Constitution

The Supreme Court ruled varying levels of immunity were present when analyzing *Trump v. United States* and declined to give a narrower guideline for when immunity applies to presidents either absolutely or presumptively.[174] This lack of guidelines has opened a door to allowing the President to commit criminal acts that are not beneficial to the country by hiding behind the power of the Executive office.[175] The idea of immunity for presidents is meant to protect a president for acts that were done to benefit the country.[176] However, immunity should not exist when a president has committed non-beneficial, criminal acts on the country; yet, in 2024, the Supreme Court declined to implement that necessary change.[177]

1. Presidential Immunity is Judicially Created and is Not in the Constitution

Until 2024, courts were implementing immunity for legislative officers under the assumption that the immunity would stop officials from being discouraged into not performing their duty due to a fear of criminal prosecution.[178] Courts used the Supreme Court's Functional Approach to achieve this prevention.[179] This approach has been criticized for weighing constitutional remedies too deeply, so, in an attempt to fix the doctrine, a re-framing of the immunity decisions made by the Court have been analyzed.[180]

The courts may have established the unwritten immunity doctrine through past case analysis such as: *Tenney v. Brandhove*, *Pierson v. Ray*, and *Imbler v. Pachtman*, but it does not mean the courts should continue to rely on these cases when determining every immunity case which confronts them.[181] Although, the courts are required to rely on case precedent through the doctrine of stare decisis, the cases above were overwhelmingly decided

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174. *Id.* at 638.

175. Ruth Marcus, *God Save Us from this Dishonorable Ct.*, WASH. POST (July 1, 2024), https://tinyurl.com/kv7u4zjs.

176. Stein, *supra* note 24, at 759 (citing Nixon, 457 U.S. S. Ct. 731 (1982)).

177. Trump, 144 S. Ct. at 639.

178. Michael L. Wells, Art.: ABSOLUTE OFFICIAL IMMUNITY IN CONSTITUTIONAL Litig., 57 Ga. L. Rev. 919 at 924 (2023) (discussing the Constitution).

179. *Id.* at 925.

180. *Id.* at 924-25.

181. *Id.;* Tenney v. Brandhove, 341 U.S. 367 at 367-77 (1951) (holding that immunity does exist for legislators if acts are within their scope of authority); Pierson v. Ray, 386 U.S. 547, 553—55 (1967) (holding judiciaries have immunity if acts are committed within the scope of their authority); *see generally* Imbler v. Pachtman, 424 U.S. 409, 410 (1976) (holding immunity applies to state prosecutors if the acts committed are within the scope of one's official duty).

wrong.[182] The lack of an immunity clause in the Constitution begs the question of whether the Founding Fathers of the Constitution actually intended for the President to have immunity; especially at the lengths the Court provides when considering absolute and presumptive immunity.[183] Thus, the use of the cases listed above were determined based off of the assumptions of people and agencies, not based off of actual writing from the Founding Fathers of the Constitution allowing presidential immunity.[184]

2. Broad Presidential Immunity Diminishes the Value of the Impeachment Clause

The Constitution includes a system of protection for the removal of unfit presidents from the Oval Office.[185] Under the U.S. Const. Art. I, §3, Clause 7, impeachment is used to remove a person from office and to disqualify the person from holding any future office in the United States.[186] In order to be impeached, under U.S. Const. Art. II, § 3, Clause 4, the President must commit treason, bribery, high crime, or some other form of misdemeanors.[187] This system of protection for American citizens further shows why it is important to understand that the Founding Fathers of the Constitution did not include an immunity clause for presidents.[188] The first settlers of the United States were breaking free from a king.[189] The Founding Fathers wanted to prevent the new role of President from holding as much control and inequality as a king.[190] Hence, Framers excluded an immunity clause for the President, because granting immunity beyond beneficial acts places the President unfairly above all Americans.[191]

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182. Trump, 144 S. Ct. 2312 at 661 (2024) (Sotomayor, J., dissenting) (stating the Framers chose to refrain from adding immunity for presidents to the Constitution).

183. *Id.*

184. *Id.* at 615. The Supreme Court reasoned that the Constitution's interpretation of the Separation of Powers and a president's duties were enough to establish presidential immunity. The Court deemed this necessary to limit the threat of prosecution against a president for acting beneficially for the country.

185. U.S. CONST. art. I, §3, cl. 7.

186. *Id.*

187. U.S. CONST. art. II, §4.

188. Trump v. U.S., 144 S. Ct. 2312 at 637 (2024) (Sotomayor. J., dissenting) (stating the Framers clearly refrained from adding immunity for presidents, which can be supported by them intentionally adding immunity to other places such as the Speech or Debate Clause instead).

189. *Id.* at 662.

190. *Id.*; Katie Scott, "'Long Live the King!': Trump Faces Backlash for Comparing Himself to Royalty," *Global News* (Feb. 20, 2025), https://globalnews.ca/news/11026858/donald-trump-backlash-king-post/ (Trump depicted himself as a King to the public soon after being re-elected President).

191. Trump v. U.S., 144 S. Ct. 2312 at 637 (2024) at 99 (Sotomayor. J., dissenting).

An example of removal through impeachment occurred when Congress impeached President Trump twice during his first term that spanned from January 20, 2017 to January 20, 2021, as President of the United States of America.[192] However, because the Senate could not reach the necessary amount of votes on either impeachment, the Court acquitted Trump and allowed him to finish the Presidential term.[193] It should still be noted that the majority of Senators voted to impeach Trump at a vote of fifty seven to forty three.[194] Due to this behavior, one may presume that Trump broke his constitutional duty under the United States Constitution Article 6, Section 1, Clause 3, under which executive officers "shall be bound by oath or affirmation to support the Constitution," and that Trump could not have been supporting the Constitution since he had done one or more of the things that fall within the qualifications of impeachment according to the United States Constitution Article 2, Section 4.[195] The vague presidential immunity standards will allow a president to get away with unconstitutional acts.[196] In doing so, the impeachment clause in the Constitution is stripped of all of its power.[197]

3. The Violation of the Fourteenth Amendment by a President

Furthermore, Section 3 of the Fourteenth Amendment of the Constitution prohibits former government officials, including presidents, from holding public office ever again if he or she has "engaged in insurrection or rebellion" against the United States. For example, one could see how Trump violated the Fourteenth Amendment of the Constitution Section 3 when the federal grand jury indicted him for committing insurrection and engaging in rebellion against the United States during the January 6 attack on the United States Capitol.[198] Therefore, one could presume that Trump's alleged insurrection would have prevented him from holding any public office if he had been convicted, since the Fourteenth Amendment states a person may not hold executive office after committing insurrection.[199] A blanket immunity would permit

192. Constitution Ann., *Art. III. S4.4.9 President Donald Trump & impeachable Offenses*, SEARCH ENGINE J., https://bit.ly/3Fuvf3K.

193. *Id.*

194. *Id.*

195. U.S. CONST. art. VI, §1, cl. 3; U.S. CONST. art. II, §4; *see also* Trump v. U.S., 144 S. Ct. 2312 at 2342, 2358, 2360 (2024).

196. U.S. CONST. art. VI, §1, cl. 3; U.S. CONST. art. II, §4; *see,* Trump, 144 S. Ct. at 639.

197. U.S. CONST. art. II, §4; *see also,* Trump, 144 S. Ct. at 645.

198. U.S. CONST. Amend. XIV, § 3.

199. U.S. CONST. Amend. XIV, § 3.; *see generally,* U.S. v. Eicher, No. 22-38, U.S. Dist. (D.D.C. May 23, 2023) (stormed the United States Capitol and filed a notice of public authority defense saying Trump authorized the acts that took place on January 6); Trump v. Anderson, 601 U.S. 100 at 108 (2024) (By making a speech, unprotected by the First Amendment, to the crowd at the Capitol on January 6, Trump engaged in insurrection.); Thompson v. Trump 142

a president to violate the Fourteenth Amendment, act unconstitutionally, and engage in acts such as insurrection without repercussion.[200]

a. Legal Accountability and the January 6 Attack on the U.S. Capitol

With uncertainties from the Supreme Court on how to handle *Trump v. United States*, the Court did not prevent Trump from making significant, broad impacts to America.[201] The impacts addressed below include examples of alleged insurrection and terrorism.[202]

On January 6, 2021, Trump lead a nationally broadcasted protest at the United States Capitol to speak about his recent loss of the Presidential candidacy to Joseph Biden.[203] Trump spread rumors the election was fraudulent to those who attended.[204] In the weeks leading to January 6, Trump had made remarks to his supporters to "stop the steal of the election" and to "combat" the stolen election.[205] However, these claims were false.[206] Social media platforms were used by Trump's campaign team to prepare to "secure Trump's presidency."[207] His supporters, some of which included white supremacists and militia organizations, came to the Capitol's grounds armed with weapons to prepare for a "perceived battle" as these groups had been waiting for a chance at a "civil war."[208] As seen by many on the nationally broadcasted event, "just moments before the attack, Trump instructed his supporters to 'march to the Capitol' and 'fight like hell,' warning they 'won't have a country anymore' if they didn't."[209] These instigations by Trump led to his followers storming the Capitol in a tragic event which ended in damages of $2.8 million, over 150 law enforcement officers with injuries, and ten deaths.[210]

S. Ct. 680 at 64 (2022) (Trump tweeted and encouraged his "followers" to gather at the Capitol).

200. U.S. CONST. Amend. XIV, § 3.

201. *See generally,* People v. Trump, 208 N.Y.S.3d 440 (N.Y. Sup. Ct. 2023).; *see generally,* People by James v. Trump, 192 N.Y.S.3d 95 (N.Y. App. Div. 1st Dept. 2023); *see generally,* Matter of People of the State of N.Y. v. Trump Org., Inc., 169 N.Y.S.3d 612 (App. Div. 2022); Blassingame v. Trump, 87 F.4th 1 at 15 (D.C. Cir. 2023).

202. *See generally,* People, 208 N.Y. Sup. Ct.; *see generally,* People by, 192 N.Y. App. Div.; *see generally* ,Eicher, U.S. Dist.

203. Angela J. Scott, *Feature legal Acct. & the Jan. 6 Attack on the U.S. Capitol*, 40 GPSolo 30 at 31 (2023) (discussing Trump v. U.S., 144 S. Ct. 2312 at 149, 151).

204. *Id.* at 30.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 31.

209. Scott, *supra* note 203, at 31 (discussing Trump v. U.S., 144 S. Ct. 2312 at 149).

210. *Id.* at 30.

The FBI investigated this act as an act of terrorism which, the FBI interpreted, can be reasonably understood as an insurrection orchestrated by Trump.[211]

These incidents on January 6, 2021, caused a great havoc on the American people.[212] Approximately 1,300 people were arrested and tried for their involvement in the January 6 storming of the Capital.[213] In the federal criminal case *United States of America v. Donald J. Trump*, Trump awaited trial for the allegations against him, including the alleged acts of insurrection and terrorism during the January 6 attack on the Capital.[214] The Court indicted Trump with four federal charges including: 1) conspiracy to defraud the United States; 2) obstructing an official proceeding; 3) conspiring to obstruct an official proceeding; and 4) conspiring against rights.[215] On September 5, 2024, Justice Chutkan noted that the case would go into 2025 surpassing the Presidential election in November 2024.[216] Contrary to prediction, Chutkan dismissed the January 6 indictments and allegations of conspiring to overturn the 2020 election, that were charged against Trump, after the election ended.[217]

Even though Trump committed these criminal offenses, the Court dropped the charges giving him a broad immunity.[218] This can be considered an error to clarify by the Court.[219] The January 6 attacks could easily be classified as an insurrection or rebellion against the United States.[220] This is a clear violation of the Fourteenth Amendment, because the vague presidential immunity standard allows Trump to be immune from such charges.[221]

B. Allowing Broad Presidential Immunity Places the President Above the Law

The Constitution supports the essential need for the Executive Branch to function while under a power check.[222] The Articles of the Constitution support how the re-election of a felon as the President of the United States of

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211. *Id.*
212. *Id.*
213. Kunzelman, Michael, and Richer, Alanna, *3 Years after the Jan. 6 Capitol Riot, a Major Mystery is Still Unsolved*, PBS NEWS, https://tinyurl.com/59dvu5ua.
214. Carrie Johnson, *Trump Jan. 6 Case gets its First Hearing Since the Sup. Ct.'s Immunity Ruling*, NPR (Sept. 5, 2024), https://bit.ly/4iJUsFu.
215. Eric Tucker, *WATCH: TRUMP INDICTED on FED. CHARGES in JAN. 6 CASE, SPEC. COUNS. JACK SMITH ANNOUNCES*, PBS NEWS (Aug. 1, 2023), https://bit.ly/3XRlwKW.
216. *Id.*
217. Ryan Reilly & Ken Dilanian, *Judge agrees to dismiss Donald Trump's 2020 ELEC. interference case*, NBS NEWS, https://bit.ly/3DEjreK.
218. Trump v. U.S., 144 S. Ct. 2312 at 599 (2024).
219. *Id.*; Reilly & Dilanian, *supra* note 210; Scott, *supra* note 203, at 771.
220. Reilly & Dilanian, *supra* note 210; Scott, *supra* note 197, at 771.
221. Scott, *supra* note 203, at 771.
222. *See generally,* U.S. CONST. art. 1, §1.3.1.

America creates disruption in the system.[223] Similarly, state laws have barriers in place to avoid the same issues—such as what acts should disqualify a person from running for an official position—that the Supreme Court had when deciding *Trump v. United States*.[224]

1. The Right to Run for Public Office

All rights and requirements demanded for presidential candidacy eligibility should be similar to the rights and requirements demanded for official office eligibility in all fifty states of America.[225] If a state citizen charged with felonies cannot vote for a presidential candidate, then it is not logical for a felon to be allowed to run for the United States presidential candidacy.[226]

In America, citizens in every state rely on the written words of the Constitution to provide a stable and reliable government to live by.[227] That is why every state has developed some form of standards to uphold their residents by.[228] If there were a lack of solidified rules, confusion, bias, and misunderstanding would steadily creep inside the minds of each states' residents.[229] In order to prevent such chaos, states have developed guidelines that are best for the fairness of those who reside within their geographical barriers.[230] From such guidelines, American citizens understand what eligibilities one must meet in order to apply for certain positions such as official public offices.[231] Since all fifty states in the country follow strict guidelines- including rules created to address felons in particular- it would be safe to assume those

223. U.S. CONST. art. 1, §1.3.1.

224. Ark. CONST. art. 5, § 9; *see generally* Trump v. U.S., 144 S. Ct. 2312 (2024).

225. Ark. CONST. art. 5, § 9; *see generally* Trump v. U.S., 144 S. Ct. 2312 (2024).

226. Ark. CONST. art. 5, § 9; *see generally* Trump v. U.S., 144 S. Ct. 2312 (2024).

227. Cooper v. Aaron, 358 U.S. 1, 78 S. Ct. 1401 (1958) (holding the Supreme Court of the United States is the superior law and states must follow the Constitution); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (holding the Supreme Court of the United States is the superior law and states must follow the Constitution).

228. U.S. CONST. art. 1, §4; U.S. CONST. art. 2, §1; U.S. CONST. amend. X.

229. U.S. Term Limits v. Thornton, 514 U.S. 779, 115 S. Ct. 1842 (1995) at 833–34. *See also,* Burdick v. Takushi, 504 U.S. 428, 433 (1992) (holding states seek to assure elections are structured equitably); Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) (holding states may adopt election restrictions to "protect the integrity and reliability of the electoral process itself").

230. U.S. Term, 115 S. Ct. 1842 (1995) at 833–34. *See also,* Burdick, 504 U.S. 428, 433 (1992); Anderson, 460 U.S. 780, 788 (1983).

231. U.S. Term, 115 S. Ct. 1842 (1995) at 833–34. *See also,* Burdick, 504 U.S. 428, 433 (1992); Anderson, 460 U.S. 780, 788 (1983).

guidelines would influence all relevant portions of the government.[232] However, that has recently been shown to no longer be the case.[233]

When presidential elections are performed, all fifty states in America are involved in the election process.[234] Residents from all fifty states participate in the voting ballots that are held within one's own state by actively voting in that particular state.[235] This may draw the conclusion that all fifty states of America's standards and guidelines surrounding public office elections would influence the standards and guidelines used in electing the position for the federal public office of the President of the United States of America.[236] Until now, that has been true.[237] However, recent events have allowed the fairness between state and public office guidelines to blur and allow bias in.[238]

One Arkansas statute prevents felons of particular crimes from holding a public office.[239] Specifically, under the Arkansas Constitution Article 5, Section 9, citizens of Arkansas who are convicted of felony offenses or a misdemeanor of deceit, fraud, false statement, or an offense related to the election process, are not eligible to hold any office in Arkansas.[240] In *Haile v. Johnston*, a Cleburne County citizen challenged Johnston's right to run in the county election for sheriff, because Johnston had previously been convicted of a felony for writing a hot check.[241] The citizen petitioned the court to hold Johnston's conviction a crime under Arkansas Constitution Article 5, Section 9 causing Johnston to be ineligible to run for public office.[242] The Court held Johnson was eligible to run for office because sealing his felonies extinguished his status as a felon and, as a result, lifted the statutory restrictions on his candidacy.[243]

Currently, Arkansas cases have shown plenty of precedent to support the test Arkansas judges use in determining whether the Arkansas Constitution Article 5, Section 9, applies to particular state citizens with felonies.[244]

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232. *See,* Moore v. Harper, 600 U.S. 1, 143 S. Ct. 2065 (2023) In this case, Chief Justice Roberts held all states are subject to state law constraints thus causing state guidelines to be under a checks and balance system with the rest of the government. During the decision, the Court clarified that a state government must abide by the state's constitution regarding state elections- as is a requirement of every state.

233. *See generally,* Trump v. U.S., 144 S. Ct. 2312 (2024).

234. U.S. CONST. art. 2; U.S. CONST. amend. XII.

235. U.S. CONST. art. 1, §4, U.S. CONST. amend. XV.

236. U.S. CONST. art. 2; U.S. CONST. amend. XII; *See generally,* Moore v. Harper, 600 U.S. 1, 143 S. Ct. 2065 (2023).

237. *See,* Moore v. Harper, 600 U.S. 1, 143 S. Ct. 2065 (2023).

238. Trump v. U.S., 144 S. Ct. 2312 (2024).

239. Ark. CONST. art. 5, § 9.

240. *Id.*

241. Haile v. Johnston, 482 S.W.3d 323 at 324 (Ark. 2016).

242. *Id.*

243. *Id.*

244. *Id.*

Allowing a felon with criminal convictions to run for re-election into Presidential Candidacy without necessary guidelines to show the distinction of what crimes are permittable by the Supreme Court could potentially create an influx of challenges of unfavorable decisions by state courts such as the Arkansas Supreme Court.[245] For example, if instances such as *Trump v. United States* are left open-ended without specific guidelines on what does and does not constitute criminal prosecution outside of presidential immunity by the Supreme Court, then equality in citizenship rights will decrease substantially.[246] Citizens should not be prevented from running for and holding state public offices for criminal acts if the federal government allows citizens who have committed criminal acts to run for and hold the position as President of the United States of America.[247] As Chief Justice Marshall once stated "the law does not discriminate between the president and a private citizen."[248] Therefore, no person should be granted lesser eligibility under the outlined qualifications whether running for governor, judge, or the President of the United States of America.[249] So, it is contradicting to enforce state laws preventing criminally run public offices, if broad immunity puts the president above the laws average Americans must abide by.[250]

This contradiction is clear when considering Trump's criminal history and his candidacy for re-election as President.[251] It is important for Americans to be aware of who may be their next presidential leader.[252] Trump has become the very first former president to be a convicted felon, and to undergo criminal trials due to his suspected tampering with the 2016 presidential election.[253] Additionally, Trump and his corporations have been defendants in a plethora of other criminal trials including tax evasion, the falsification of business records, defamation, and fraud.[254] After his first term, the President and his personal corporations were indicted of each charge and received a combined total of fifty-one felony charges.[255] By allowing a felon guilty of these crimes, such

245. *Id.*
246. *See generally,* Trump v. U.S., 144 S. Ct. 2312 (2024) (Kagan, J., dissenting).
247. *Id.*
248. U.S. v Burr, 25 F. Cas. 30 at 34 (C.C.D. Va. 1807) (No. 14,692d) (holding President Aaron Burr was not above the same laws enforced on all citizens just because he was President).
249. U.S. CONST. art. IV, §2, Cl. 1; and U.S. CONST. art. 1, §6.
250. *Id.*; *See generally,* Trump,144 S. Ct. at 685.
251. Graham Kates, *Trump fraud ruling adds to his string of legal losses in New York*, CBS NEWS (Feb. 19, 2024, 10:37 AM), https://bit.ly/4kRPtVa.
252. *See generally,* Medina v. City of Osawatomie, 992 F. Supp. 1269 (D. Kan. 1998) (holding it is not unconstitutional to disclose the felonies of others; including presidential candidates).
253. Kates, *supra* note 251; *see also* USCS CONST. Amend. XII.
254. Kates, *supra* note 251, at ¶ 8-12.
255. *Id.*

as Trump, to run as a presidential candidate is extremely dangerous.[256] A person capable of mass amounts of criminal activity is not someone who should be leading the country.[257] A leader is someone who is charged with the control, organization, and responsibility of others.[258] The country must ask itself how a person can be a proper leader for the United States if the person has committed those types of felony offenses.[259] If a president is allowed to be re-elected President of the United States of America after committing criminal acts, he or she will likely pardon themself of his or her felonies, no longer answering for any of their past actions.[260]

2. The Right to Own Firearms

Similarly, other rights of the average American citizen are also subverted.[261] Under 18 United States Code 922(g), it is unlawful for any individual who has been convicted of a felony to own or possess firearms or ammunition.[262] However, under the United States Constitution Article I, Section 2, the President is named the commander in chief of the Army and Navy.[263] The President is also given the power to grant reprieves and pardons for crimes committed against the United States.[264] For example, if a convicted felon is allowed to run for President—a public office—and is elected, he or she would be the leader of the armed forces of this country and would have access to weaponry and ammunition at his or her disposal.[265] This would create uncertainty and contradiction, because the President would be a convicted felon who is allowed to go above the law as established under 18 U.S.C. 922(g) by owning, commanding, and using weapons, while average Americans must still abide by the law.[266] This creates an unfair legal system between Americans, and a clear double standard for the President.[267]

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256. *Id.*
257. *Id.*
258. *See,* Section 3B1.1 of the Fed. Sent'g Guidelines; *Aggravating & Mitigating Role Adjustments Primer,* OFF. OF GEN. COUNS. U.S. SENT'G COMMISSION, Mar. 2013, https://bit.ly/426aHr4.
259. *Restoration of Voting Rights for Felons*, Nat'l Conf. of State Legislatures, https://www.ncsl.org/elections-and-campaigns/felon-voting-right (Last updated: August 19, 2025).
260. *Id.*
261. *Id.*
262. 18 U.S.C. § 922(g)(1).
263. U.S. CONST. art. II, § 2.
264. *Id.*
265. *Id.*
266. *Id.*; *See,* 18 U.S.C. 922(g).
267. David Cole, *Supreme Ct. Grants Trump, Future Presidents a Blank Check to Break the L.,* Aclu (July 3, 2024), https://www.aclu.org/news/civil-liberties/supreme-court-grants-trump-future-presidents-a-blank-check-to-break-the-law.

3. The Right to Vote

Likewise, the Fifteenth Amendment protects the right of American citizens to vote not reliant on "race, color, or previous conditions of servitude" in the United States.[268] However, in the United States felons have generally been restricted from voting.[269] The process to reinstate the felon's right to vote is a state-by-state policy.[270] In three states, felons never lose the right to vote; in twenty-three states, felons lose the right to vote while incarcerated and then upon release can vote again; in fifteen states, felons lose the right to vote while incarcerated and while on probation and parole; and in ten states, felons forever lose the right to vote unless granted a pardon by a high acting government official such as a Governor or the President.[271] Specifically, the District of Columbia allows felons to vote, which allows the President to vote even with criminal convictions because the President resides at the White House in the District of Columbia.[272] Therefore, by allowing a convicted felon to run for President, the felon is then allowed to vote no matter what that felon's home state law required.[273] Additionally, the President is allowed to pardon his or herself from any criminal convictions he or she may have had when entering the Presidency ensuring the right to run for future public offices across America.[274] This inconsistency between the different states has allowed for confusion and contradiction between the rights of felons across the United States, thus furthering an unfair legal system for Americans.[275]

IV. PROPOSED SOLUTION: ESTABLISHING AN EXACT INTERPRETATION OF HOW THE CONSTITUTION INTENDED PRESIDENTIAL IMMUNITY TO BE IMPLEMENTED WHEN FACING CRIMINAL PROSECUTION

To overcome the downfall of the United States Constitution, there are five proposed solutions that may benefit the entirety of the country.[276] The

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268. U.S. CONST. Amend. XV, §1.

269. *See,* NCSL, *supra* note 259.

270. *Id.*

271. *Id.*

272. D.C. Bd. of ELEC, *Voting While Incarcerated*, CIC, https://cic.dc.gov/sites/default/files/dc/sites/cic/page_content/attachments/Voting%20While%20Incarcerated%20.pdf.

273. *See,* NCSL, *supra* note 259.

274. *See generally,* Matter of People of the State of N.Y. v. Trump Org., Inc., 205 A.D.3d 625 (App. Div. 1st Dept. 2022) (holding Trump's personally operated business **was** charged with seventeen felonies for fraud through tax evasion spanning a period of fifteen years).

275. *See,* NCSL, *supra* note 259, at para. 6.

276. *See generally,* Nixon v. Fitzgerald, 457 U.S. 731 (1982) (considering if an amendment is needed to establish a balance of power in the Executive Branch); and *see generally,* Clinton v. Jones, 520 U.S. 681 (1997) (opining the need for clearer guidelines for immunity in the Constitution). The Justices have had originalist views in the past, but the Trump v. United

first, and most needed, proposed solution would be to vote a new president into the presidential office to strengthen the relationship between the country and the federal government, and between the judiciary and the Executive Branch.[277] The second proposed solution would be to adjust the structure of the Supreme Court of the United States by requiring political affiliation fairness and removing life time appointments.[278] The third proposed solution is to incorporate immunity standards other states and countries are using into America's Executive Branch, by setting a specific rule detailing exactly what actions fall under presidential immunity by determining official and unofficial acts.[279] The fourth proposed solution is to attempt to add an amendment to the Constitution that would clear confusion moving forward and solidify a law for presidential immunity into the actual Constitution.[280] Finally, the last proposed solution would be to overturn the decision of *Trump v. United States*.[281]

A. Removing Trump as President to Bring Rest and End Fear Amongst the Judiciary

The most important step Americans need to take during this trivial time is to come together to remove Trump from the presidency.[282] President Trump's first term and second term as President have created an uprise of fear in the judiciary and amongst the country.[283] Fear to uphold the Constitution, fear to speak freely in one's elected position, fear to rule accordingly as the law demands, and most importantly fear of repercussions that may follow

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States decision did not follow that logic. Originalists adopt the position of the Framers who intentionally expressed silence on presidential immunity.

277. IMPEACH. TRUMP. AGAIN., *Demand Accountability*, https://www.impeachtrumpagain.org; Free Speech for People.org, *Trump is Openly Committing Treason. He Must be Impeached and Removed from Office*, (Dec. 12, 2025), https://freespeechforpeople.org/trump-treason-article-impeach-and-remove/; IMPEACH TRUMP NOW, *WHY IMPEACHMENT*, https://impeachdonaldtrumpnow.org/case-for-impeachment/why-impeachment/.

278. Lee, Hyungi, The Georgetown Journal of Legal Ethics, *Lifetime Appointments of Federal Judges: A Double-Edged Sword*, (Nov. 22, 2024), https://www.law.georgetown.edu/legal-ethics-journal/blog/lifetime-appointments-of-federal-judges-a-double-edged-sword/.

279. Library of Cong., *Immunity from Prosecution for Former Presidents*, LIBRARY OF CONG. (Dec. 30, 2020), https://bit.ly/3DTTRSS.

280. Nixon, 457 U.S. S. Ct. 731 at 769.

281. Trump v. U.S.,144 S. Ct. 2312 at 682 (2024); Loper Bright Enters v. Raimondo, 144 S. Ct. 2244 at 412 (2024); *see generally*, Chevron USA v. Nat'l RES. Def. Council, 467 U.S. 837 (1984).

282. *See,* IMPEACH. TRUMP. AGAIN., *supra* note 277; *see,* Free Speech, *supra* note 277; *see* IMPEACH TRUMP NOW, *supra* note 277.

283. *See*, Free Speech, *supra* note 277.

from the criminal who currently sits in the White House and demands the title of President of the United States of America.[284]

The best way to accomplish the permanent end of such fear is to remove Donald Trump from the presidential office.[285] By doing so, the country will be able to sit in peace, and the judiciary will be able to fulfill their roles as the law intended.[286] As it sits now, the judiciary is afraid to lawfully act within their roles because Trump actively threatens unlawful repercussions such as: wrongful termination, incarceration, diminished ability to gain government employment, harm to their character, fear of physical harm, and so much more.[287] Additionally, Average American citizens would have equality amongst one another and those who represent them in the federal government.[288]

To avoid further downfall, Trump's current administration should be stripped from their positions as well.[289] This will create a fresh start for the federal government to perform from.[290] From this, a new president should be elected into office and there is only one manner that would best achieve this: automatically swear in the next available presidential candidate from that term's election proceedings – in this scenario this would be Vice President Kamala Harris.[291] Attempting to commence an entirely new presidential election in this scenario would not be viable, because a new election would take too much time and too many resources while the country sat without a leader.[292] This simply would not do.[293] However, electing the next available presidential candidate from that term's election would be a timely transition and would provide an available candidate who was 1) qualified for the position, and 2) already prepared for the role.[294]

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284. Johnson, Carrie, NPR, *Judges Threatened with Impeachment, Bombs, for Ruling Against Trump Agenda*, (Mar. 14, 2025), https://www.npr.org/2025/03/13/nx-s1-5316340/threats-judges-trump.

285. *See*, IMPEACH TRUMP NOW, *supra* note 277.

286. *See*, Johnson, Carrie, *supra* note 284.

287. *Id.*

288. *See*, Hrezek, *The Power of Equity: Why it Matters in America* (May 11, 2023), https://www.eracoalition.org/2023/05/11/the-power-of-equality-why-it-matters-in-america/.

289. Casten, Sean, *LET'S TALK ABOUT IMPEACHMENT*, https://casten.house.gov/impeachment-2025; *see*, *IMPEACH TRUMP NOW, supra* note 277.

290. *Id.*

291. *See*, Peters, Gerhard and Woolley, John, *The American Presidency Project* (Dec. 31, 2024), https://www.presidency.ucsb.edu/statistics/elections/2024.

292. *See*, Usa Gov, *Overview of the Presidential Election Process* (Feb. 25, 2025), https://www.usa.gov/presidential-election-process.

293. *Id.*

294. *Id.*; *see*, Peters, Gerhard and Woolley, John, *The American Presidency Project* (Dec. 31, 2024), https://www.presidency.ucsb.edu/statistics/elections/2024.

B. Adjusting Lifetime Appointments and Political Affiliations in the Justice Positions

To ensure fairness in court cases across America, it is necessary to resolve the politically unequal and disadvantaged hung and often bullied Supreme Court of the United States of America.[295] The Supreme Court should not be stacked, and that is exactly what is staring America in the face- as seen in each of the cases involving Donald Trump after his second term commenced, *Roe v. Wade*, and others.[296] Presidents use this to their advantage as a way to bully the lower ranking political party filling the judiciary in order to landlock decisions in their favor.[297] If there are too many people of one political affiliation then all presidential decisions good or bad will be blocked or granted passage depending on what the president's political party is.[298] For example, if the president is Republican, then the President is going to insert a majority of Republican members into the judicial roles so that all of his or her acts will be ruled in his or her favor.[299] However, this creates unfairness because it allows for a swing in the votes accompanied by those political affiliates, thus the opposing party cannot vote accordingly because they are almost always out voted.[300] The solution to this is quite simple.[301]

First, there are nine seats available to Supreme Court Justices, so allot only four seats to Democrats, only four seats to Republicans, and one seat to an Independent.[302] Additionally, when one Justice leaves his or her position, that position is to be filled only with a candidate of the same political affiliation as the prior sitting Justice.[303] Second, remove the right of appointing the Supreme Court Justices from the power of the President and transition the power to the Congress.[304] Finally, the Supreme Court Justices should not be appointed for life.[305] Instead, there should be an age limit set in place stating no Supreme Court Justice can remain in the position or be appointed beyond

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295. *See*, Copeland, Joseph, Pew Research Center, *Favorable Views of Supreme Court Remain Near Historic Low*, (Sept. 3, 2025), https://www.pewresearch.org/short-reads/2025/09/03/favorable-views-of-supreme-court-remain-near-historic-low/.

296. *Id.*

297. Zwarenstyn, Lena, The Leadership Conference on Civil and Human Rights, *Project 2025 and the Project to Take Over Our Courts and Our Rights*, (Oct. 1, 2024), https://civilrights.org/blog/project-2025-and-the-project-to-take-over-our-courts-and-our-rights/.

298. *Id.*

299. *Id.* para. 2.

300. *See*, Zwarenstyn, *supra* note 297.

301. *Id.*

302. *Id.*

303. *See*, Copeland, *supra* note 295.

304. *Id.*

305. Buchanan, Maggie Jo, CAP, The Need for Supreme Court Term Limits, https://www.americanprogress.org/article/need-supreme-court-term-limits/.

the age of seventy-five.[306] This will eliminate bias, unfairness, and bullied Justices who are voted out due to a particular stacked political affiliation.[307] In addition, it will leave the positions open to newer, fresher views within shorter periods of time while still allowing for those in the position to grow through experience during his or her term.[308]

C. Setting Clear Guidelines by Incorporating Other Accepted Immunity Standards

As earlier discussed, many states and other countries have approached immunity in a clear and demanding manner.[309] By having a finite standard to implement on a president when the leader has overstepped his or her duties, these countries have been able to avoid confusion and contradiction.[310] In many countries, if presidential immunity is not automatically revoked, the immunity is at least stalled until an investigation into the non-beneficial duties has concluded.[311] By doing so, the country is protected from potential criminal activities that may harm the country and its citizens.[312] Similarly, many American states have clear guidelines for when public officials are granted immunity to avoid confusion, contradiction, and the possibility of harmful criminal activity, so the Supreme Court should be able to set a similar guideline for when Presidents can be granted immunity to avoid the same types of issues.[313]

For example, in Arkansas, in the case *State v. Oldner*, the Arkansas Supreme Court determined the Arkansas Constitution did deny any felon the right to hold a public office position within the state.[314] During the case, the Court determined that any infamous crime such as embezzlement, forgery, or even dishonesty could be enough to prevent an Arkansas resident from having eligibility to run for judge, governor, or any other state public office.[315] Further, in the Arkansas case *State v. Cassell*, the court ruled that any person convicted of such infamous crimes would be forever ineligible for public

306. *Id.*
307. *Id.*
308. *Id.*
309. *See generally*, Library of Cong., *supra* note 279.
310. *Id.; see*, *ACLU, supra* note *256.*
311. Library of Cong., *supra* note 279.
312. *See generally*, Sharma v. Hirsch, 121 F.4th 1033 (4th Cir. 2024); *see also* Fletcher v. Young, 689 S.W.3d 161 at 162 (Mo. 2024).
313. *See generally*, Library of Cong., *supra* note 279.
314. State v. Oldner, 361 Ark. 316, 206 S.W.3d (2005).
315. *Id.*

office positions.[316] In *Cassell*, the Court stated that nothing could reverse this ineligibility even voter approval by other members of the state.[317]

In *Edwards v. Campbell*, the defendant had committed an infamous crime of dishonesty by stealing property.[318] From this outcome, the Court barred the defendant from running for a political office in Arkansas, making him ineligible for re-election as mayor.[319] In support of the refusal to allow crimes of dishonesty, the court in the Arkansas case *Pruitt v. Smith* reiterated that felony convictions based on crimes of dishonesty and public trust automatically made the state resident ineligible to run for any public office.[320] Since the defendant had previously committed and been convicted of voter fraud, Arkansas's constitutional standards rendered him ineligible.[321]

Additionally, in *Haile v. Johnston*, the defendant had been convicted of using a hot check, but the defendant's record had been sealed.[322] According to Arkansas' guidelines, only when a felon's record is sealed and the offense is not a public trust conviction, is the person's eligibility to hold a public office restored.[323] In Arkansas, the state constitution is designed to honor the decisions of the other states in the country.[324] The standards and guidelines upheld in Arkansas allow for the input of other states' standards and guidelines creating equality among all fifty states.[325] All five of the above cases follow state constitutional standards that Arkansas has laid out in order to protect the honesty, safety, and fairness of all Arkansas residents and Americans as a whole.[326]

It would be beneficial to America to implement some of these same standards into the Executive Branch when determining if a president should be disqualified for immunity.[327] For example, the Supreme Court of Arkansas explained there are three steps to walk through when reviewing if Arkansas Constitution Article 5, Section 9, applies to a case at hand: 1) the plain meaning of the statute, 2) the intent of the legislature, and 3) comparing the statute

316. *See generally*, State v. Cassell, 2013 Ark. 221, 427 S.W.3d 663 (2013) (affirming State v. Oldner, 316 (Ark. 2005).

317. *Id.*

318. *See generally*, Edwards v. Campbell, 2010 Ark. 398, 370 S.W.3d 250.

319. *Id.*

320. *See generally*, Pruitt v. Smith, 2020 Ark. 382, 610 S.W.3d 660.

321. *Id.*

322. *See generally*, Haile v. Johnston, 2016 Ark. 52 at 7, 482 S.W.3d 323 at 327.

323. *Id.*

324. *Id.*

325. *See generally*, State v. Oldner, 361 Ark. 316, 206 S.W.3d (2005); State v. Cassell, 2013 Ark. 221, 427 S.W.3d 663; Edwards, 2010 Ark. 398, 370 S.W.3d 250; *Pruitt*, 2020 Ark. 382, 610 S.W.3d 660 (2020); and Haile, 2016 Ark. 52 at 7, 482 S.W.3d 323 at 327.

326. *See generally*, Oldner, 361 Ark. 316, 206 S.W.3d; Cassell, 2013 Ark. 221, 427 S.W.3d 663; Edwards, 2010 Ark. 398, 370 S.W.3d 250; Pruitt, 2020 Ark. 382, 610 S.W.3d 660; and Haile, 2016 Ark. 52 at 7, 482 S.W.3d 323 at 327.

327. *See*, Clinton v. Jones, 520 U.S. 681 at 684 (1997).

to similar statutes on the same matter to establish the meaning as a whole.[328] Therefore, if a person has been convicted of any infamous crime under Arkansas Constitution Article 5, Section 9, then he or she is not applicable to hold any Arkansas public office.[329] Moreover, if the person does not have a felony record, then he or she is eligible to run for an Arkansas public office.[330] These guidelines prevent uncertainty on whether a felon can be elected into a state public office.[331]

Arkansas courts can unanimously agree on the test to apply when faced with the question of whether an act by a citizen constitutes a criminal act, and when that criminal act prevents the citizen from running for and holding a public office.[332] Some of these Supreme Court of Arkansas cases include: *State v. Oldner*, *Powers v. Bryant*, *Campbell v. State*, and *Weeks v. Thurston*.[333] If this unanimous test can be applied in a state court, such as Arkansas, then the United States Supreme Court should also be able to adopt a test to apply when determining if an act by a president should prevent that president from running for and holding a public office.[334] If the Court cannot determine with certainty when an act would prevent a president from holding office, the Court should at least set a clear guideline that withholds a president from running for public office until the Court has determined whether the act fell outside of a president's official acts and if the act qualified for presumptive immunity.[335]

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328. *Haile*, 2016 Ark. 52 at 7, 482 S.W.3d 323 at 327; *see generally,* Ortho-McNeil Janssen Pharm., Inc. v. State, 2014 Ark. 124, 432 S.W.3d 563; Dept. of Hum. Serv. & Child Welf. Agency Rev. Bd. v. How., 238 S.W.3d 1 at 57 (Ark. 2006); Lawhon Farm SERVS v. Brown, 984 S.W.2d 1 at 279 (Ark. 1998); Berryhill v. Synatzske, 2014 Ark. at 4, 432 S.W.3d 637 at 640.

329. *Haile*, 2016 Ark. 52 at 8, 482 S.W.3d at 328.

330. *Id.*

331. *Id.*

332. *Id.*

333. *Oldner*, 361 Ark. 316 at 325–26, 206 S.W. 3rd 818 at 821–22 (2005) (quoting State ex rel. Olson v. Langer, 256 N.W. 377 (N.D. 1934)), ("'[t]he presumption is, that one rendered infamous by conviction of felony, or other base offense, indicative of great moral turpitude, is unfit to exercise the privilege of suffrage, or to hold office, upon terms of equality with freemen who are clothed by the State with the toga of political citizenship'"); *see generally* Campbell v. State, 300 Ark. 570, 781 S.W.2d 14 (1989) (The Court convicted Judge Campbell of vote buying and withheld him from returning to office until the Supreme Court made a final decision.) This touches on the importance of prohibiting a person form holding office while on trial for criminal acts; *see generally* Weeks v. Thurston, 2020 Ark. 64, 594 S.W.3d 23.

334. Tory Hodges Lewis & Brett D. Watson, *ARKANSAS PRECEDENT on the LAW of PRECEDENTS: WHERE HAE WE BEEN & WHERE are WE NOW*?, 57 Ark. L. Rev. 10 at 12 (Winter 2022).

335. *Id.*

Every American state has implemented some form of limitation on who can and cannot hold an official public office.[336] Other states, such as West Virginia, Georgia, Louisiana, Illinois, Virginia, New Hampshire, and Nebraska all prohibit citizens from holding public office if they have been convicted of or have committed serious crimes.[337] In Washington D.C. the Council of the District of Columbia has written the eligibility requirements in a way that prevents Americans from running for an official public office if the person has been convicted of felonies during a prior term in an official public office.[338] These rules have been set in place in order to protect the fairness, reputation, and security of each office in the best interest of the American people.[339]

For example, in the Supreme Court of Arkansas case *Weeks v. Thurston*, the honorable Weeks filed an appeal to protect his right to run for an official public office- Third Judicial, Division Three, Circuit Judge.[340] Weeks underwent judicial review of his prior misdemeanors for both fictitious tags and a hot check.[341] The Court determined Weeks' hot check violation did not amount to a disqualification, and only analyzed Article Five Section Nine of the Arkansas Constitution to determine whether Weeks' use of fictitious tags qualified as an infamous crime.[342] According to the Court, the Framers of the Arkansas Constitution intended an infamous crime to include the elements of 1) deceit, 2) dishonesty, and 3) crimes that impact the integrity of the person's ability to work in an official public office.[343] The Court reviewed Arkansas's laws on the plain meaning of the language and held Weeks did not knowingly commit the offense and therefore allowed to run for an official public office in Arkansas.[344]

The Court attempted to find fairness and order in the governing of Arkansas's citizens by reviewing the state's Constitution and applying it to the facts of the case.[345] A necessary element of an infamous crime under the Arkansas Constitution Article Five Section Nine is to portray dishonesty.[346] The

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336. Gary Fields & Josh Funk, *State Laws Vary Widely on Whether Felons Can Run for Off.*, DC NEWS NOW: AP POL. (Jan. 19, 2023), https://www.dcnewsnow.com/news/politics/ap-politics/ap-state-laws-vary-widely-on-whether-felons-can-run-for-office/.

337. *Id.*; *see also,* Sharma v. Hirsch, 121 F.4th 1033 at 1036; *see also,* Sapp v. Foxx, 20-22 U.S. Dist. LEXIS 106731 at 15, 16 (N.D. III. June 21, 2023).

338. Council of the District of Columbia, *Code of the District of Columbia*, (Dec. 20, 2018), https://code.dccouncil.gov/us/dc/council/code/sections/1-204.02.

339. *Id.*

340. *Weeks*, 2020 Ark. 64 at 2, 594 S.W.3d 23 at 24.

341. *Id.,* 2020 Ark. 64 at 3, 594 S.W.3d 23 at 24.

342. *Id.*

343. *Id.,* 2020 Ark. 64 at 4, 594 S.W.3d 23 at 24–25.

344. *Id.,* 2020 Ark. 64 at 7–9, 594 S.W.3d 23 at 26–28.

345. *See generally, Weeks*, 2020 Ark. 64, 594 S.W.3d 23.

346. *Id., 2020 Ark. 64 at 9, 594 S.W.3d 23 at 27.*

Court went further to state the defendant had to knowingly have been dishonest in his act to commit the crime.[347] Since Weeks had not knowingly committed the act, he could not have been dishonest in committing the crime.[348] This outcome produced fairness and protected the integrity of Arkansas's official public office positions such as Judges.[349]

Similarly, many countries have effective standards, too.[350] For instance, Burundi, Lebanon, Madagascar, and Rwanda do not offer immunity to a President if they have either committed treason, violated the Constitution, or both.[351] Additionally, Iceland strips immunity from a President unless the Icelandic Parliament makes an exception for the actions taken by the President.[352] Also, Namibia prohibits immunity of a President if they are alleged to have committed criminal or civil acts in their personal capacity.[353] Russia allows the immunity to be stripped from a President for criminal investigation if they have committed a grave crime while in office.[354] America could adopt the same standard for presidential immunity that the country of Namibia uses.[355] In this way, if an American president commits a criminal or civil act even in his or her personal capacity, then that President would not be given any type of presidential immunity.[356] By doing so, the country is protecting its citizens from a potentially dangerous and unfit leader.[357]

Additionally, America could also implement Russia's presidential immunity standard which would encompass stripping presidential immunity away from an American president in order to conduct a criminal investigation into any alleged, serious criminal offenses that the President may have committed while in office.[358] This would benefit America by limiting confusion and contradiction that may arise from having an active president with felonies, because it would place a halt on any actions that president could do until the government had further investigated the extent of the crimes.[359] Addressing

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347. *Id.*

348. *Id.* In the Dissent, Chief Justice Kemp felt strongly that a conviction is a conviction. Additionally, he argued the Arkansas statute had not changed since 1949 and neither had the Framers' intent to include fraudulent vehicle registration as an infamous crime of dishonesty and deceit, so Weeks should have been prevented from running for an official public office in the state of Arkansas.

349. *Id.*

350. Library of Cong., *supra* note 279.

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

356. Library of Cong., *supra* note 279.

357. *Id.*

358. *Id.* Comparatively, America has shown to have the ability to mirror and exceed Russia's accomplishments and should be capable to do so in this scenario, as well.

359. *Id.*

the criminal acts, whether alleged or proven outright, protects American citizens and the country as a whole from any potential future harm by that leader.[360] Additionally, implementing this standard would provide fairness across America by ensuring every American citizen faced the same responsibilities and eligibility requirements in order to hold a state or federal public office.[361]

Another, more strict but just as important, standard that America could incorporate is Burundi, Lebanon, Madagascar, and Rwanda's elimination of presidential immunity for any president who has committed treason, violated the Constitution, or both.[362] If a president has committed treason or violated the constitution, he or she has broken the oath taken during inauguration to uphold the Constitution.[363] By using these countries' standard, America would be protecting the Constitution and its purpose in the way the Founding Father's meant for America to.[364]

When combined together, America would have a clear directive to use when determining if Presidents are exempted from criminal prosecution because all acts that fell within those standards would be outside of a president's constitutional powers; therefore, disqualifying a president for immunity.[365] The combined standards could be read as one to say,

An acting President is prohibited from receiving presidential immunity if he or she has: 1) committed criminal or civil acts even within his or her personal capacity; 2) committed treason; 3) violated the Constitution of the United States of America; or 4) done any of the prior listed criminal offenses.

If an acting or non-acting President is alleged to have committed serious criminal offenses while in his or her Presidential term, that President is prohibited from receiving presidential immunity until a criminal investigation has been conducted, exhausting all resources, and 1) the President has been found innocent of the alleged crimes; or 2) the alleged crimes were not serious enough to receive felony charges, or the offenses were for the sole benefit of the country and it can be proven the President had nothing to personally gain from the acts.

While the government may feel uncertainty at the idea of adopting the laws of foreign countries, these laws have been proven successful.[366] From Namibia to Rwanda these presidential immunity laws have been upheld for

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360. *See generally, Id*; David Cole, *Supreme Court Grants Trump, Future Presidents a Blank Check to Break the Law*, ACLU (Jul. 3, 2024), https://bit.ly/4bQzPFs.

361. *See generally,* Library of Cong., *supra* note 279; Cole, *supra* note 360.

362. Library of Cong., *supra* note 279.

363. U.S. CONST. art. VI, §1, cl. 3.

364. Trump v. U.S., 144 S. Ct. 2312 at 2358-2360 (2024) (Sotomayor, J., dissenting).

365. Stein, *supra* note 24, at 771 (citing Nixon, 457 U.S. Ct. 731 (1982)).

366. *See* Library of Cong., *supra* note 279.

many years without fault.[367] The countries' citizens feel safer, there is less confusion in the government, and courts are provided a clear standard of what to do when facing controversy involving a president's actions.[368] If America were to adopt the combined standard above, there would no longer be confusion on when an American president could qualify for immunity.[369]

D. Proposing an Amendment to the Constitution

Amending the United States Constitution is a strong argument because it has been successfully done before.[370] For example, in *Marbury v. Madison* the court addressed the Constitution as a living document intended for adaptability and change.[371] By looking at the Constitution as a document that can be changed, decisions such as *Dred Scott v. Sandford* and *Plessy v. Ferguson* led to direct amendments to the Constitution, as well as other cases such as *Brown v. Board of Education* which pathed a path to the Equal Protection Clause under the Fourteenth Amendment.[372]

To have the Constitution amended, there has to be something directly impacting the country as a whole in a severe way.[373] The severity of the issue also has to have a lasting impact that will not lead to certain characteristics such as equality.[374] In order for an amendment to be proposed, the House of Representatives and Congress both have to have a two-thirds vote to make the amendment.[375] After the voting has been successfully completed, the amendment must then be ratified by a three-fourths majority of the State Legislature.[376] Only then, if both processes have been met, will the Constitution be amended with the proposed position.[377]

Today, an amendment to the Constitution needs to be voted for in order to protect the United States of America from inequality and confusion.[378] The amendment would be the twenty-eighth amendment to the United States Constitution.[379] It would state that presidential immunity is a narrowed immunity

367. *Id.*
368. *See generally*, *Id.*
369. *Id.*; Trump, 144 S. Ct. at 630, 657.
370. *See generally*, U.S. CONST. (twenty-seven Amendments have been made to the Constitution).
371. *See generally*, Marbury v. Madison, 5 U.S. 137 (1803).
372. *See generally*, Dred Scott v. Sandford, 60 U.S. 393 (1857), superseded (1868); *see generally*, Plessy v. Ferguson, 163 U.S. 537 (1896); *see generally*, Brown, supra note 328.
373. *See generally Const. Amend. Process,* NAT'L ARCHIVES, https://www.archives.gov/federal-register/constitution.
374. *See*, Id.
375. *Id.*
376. *Id.*
377. *Id.*
378. *Id.*
379. U.S. CONST. Amend. I—XXVII.

granted to presidents during his or her time in office to protect the Executive Branch's power to lead the country while performing acts solely beneficial for the whole of the United States of America.[380] The amendment could be worded to say,

The acting President of the United States of America shall be granted narrowed presidential immunity for executive actions taken during his or her time in office which were done solely for the purpose of benefiting the whole of American people. No presidential immunity shall be granted to the President for any acts committed which were not done for the benefit the United States of America, caused America to suffer, or were committed solely to benefit the acting President's ability to remain in power.

Although amendments are not common, here it is likely to be successful.[381] By creating this amendment, the judicial system would have a clear Constitutional law in place that would eliminate ambiguity surrounding when a president is eligible to receive presidential immunity.[382]

Although some may argue Congress does not vote to amend the Constitution often, there have been twenty-seven successful amendments.[383] These amendments collectively focus on the betterment of America as a whole and the equality of American citizens.[384] The amendment proposed above would also be a successful amendment to the Constitution because it would be for the benefit of America by: 1) providing the clarity needed by courts to make immunity decisions, and 2) giving equality to Americans by eliminating contradicting actions.[385] Therefore, while amendments to the Constitution are uncommon this proposed amendment would be very likely to pass.[386]

E. The Supreme Court Should Overturn *Trump v. United States*

The Supreme Court ruling of *Trump v. United States* is binding but not dependable.[387] While there has been an official ruling that the President is entitled to presumptive immunity for official acts through *Trump v. United States*, the basis for the decision remains on shaky ground until the issues involving Trump's actions are addressed and courts move away from the old,

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380. *See*, Trump v. U.S., 144 S. Ct. 2312 (2024) (Kagan, J., and Jackson, J., dissenting).

381. *Id.* An Amendment to the Constitution is the best solution but may be hardest to do.

382. *See generally*, Harlow v. Fitzgerald 102 S. Ct. 2727 (1982); *see also*, Nixon v. Fitzgerald, 457 U.S. 731 at 769 (1982) (considering an amendment to establish a balance of power in the Executive Branch).

383. U.S. CONST Amend. V; *see*, Nat'l Archives, *The Constitution of the U.S.: a Transcription*, Am. FOUNDING DOC., https://tinyurl.com/hzs9maex.

384. *See generally*, U.S. CONST. AMENDS. I–XVII, XIX–XXVII.

385. *Id.*

386. *Id.*

387. *See*, Trump v. U.S.,144 S. Ct. 2312 at 2355 (2024) (Sotomayor, J., Kagan J., and Jackson J., dissenting).

unwritten immunity doctrine.[388] If Trump had been convicted of insurrection in the *United States of America v. Donald J. Trump* for his actions, Trump would no longer have been able to run for any public office, especially Presidency, without a majority vote from Congress.[389] If this conviction had occurred, the basis for the decision in *Trump v. United States* would no longer be correct, because the Supreme Court reasoned that Trump had some form of immunity as President and his actions were taken within some manner of the scope of that immunity.[390] Finding Trump guilty of insurrection would place his actions outside the scope of his executive power.[391] Thus, Trump would not have been within the scope of immunity granted to Presidents at the time of the Supreme Court's ruling of *Trump v. United States*.[392]

1. Overturning Supreme Court Precedent

If *Loper Bright Enters v. Raimondo* could overturn the forty-four-year-old ruling of *Chevron USA v. National Resources Defense Council* with a six to three decision, then the same numerical judicial decision of six to three in *Trump v. United States* can be overturned.[393] Although overturning *Trump v. United States* could take an extended period of time to happen, the possibility still remains.[394]

There have been many cases in the Supreme Court of the United States throughout history which have been overturned.[395] For example, the Court overturned *Roe v. Wade* fifty-one years later in 2022 by the same court in the decision of *Dobbs v. Jackson*.[396] By reviewing these examples, and many others, it is very likely the Supreme Court could overturn the decision of *Trump v. United States* in the future, as well.[397]

Further, whether presidential immunity exists does not present an ambiguous law for deciding if executive officials acted within one's statutory

388. *Id.*; *see*, U.S. CONST. Amend. XIV.
389. U.S. CONST Amend. XIV, §3.
390. *See*, Trump, 603 U.S. at 602, 605.
391. *Id.*
392. *Id.*
393. Loper Bright Enters v. Raimondo, 603 U.S. 369 (2024); Chevron USA v. Nat'l RES. Def. Council, 467 U.S. 837 (1984) (determining when the ambiguity of laws should be analyzed by the courts).
394. *See generally*, Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705 at (1973); *see generally*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 142 S. Ct. 2228 (2022).
395. *Id.*
396. Dobbs, U.S. at 260 253 (holding a Texas law broke the Ninth Amendment, Tenth Amendment, Eleventh Amendment, and the Fourteenth Amendment).
397. Brown v. Bd. of EDUC. at 3 (1954) (overturning Plessy v. Ferguson (1896). This decision by the Supreme Court supports precedent for a judicial standard of overturning Supreme Court decisions.

authority.[398] The Framer's did not include any clauses in the Constitution addressing presidential immunity or any clauses that would induce the assumption that presidential immunity had been implied through other areas of the Constitution.[399] Therefore, courts do not need to use its own interpretation of what the Constitution intended for presidential immunity.[400] Since no direct or indirect law discussing presidential immunity exists, there is no ambiguity left to interpret.[401] If courts must be faced with a question of presidential immunity, the courts have the judicial power delegated by Article III of the Constitution to clarify the intentional language used by the Framers had been purposeful in excluding presidential immunity.[402] If courts leave presidential immunity open to interpretation, it allows ambiguity and misapplication.[403]

Although the process of overturning would take time, the clarity from overturning *Trump v. United States* would still benefit America by more directly addressing actions that would not qualify for immunity.[404] Regardless of timing, the decision can still be overturned in a manner that would benefit America more adequately.[405]

V. CONCLUSION

A system must be created to determine exactly when a president's acts are outside one's constitutional powers or America will be left confused and substantially harmed.[406] Without a system in place presidents are openly able to evade criminal prosecution and abuse the Executive Branch's constitutional powers for personal gain; putting them above the laws.[407] However, courts have declined to set clear guidelines for when an act by the President exceeds absolute and official immunity.[408] On the other hand, the Founding Father's made an intentional choice to exclude presidential immunity. Courts,

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398. *Id.*; *see generally*, Trump v. U.S., 144 S. Ct. 2312 (2024) (Sotomayor, J., dissenting) (stating the Framers chose to refrain from adding immunity for presidents to the Constitution).

399. *See*, Trump, 144 S. Ct. at 660, 661 (Sotomayor, J., dissenting) (stating the Framers chose to refrain from adding immunity for presidents to the Constitution).

400. *Id.*; Loper Bright Enters v. Raimondo, 144 S. Ct. 2244 at 392 (2024).

401. Loper, 144 S. Ct. at 399.

402. *Id.*

403. *See generally*, Trump, 144 S. Ct.

404. *Id.*

405. *Id.*, *see generally*, Brown, *supra* note 328.

406. NCSL, *supra* note 259.

407. David Cole, *Sup. Ct. Grants Trump, Future Presidents a Blank Check to Break the L.*, ACLU (Jul. 3, 2024), https://www.aclu.org/news/civil-liberties/supreme-court-grants-trump-future-presidents-a-blank-check-to-break-the-law [https://bit.ly/4bPN89c].

408. Trump v. U.S., 603 U.S. at 657 (Sotomayor, J., dissenting); *id.* at 686 (Jackson, J., dissenting).

however, have relied on judicial precedent to decide when granting a president presidential immunity is appropriate.[409]

Without an established solution, presidents who commit felonies will not be accurately prosecuted.[410] Similarly, if America allows a felon to manipulate the country as its leader, citizens will be left confused and harmed, and laws for ordinary American citizens will be contradicted and overlooked.[411] The contradictions between the constitutional rights of individuals at a state level versus at a federal level must be stopped due to the adverse effects it has caused on America as seen when comparing cases specifically in Arkansas.[412]

Therefore, the American government should adopt a solution such as: 1) removing Trump as President and replacing him with someone new in the position; 2) remove the Supreme Court Justice's lifetime positions and have equal political affiliated seats to be fair and prevent bullying, a stacked court, and bias; 3) incorporating standards similar to other states' and countries' immunities standards; 4) amending the Constitution to include a finite standard on when and to what extent presidential immunity exists; and 5) overruling the judicial precedent, particularly the decision set in *Trump v. United States*, so courts no longer rely on ambiguous binding decisions.[413] There is true fear in the judiciary creating unrest and by adopting and establishing these proposed solutions, America will finally have the balance of power needed to ensure the freedom the Founding Father's intended for American citizens to have.[414]

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409. *See*, Trump, 603 U.S; *see generally,* Blassingame v. Trump, 87 F.4th 1, 13 D.C. Cir. 2023.

410. *See*, Tory Hodges Lewis & Brett D. Watson, *Ark. Precedent on the L. of Precedents: Where Have We Been & Where Are We Now*?, 57 Ark. L. Rev. 10 at 12 (Winter 2022).

411. *See*, NCSL, *supra* note 259.

412. *See*, Ark. Code Ann. §21-8-305 (2024); *see generally*, State v. Oldner, 361 Ark. 316, 206 S.W.3d 818 (2005); *see generally*, State v. Cassell, 2013 Ark. 221, 427 S.W.3d 663 (2013); *see generally*, Edwards v. Campbell, 2010 Ark. 398, 370 S.W.3d 250 (2010); and *see generally*, Pruitt v. Smith, 2020 Ark. 382, 610 S.W.3d 660 (2020).

413. Library of Cong., *supra* note 279.

414. U.S. CONST. (the entirety of the Constitution does not mention presidential immunity); *see generally* Trump, 603 U.S. at 662 (Sotomayor, J., dissenting) (saying no historical evidence supported the majorities decision).