Mercer Law Review

Volume 75
Number 4 *Eleventh Circuit Survey*

Article 13

5-2024

Starting with the Text: Textualist Interpretation at the Eleventh Circuit

Stephen J. Greenway Jr.

Starting with the Text: Textualist Interpretation at the Eleventh Circuit

Stephen J. Greenway, Jr.*

I. INTRODUCTION

In the field of statutory interpretation, textualism has emerged as a foundational doctrine, emphasizing the supremacy of the statutory text. Among the courts that have fully embraced textualism in recent years is the United States Court of Appeals for the Eleventh Circuit. Although the Eleventh Circuit previously favored a purpose-based approach to statutory interpretation,[1] the court's opinions now broadly align with the common textualist principles advocated by Justice Scalia and Justice Thomas,[2] consistently emphasizing that the starting point in statutory interpretation is the text itself.[3] Through an examination of the Eleventh Circuit's textualist methodology, this Comment argues that the court's

*Editor, *Annual Survey of Georgia Law*, MERCER L. REV., Volume 75. I would like to thank my faculty advisor, Stuart Walker, along with Randy Beck, Stephen Petrany, Christopher Mills, Karen Sneddon, Miles Skedsvold, Brennan Mancil, Zachary Mullinax, Sara White, and Katie Anderson for their comments and suggestions to earlier drafts of this Comment. All errors are my own. I would also like to thank Greg Fleenor and Kelly Bryan for all that they taught me when I was a young writer. Finally, this Comment is dedicated to my father, who published his Comment for *Georgia Law Review* 31 years ago. S. Jefferson Greenway, Comment, *Unisys Finance Corp. v. Resolution Trust Corp.: The Seventh Circuit Creates A Grave Constitutional Question*, 27 GA. L. REV. 995 (1993).

1. *See, e.g.*, Caro-Galvan v. Curtis Richardson, Inc., 993 F.2d 1500, 1505 (11th Cir. 1993); Nat'l Wildlife Fed'n v. Marsh, 721 F.2d 767, 778 (11th Cir. 1983); WTWV, Inc. v. Nat'l Football League, 678 F.2d 142, 143 (11th Cir. 1982); Loc. Div. 732, Amalgamated Transit Union v. Metro. Atlanta Rapid Transit Auth., 667 F.2d 1327, 1334 (11th Cir. 1982) (appealing to legislative intent and statutory "purpose" in statutory interpretation).

2. See *infra* Part II.

3. United States v. Stevens, 997 F.3d 1307, 1314 (11th Cir. 2021) ("As with any statutory interpretation question, our analysis 'must begin, and usually ends, with the text of the statute.'" (quoting Boca Ciega Hotel, Inc., v. Bouchard Transp. Co., 51 F.3d 235, 237 (11th Cir. 1995))).

embrace of textualism has had a positive impact on its statutory jurisprudence, providing the court with objective tools for resolving statutory cases and a principled approach that elevates the words enacted by Congress over the subjective, normative values held by judges.

Additionally, this Comment also aims to provide practitioners[4] with a practical guide to textualism as applied by the Eleventh Circuit.[5] By surveying recent opinions and separate writings that articulate core textualist principles, this Comment aims to equip practitioners with the necessary tools to make effective textualist arguments in litigation,[6] while also offering scholars and commentators compelling evidence that textualism significantly surpasses its alternatives in providing courts with an objective method of interpreting legal texts.

This Comment proceeds as follows. Part II provides an overview of textualism as practiced by its leading advocates—Justice Scalia and Justice Thomas. Part III explores the Eleventh Circuit's application of textualist principles, emphasizing the court's commitment to the statutory text, use of dictionaries, consideration of statutory context, limited reliance on statutory purpose, and avoidance of legislative history to resolve statutory ambiguities. Part III also provides a detailed subsection on the common rules and presumptions about statutory language, commonly referred to as canons of construction, that aid the Eleventh Circuit in interpreting statutes. This walkthrough of the court's textualist approach reveals that, although textualism's core emphasis is the text itself, textualism is a holistic endeavor that combines multiple sources that provide the necessary context to achieve a fair reading of a statutory text.

---

4. Throughout its discussion of textualism as applied by the Eleventh Circuit, this Comment relies heavily on the court's most frequently cited textualist resource, Justice Scalia and Bryan Garner's treatise *Reading Law*. ANTONIN SCALIA & BRYAN A. GARNDER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012). By this Comment's count, the Eleventh Circuit has cited to Scalia and Garner's treatise in over 200 cases.

5. Although textualism is often associated with the Supreme Court of the United States, this Comment explores its application by a federal circuit court of appeals. *See* Lawrence Baum & James J. Brudney, *Two Roads Diverged: Statutory Interpretation by the Circuit Courts and the Supreme Court in the Same Cases*, 88 FORDHAM L. REV. 823 (2019); James J. Brudney & Lawrence Baum, *Protean Statutory Interpretation in the Courts of Appeals*, 57 WM. & MARY L. REV. 681 (2017); Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1 (2018).

6. This Comment places particular emphasis on cases decided from 2017 until the present. A discussion of the Eleventh Circuit's interpretation of administrative agency regulations falls outside the scope of this Comment.

Ultimately, the Eleventh Circuit's adherence to textualism reflects the court's fidelity to judicial restraint. The Eleventh Circuit's newfound textualist approach respects the separation of powers between Congress and the judiciary, leaves questions of what the law should be to the people, and secures the rule of law by furthering methodological transparency and prioritizing the enacted text over unenacted sources of meaning.

II. WHAT IS TEXTUALISM?

Textualism is the method of statutory interpretation that emphasizes the primacy of the text.[7] Textualism differs sharply from its methodological rival purposivism, which is the approach to legal interpretation that seeks to give effect to the legislature's underlying purpose or intent.[8] Although textualism was known and practiced by early American jurists, the modern "new textualism" emerged in the second half of the twentieth century as a reaction against purpose-driven methods of interpretation that relied heavily on legislative intent.[9] Led by jurists like Antonin Scalia, Clarence Thomas, and Frank Easterbrook, textualists attacked purposivist judicial opinions as "an invitation to judicial lawmaking" and "not compatible with [the American] democratic theory" of representative government.[10] Rather than interpreting statutes according to an unexpressed legislative intent, these textualists argued that judges should follow the ordinary meaning of the text irrespective of the ideological result.[11]

Textualism's commitment to the objective, plain meaning of the statutory language over subjective notions of legislative intent is a hallmark of its methodology. Writing for the Supreme Court in

---

7. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 22 (Amy Gutmann ed., 1997) ("The text is the law, and it is the text that must be observed.").

8. *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892) (articulating the purposivist approach to statutory interpretation, which focuses on the "spirit" and "the intention of [the statute's] makers"); JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 23 (4th ed. 2021) ("Purposivists . . . maintain that the legislature enacted the statute for an ascertainable reason, and that courts should read specific statutory provisions to advance that general statutory purpose.").

9. MANNING & STEPHENSON, *supra* note 8, at 58–59.

10. SCALIA, *supra* note 7, at 21; *see also* John F. Manning, *Second Generation Textualism*, 98 CALIF. L. REV. 1287, 1311 (2010) (describing Justice Scalia and Justice Thomas as "the Court's most committed textualists").

11. MANNING & STEPHENSON, *supra* note 8, at 58 ("[J]udges must hew closely to the meaning of a clear statutory text even when the result contradicts the statute's apparent purpose, however derived.").

Connecticut National Bank v. Germain,[12] Justice Thomas explained that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there."[13] Put differently, textualism emphasizes that the enacted text, not the unenacted intent of the legislature, is what counts in interpretation.[14]

Textualism underscores the importance of interpreting statutes according to the meaning they held at the time of their enactment.[15] Unlike more flexible methods of interpretation, textualists argue that the Constitution's separation of powers forbids courts from interpreting a statutory text based on Congress's apparent purpose or based on what a provision "ought to mean" in modern times.[16] Textualists operate under the assumption that the words used by Congress when a statute was passed retain their original meaning unless and until Congress chooses to amend them. This approach properly cabins the judicial role by preventing judges from adding a contemporary gloss to old statutory language.

Textualists generally possess an inherent respect for legislative compromise, recognizing that legislation is often the result of a delicate balance of competing interests and that the text represents a hard-fought bargain of policy decisions struck by lawmakers, not judges.[17] Textualist judges respect this compromise in values by interpreting and applying statutes according to their written text.[18] Rather than adjusting or reinterpreting the text to accommodate what might be perceived as the better policy outcome, textualism insists on fidelity to the delicate

---

12. 503 U.S. 249 (1992).

13. *Id.* at 253–54.

14. *See* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60 (1988) ("The words of the statute, and not the intent of the drafters, are the 'law.'").

15. Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 367–68 (2005) ("The typical textualist seeks to unearth the statutes' original meanings rather than enforcing whatever modern readers might take the statutes' language to mean.").

16. SCALIA, *supra* note 7, at 22; Bostock v. Clayton County, 590 U.S. 644, 780–81 (2020) (Kavanaugh, J., dissenting) ("[W]e are judges, not Members of Congress . . . Under the Constitution's separation of powers, our role as judges is to interpret and follow the law as written, regardless of whether we like the result . . . . Our role is not to make or amend the law.")

17. MANNING & STEPHENSON, *supra* note 8, at 71 ("[T]extualists conclude that respect for legislative supremacy requires judicial respect for . . . often arbitrary legislative compromises, rather than a judicial attempt to derive (and impose) a coherent statutory 'purpose.'").

18. *Cf.* William H. Pryor Jr., *Against Living Common Goodism*, 23 FEDERALIST SOC'Y REV. 24, 29 (2022) (arguing that the judicial oath imposes a "moral duty" on judges to support written legal texts).

compromise between competing legislative goals represented by the text.[19]

Another central tenet of textualism is its skepticism toward legislative history as a reliable tool of statutory interpretation. Textualists argue that reliance on legislative history materials, such as committee reports, floor debates, and other documents that purport to provide insight into the legislature's intent, often leads to subjective readings of the law.[20] Textualists assert that the statutory text itself is the only authentic expression of legislative intent and deference to legislative history raises a variety of stark constitutional and practical problems.[21]

Notably, textualism's victory over purposive interpretation in recent years has given way to a vigorous debate over how to properly apply textualist principles.[22] Some argue that textualist interpretation should begin and end with the semantic meaning of the statutory text.[23] Others argue for a more contextual textualism in which the text's structure, history, text-informed purpose, and background legal principles are all

---

19. *See* Wyeth v. Levine, 555 U.S. 555, 601 (2009) (Thomas, J., concurring) ("[A] statute's text might reflect a compromise between parties who wanted to pursue a particular goal to different extents.").

20. Shannon v. United States, 512 U.S. 573, 583 (1994) (Thomas, J.) (explaining that "passage[s] of legislative history [that are] . . . in no way anchored to text of the statute" are not reliable for purposes of interpretation). *But see* Comm'r of Internal Revenue v. Lundy, 516 U.S. 235, 255–57 (1996) (Thomas, J., dissenting) (examining "the statute's legislative history" when "Congress' intent … is difficult to discern" or when "Congress may have had *no* intent"); *see also* H. Brent McKnight, *The Emerging Contours of Justice Thomas's Textualism*, 12 REGENT U.L. REV. 365, 377 (2000) ("*Lundy* suggests legislative history has a limited 'last resort' role within Justice Thomas's textualism. Thomas believes the text is the guide in statutory construction. However, his *Lundy* opinion demonstrates that where the text is ambiguous and it is likely Congress had no relevant intent, rules of construction are powerless, making resort to legislative history necessary. Canons of construction help to discern congressional intent from the text, but they do not apply where there is no intent to discern.").

21. *See* Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators."); Digital Realty Tr., Inc. v. Somers, 583 U.S. 149, 172 (2018) (Thomas, J., concurring) ("Even assuming a majority of Congress read [a] Senate Report, agreed with it, and voted for [the bill] with the same intent, 'we are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended.'" (quoting Lawson v. FMR LLC, 571 U.S. 429, 459–60 (2014) (Scalia, J., concurring in part and concurring in judgment))).

22. *See, e.g.*, Kevin Tobia et al., *Progressive Textualism*, 110 GEO. L.J. 1437, 1455–58 (2022) (arguing for a progressive form of textualism rooted in "democratic interpretation").

23. *See* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 269 (2020) (arguing that "a federal judge should favor formalistic textualism—a relatively rule-bound method that promises to better constrain judicial discretion and thus a judge's proclivity to rule in favor of the wishes of the political faction that propelled her into power").

used to determine the original understanding of a statutory provision.[24] In short, although textualists share certain core beliefs about the written word as law, textualism is not a monolith. Textualists, including the self-identified textualists on the Eleventh Circuit, often disagree amongst themselves over how their methodology should cash out in particular cases.[25]

With this overview of textualism's fundamental precepts in mind, this Comment proceeds with a survey of textualism as applied by the Eleventh Circuit.

III. TEXTUALISM AT THE ELEVENTH CIRCUIT: PRINCIPLES AND APPLICATION

A. The Eleventh Circuit's Elevation of Objective Text over Subjective Purpose

Toward the turn of the century, textualist principles of interpretation began appearing in the decisions of the Eleventh Circuit. In 1998, the Eleventh Circuit clearly set out a standard for statutory interpretation rooted in textualism:

> 'In construing a statute *we must begin, and often should end as well, with the language of the statute itself*.' Where the language Congress chose to express its intent is clear and unambiguous, that is as far as we go to ascertain its intent because we must presume that Congress said what it meant and meant what it said.[26]

When interpreting federal law, the Eleventh Circuit's goal is "to give . . . statute[s] a 'fair reading.'"[27] Giving statutes a "fair reading" requires the court to determine "how a reasonable reader, fully competent in the language, would have understood the text at the time

---

24. *See, e.g.*, William Baude, *The 2023 Scalia Lecture: Beyond Textualism?*, 46 HARV. J.L. & PUB. POL'Y 1331, 1336 (2023) (arguing for a textualist interpretation "supplement[ed] . . . with the unwritten law that governs interpretation and background principles against which interpretation takes place").

25. *See, e.g.*, Brown v. Sec'y, U.S. Dep't of Health & Human Servs., 4 F.4th 1220 (11th Cir. 2021) (dividing over the scope of the CDC's statutory authority under 42 U.S.C. § 264), *vacated*, 20 F.4th 1385 (11th Cir. 2021); United States v. Garcon, 54 F.4th 1274 (11th Cir. 2022) (en banc) (dividing over the meaning "and" in the safety-valve relief provision of the First Step Act, 18 U.S.C. § 3553(f)(1)).

26. United States v. Steele, 147 F.3d 1316, 1318 (11th Cir. 1998) (quoting Merritt v. Dillard Paper Co., 120 F.3d 1181, 1185 (11th Cir. 1997)) (emphasis added).

27. Georgia Ass'n of Latino Elected Officials, Inc. v. Gwinnett Cnty. Bd. of Registration & Elections, 36 F.4th 1100, 1120 (11th Cir. 2022) (quoting SCALIA & GARNER, *supra* note 4, at 3).

it was issued."[28] Under this approach, the court ascertains and applies the text's ordinary public meaning to the case at hand.[29] The Eleventh Circuit's ordinary public meaning inquiry encompasses four guideposts: (1) starting with the text, (2) reading the text in context, (3) referencing the statutory purpose expressed in the text itself, and (4) employing the canons of construction as rules of thumb to clarify statutory meaning. As it should, the court's inquiry starts with the text of the statute.[30]

Litigants appearing before the Eleventh Circuit must prioritize the statutory text, because "[s]tatutory interpretation starts, and ideally ends, with the text."[31] This "supremacy-of-text principle" asserts that the text itself must be of "paramount concern" when courts perform interpretation.[32] The Eleventh Circuit consistently underscores that it is "the words of the statutes themselves" that guide the interpretation inquiry.[33] "If the text of the statute is unambiguous," the Eleventh Circuit "look[s] no further" and applies the law as written.[34] The court's job is finished if the plain meaning of the statutory text is clear and the statutory structure is logical.[35]

Textualism as applied in the Eleventh Circuit holds that "general policy concerns cannot overcome the plain language of the statute."[36] In

---

28. SCALIA & GARNER, *supra* note 4, at 33.

29. Heyman v. Cooper, 31 F.4th 1315, 1319 (11th Cir. 2022) ("In interpreting written law, [the court's] duty is to 'determine the ordinary public meaning' of the provision at issue.") (quoting *Bostock*, 590 U.S. at 654).

30. *Garcon*, 54 F.4th at 1277 ("We begin, as we must, with the text of the statute.").

31. Fuerst v. Hous. Auth. of City of Atlanta, 38 F.4th 860, 869 (11th Cir. 2022); *see also* United States v. DBB, Inc., 180 F.3d 1277, 1281 (11th Cir. 1999) ("The starting point for all statutory interpretation is the language of the statute itself.").

32. SCALIA & GARNER, *supra* note 4, § 2, at 56 (defining the supremacy-of-the-text principle as the theory that "the words of a governing text are of paramount concern and what they convey, in their context, is what the text means") ; *see* Savage Servs. Corp. v. United States, 25 F.4th 925, 941 (11th Cir. 2022); Andrews v. Warden, 958 F.3d 1072, 1078 (11th Cir. 2020); United States v. Frediani, 790 F.3d 1196, 1201 (11th Cir. 2015). *See also* SE Prop. Holdings, LLC v. Welch, 65 F.4th 1335, 1342 (11th Cir. 2023) (discussing the supremacy-of-text principle under Florida law).

33. Gregory v. Comm'r of Internal Revenue, 69 F.4th 762, 766 (11th Cir. 2023) (citing Harris v. Garner, 216 F.3d 970, 972 (11th Cir. 2000) (en banc)).

34. Iberiabank v. Beneva 41-I, LLC, 701 F.3d 916, 924 (11th Cir. 2012).

35. Kroner v. Comm'r of Internal Revenue, 48 F.4th 1272, 1276 (11th Cir. 2022) (explaining that the Eleventh Circuit's "'inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent'") (quoting United States v. Chafin, 808 F.3d 1263, 1270 (11th Cir. 2015)).

36. *In re* Guillen, 972 F.3d 1221, 1228 (11th Cir. 2020); *see also In re* BFW Liquidation, LLC, 899 F.3d 1178, 1193 (11th Cir. 2018) ("Our interpretation of the language of the statute obviously trumps any opposing policy argument.").

In re Cumbess,[37] the court explained that an "unarticulated 'intent' can[not] prevail over a statute's enacted text."[38] This is because the Eleventh Circuit rightly expects that if Congress intended to make law, it would have said so in the statutory text.[39] Because "no statute 'pursues its purposes at all costs,'"[40] the "polestar of statutory interpretation" at the Eleventh Circuit is the text itself.[41]

B. The Canons of Construction: Tools for Discerning Ordinary Meaning

After analyzing the text, the Eleventh Circuit may employ the statutory canons of construction to confirm a plain reading of the text or clarify statutory meaning.[42] Although the Latin names and the sheer number of these canons might be intimidating, the canons simply represent "presumptions about what an intelligently produced text conveys."[43] When there are two or more plausible readings of a statutory text, the Eleventh Circuit appropriately "look[s] to the canons of statutory construction as a guide" rather than an algorithm.[44] Litigants sometimes mistake the canons for hard-and-fast rules,[45] but as the Eleventh Circuit cautioned in *Heyman v. Cooper*,[46]

> [W]e shouldn't treat the canons 'like rigid rules,' lest we be 'led . . . astray.' . . . [Where] a wooden application of the canons would supplant rather than supply ordinary meaning . . . we remain

37. 960 F.3d 1325 (11th Cir. 2020).

38. *Id.* at 1335 (alterations adopted).

39. *Steele*, 147 F.3d at 1318 (explaining that, when interpreting statues, the Eleventh Circuit "presume[s] that Congress said what it meant and meant what it said"); *see also* Nat'l Coal Ass'n v. Chater, 81 F.3d 1077, 1082 (11th Cir. 1996) ("[A] general appeal to statutory purpose [cannot] overcome the specific language of [a statute], because the text of a statute is the most persuasive evidence of Congress's intent.").

40. United States v. Jackson, 995 F.3d 1308, 1311 (11th Cir. 2021) (quoting SCALIA & GARNER, *supra* note 4, § 2, at 57).

41. McAlpin v. Sneads, 61 F.4th 916, 929 (11th Cir. 2023). *Compare id. with* Carey v. Throwe, 957 F.3d 468, 483 (4th Cir. 2020) ("After all, the touchstone for statutory interpretation is congressional intent.").

42. *Heyman*, 31 F.4th at 1319 ("The canons of construction [or interpretation] often play a prominent role . . ., serving as useful tools to discern [a statute's] ordinary meaning.") (citation omitted).

43. SCALIA & GARNER, *supra* note 4, at 51.

44. *Garcon*, 54 F.4th at 1299 (Branch, J., dissenting).

45. *See* Hylton v. U.S. Att'y Gen., 992 F.3d 1154, 1160 (11th Cir. 2021) ("Although no canon is absolute, the relevant canons all cut in the same direction . . .").

46. *See Heyman*, 31 F.4th 1315.

> obligated to the text—not to what the canons might suggest about the text.[47]

So, even if litigants believe their ordinary-meaning argument is a winner, they should cite the canons to confirm to the court that the text weighs in their favor and that their interpretation is the best and perhaps "the only reasonable meaning of the statute."[48]

The canons of construction can be divided into three broad subgroups: (1) semantic, or "textual," canons; (2) contextual canons; and (3) substantive canons.[49] The semantic canons of construction are "simply a fancy way of referring to the general rules by which we understand the English language."[50] By contrast, the contextual canons provide the Eleventh Circuit with presumptions that assist with understanding the text as a whole.[51] Finally, substantive or "normative" canons are policy-based background principles that come into being after longstanding judicial application, such as the rule of lenity.[52] Although a comprehensive explanation of all of the canons can be found in Justice Scalia and Bryan Garner's treatise, this Comment proceeds to survey how the Eleventh Circuit has relied on all three types of interpretative canons.

1. The Semantic Canons of Construction

In a concurrence in *Calderon v. Sixt Rent a Car, LLC*,[53] a self-identified textualist judge on the Eleventh Circuit described semantic canons as

---

47. *Id.* at 1319 (quoting Facebook, Inc. v. Duguid, 141 S.Ct. 1163, 1175 (2021) (Alito, J., concurring) (alterations adopted); *see also Germain*, 503 U.S. at 253–54 (Thomas, J.) (explaining that the "canons of construction are no more than rules of thumb that help courts determine the meaning of legislation").

48. Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 970 (11th Cir. 2016) (en banc).

49. Scalia and Garner's treatise lists other categories of canons, including syntactic canons, *see* SCALIA & GARNER, *supra* note 4, §§ 17–23; expected-meaning canons, *see* SCALIA & GARNER, *supra* note 4, §§ 38–44; government-structuring canons, *see* SCALIA & GARNER, *supra* note 4, §§ 45–47; private-right canons, *see* SCALIA & GARNER, *supra* note 4, §§ 48–51; and stabilizing canons, *see* SCALIA & GARNER, *supra* note 4, §§ 52–57.

50. Brett Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2145 (2016).

51. *See* Kevin Tobia et al., *Statutory Interpretation from the Outside*, 122 COLUM. L. REV. 213, 225, 235 (2022) (arguing that contextual canons are "triggered by a certain kind of linguistic formulation or context, rather than by precise language" and that "[e]ach of these canons interacts with the literal meaning of a provision in some way, typically by narrowing it, on the basis of inferences from context.").

52. John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 82 n.44 (2006) (discussing substantive canons).

53. 5 F.4th 1204 (11th Cir. 2021).

tools that "provide 'the general rules by which we understand the English language.'"[54] These canons "help courts ascertain the ordinary meaning of a legal text—such as by reminding [judges]" of essential presumptions embedded in statutory language.[55] This section explores several of the semantic canons applied by the Eleventh Circuit in statutory cases.

a. The Ordinary Meaning Canon

The ordinary-meaning canon, regarded as the "'most fundamental semantic rule of interpretation,'"[56] holds that "[w]ords are to be understood in their ordinary, everyday meanings" unless the statutory context suggests otherwise.[57] Like the fixed-meaning cannon discussed below, this canon "assign[s] [statutory] terms their ordinary meaning at the time Congress adopted them."[58] As the Eleventh Circuit, sitting en banc, explained in *United States v. Garcon*,[59] the ordinary meaning canon instructs the court to seek and apply the ordinary meaning of the words and phrases in a statutory text as they were originally understood at the time of enactment, unless the context points in a different direction.[60]

When applying the ordinary-meaning canon, the Eleventh Circuit seeks to determine how a regular, reasonable speaker of English would have understood the statutory language.[61] When a term is not defined in the act itself, the Eleventh Circuit "look[s] to the common usage of words for their meaning."[62] Although evidence of contemporary, conversational prose may prove valuable in the search for the plain meaning of statutory

54. *Id.* at 1219 (Newsom, J., concurring) (quoting Kavanaugh, *supra* note 50, at 2145).

55. *Id.*

56. *Garcon*, 54 F.4th at 1277 (quoting SCALIA & GARNER, *supra* note 4, § 6, at 69).

57. Alberts v. Royal Caribbean Cruises, Ltd., 834 F.3d 1202, 1204 (11th Cir. 2016) (quoting SCALIA & GARNER, *supra* note 4, § 6, at 69).

58. Estate of Keeter v. Comm'r of Internal Revenue, 75 F.4th 1268, 1279 (11th Cir. 2023).

59. *See* 54 F.4th 1274.

60. *Id.* at 1277–78 ("[T]he command of the [ordinary-meaning] canon is simple: our job is to interpret the words consistent with their ordinary meaning at the time Congress enacted the statute, unless the context in which the words appear suggests some other meaning.") (cleaned up).

61. United States v. Chinchilla, 987 F.3d 1303, 1308 (11th Cir. 2021) (explaining that the Eleventh Circuit seeks to determine "the plain and ordinary meaning of the statutory language as it was understood" by a reasonable speaker of the English language "at the time the law was enacted").

62. CBS Inc. v. PrimeTime 24 Joint Venture, 245 F.3d 1217, 1222 (11th Cir. 2001) (citation omitted); *see also* FDIC v. Meyer, 510 U.S. 471, 476 (1994) (Thomas, J.) ("[I]n the absence of . . . a [statutory] definition, we construe a term in accordance with its ordinary or natural meaning.").

terms, evidence of everyday usage by average speakers is not dispositive.[63]

To determine the ordinary meaning of a statutory provision, the Eleventh Circuit considers a wide range of evidence from the time period in which the statute was enacted, such as common dictionaries.[64] Further, the plain meaning inquiry instructs the court to analyze the text itself, rather than the social or political circumstances that produced that text.[65] When the text is clear, the Eleventh Circuit's inquiry ceases. And, when the text is clear, the Eleventh Circuit does not look to rely on subjective sources of meaning, such as legislative intent or legislative history, to inject fresh meaning into that clear text.[66] Importantly, statutory context is a critical component of the ordinary-meaning canon. In determining the plain meaning of a statutory term or phrase, the Eleventh Circuit analyzes the text, the text in context, the statutory structure, and the law as a whole.[67]

b. The Fixed-Meaning Canon

The Eleventh Circuit applies the fixed-meaning canon when performing statutory interpretation. It is "hornbook law" that the meaning of a statute is fixed "'at the time of its enactment'" and does not change over time.[68] An application of the fixed-meaning canon enables the Eleventh Circuit to ascertain the ordinary public meaning of the

63. Sec. & Exch. Comm'n v. Complete Bus. Sols. Grp., Inc., 44 F.4th 1326, 1332 (11th Cir. 2022) (explaining that "colloquial usage, while relevant, doesn't control a statute's meaning."); *see also Heyman*, 31 F.4th at 1320 n.3 (explaining that "'conversational conventions"—relevant as they may be—do not control a statute's legal analysis. Therefore, . . . where conversational usage cuts both ways and an exhaustive review of dictionary definitions favors one interpretation over another . . . we see no reason to privilege indeterminate conversational usage over more formal indicators of meaning.") (alterations adopted) (internal citations omitted).

64. United States v. Dominguez, 997 F.3d 1121, 1124 (11th Cir. 2021) ("We can look to dictionaries and other materials from around [the relevant] time in an attempt to determine the ordinary public meaning.").

65. Marrache v. Bacardi U.S.A., Inc., 17 F.4th 1084, 1096 (11th Cir. 2021) ("The 'plain' in 'plain meaning of the words' requires [the court to] look to the actual language used in the statute, not to the circumstances that gave rise to that language.") (citations omitted).

66. CSX Corp. v. United States, 909 F.3d 366, 369 (11th Cir. 2018) (explaining that the Eleventh Circuit "does not 'resort to legislative history' when a statute is relatively clear, and [the court] 'certainly [does] not do so to undermine the plain meaning of the statutory language.'") (quoting *Harris*, 216 F.3d at 976).

67. *Georgia Ass'n of Latino Elected Officials*, 36 F.4th at 1120 (stating that the Eleventh Circuit "must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.") (citation omitted).

68. Clements v. Florida, 59 F.4th 1204, 1222 (11th Cir. 2023) (Newsom, J., concurring) (quoting *Bostock*, 590 U.S. at 654).

statutory text as it would have been understood by the public at the time the law was enacted. This canon rightly constrains the Eleventh Circuit from rewriting old statutory text to account for changes in circumstances that are better left to the people's representatives in Congress.[69]

c. The Negative-Implication Canon

The negative-implication canon, or *expressio unius est exclusio alterius*, is a semantic canon that holds that when Congress has enumerated a series of items, courts should presume that items left off the list were intentionally left out.[70] In the recent Eleventh Circuit case *Johnson v. White*,[71] the negative-implication canon significantly influenced the court's ruling. There, a federal prisoner sued his prison guards for sexual assault and battery under 28 U.S.C. § 1346(b)(2) of the Federal Tort Claims Act (FTCA).[72] The court ruled against Johnson, partly because the "*expressio unius* canon weigh[ed] heavily against Johnson's position."[73] The court in *Johnson* noted that Congress, when amending the FTCA in 2013, chose to import the definition of "sexual act" from another statute: 18 U.S.C. § 2246(2).[74] But Congress had *not* chosen to import the definition for "sexual contact," the crime that Johnson was alleging. The court explained that the "2013 amendment to § 1346(b)(2) strongly indicate[d] Congress's intent to exclude allegations like Johnson's."[75] Because "Congress expressly incorporated § 2246(2)'s definition of 'sexual act' into the FTCA, but didn't incorporate the immediately adjacent subsection, § 2246(3), which defines 'sexual contact[,]'" the court concluded that Congress intentionally excluded "sexual contact" from § 1346(b)(2).[76]

The Eleventh Circuit has previously noted that the negative-implication canon has "its limits and exceptions and cannot apply when the . . . [statutory] context [is] contrary" to a fair reading of

69. Domante v. Dish Networks, L.L.C., 974 F.3d 1342, 1346 (11th Cir. 2020) (Eleventh Circuit judges "not at liberty to add statutory language where it does not exist.").

70. Christian Coal. Of Fla., Inc. v. United States, 662 F.3d 1182, 1193 (11th Cir. 2011) (describing the negative-implication canon as "when a legislature has enumerated a list or series of related items, the legislature intended to exclude similar items not specifically included in the list.").

71. 989 F.3d 913 (11th Cir. 2021).

72. 28 U.S.C. § 1346(b)(2) (1946).

73. *Johnson*, 989 F.3d at 918.

74. *Id.* at 914.

75. *Id.*

76. *Id.* at 918 (citing United States v. Hurtado, 779 F.2d 1467, 1475 (11th Cir. 1985) "We may not import into the statute a provision Congress elected not to include.") (alterations adopted)).

the statute.[77] Other prominent textualists agree. Writing for the Supreme Court in *Marx v. General Revenue Corp.*,[78] Justice Thomas explained that "the *expressio unius* canon *does not apply* 'unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it,'" and "the canon can be overcome by 'contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion.'"[79] Thus, while the negative implication canon may be persuasive, litigants should remember that the canon does not provide an absolute rule and its application always hinges on the specific statutory context.

d. The Conjunctive/Disjunctive Canon

Another important semantic canon in the Eleventh Circuit textualist doctrine is the conjunctive/disjunctive canon. According to this canon, the court presumes the word "or" bears a disjunctive meaning, indicating alternatives that should "be treated separately."[80] Conversely, the Eleventh Circuit has explained that "and" should be presumed to be read conjunctively, unless the statutory context suggests another meaning."[81] As always, statutory context can be used to overcome either of these rules regarding conjunctions.[82]

In *United States v. Garcon*,[83] the Eleventh Circuit, sitting en banc, grappled with competing textualist interpretations of the word "and" in 18 U.S.C. § 3553(f)(1),[84] with one faction advocating for its conjunctive

77. United States v. Castro, 837 F.2d 441, 442–43 (11th Cir. 1988).

78. 568 U.S. 371 (2013).

79. *Id.* at 381 (quoting Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003)) (emphasis supplied). For an example of the Eleventh Circuit determining that context precluded the application of the negative-implication canon, *see Castro*, 837 F.2d at 442–43.

80. Dacostagomez-Aguilar v. U.S. Att'y Gen., 40 F.4th 1312, 1316 (11th Cir. 2022) (citation omitted).

81. Am. Bankers Ins. Grp. v. United States, 408 F.3d 1328, 1332 (11th Cir. 2005).

82. *See, e.g.*, Shaw v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 605 F.3d 1250, 1254 (11th Cir. 2010) (explaining that "the context in which the word ['and'] appears often resolves any superficial uncertainty"); Peacock v. Lubbock Compress Co., 252 F.2d 892, 893 (5th Cir. 1958) (stating the conjunctive presumption regarding "and" is rebuttable); Noell v. Am. Design, Inc., 764 F.2d 827, 833 (11th Cir. 1985) (explaining how the word "'or' is frequently construed to mean 'and,' and *vice versa*, in order to carry out the evident intent of the parties.").

83. 54 F.4th 1274.

84. 18 U.S.C. § 3553 (2018).

reading and another taking a disjunctive stance. Chief Judge Pryor,[85] delivered the majority opinion, held that "and" should be read in its conjunctive sense. Judge Branch, joined by several other judges, dissented, asserting that a disjunctive interpretation aligned with the statute's structure and context.

Section 3553(f)(1)(A)–(C)[86] enumerated the requirements for a defendant to be eligible for safety-valve relief. Under § 3553(f)(1), a defendant may be sentenced without regard to any statutory mandatory minimum sentence "if the defendant does not have (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, . . . (B) a prior 3-point offense . . . *and* (C) a prior 2-point violent offense . . . ."[87] The question in *Garcon* was whether the "and" in § 3553(f)(1) should be read in its ordinary, conjunctive sense.[88]

The court held that "and" in § 3553(f)(1) was conjunctive. The court explained that "when 'and' is used to connect a list of requirements, [it] ordinarily has a 'conjunctive' sense, meaning that all requirements must be met."[89] Moreover, the court asserted that "'and' retains its conjunctive sense when a list of requirements follows a negative."[90] The court applied this semantic presumption and concluded that the defendant's "prior 3-point offense does not disqualify him from safety-valve relief . . . [b]ecause [the defendant] had a prior 3-point offense but does not have 4 criminal history points (excluding any 1-point offense) or a prior 2-point violent offense."[91]

Judge Branch, joined by Judge Grant, Judge Brasher, and, in part, by Judge Jordan, rejected the majority's interpretation. The dissent argued that the majority's reading of § 3553(f)(1) was "contrary to the structure and context of the statute . . . [and] . . . create[d] two surplusage problems."[92] In the dissent's view, "and" should be read in the disjunctive with the result that "§ 3553(f)(1) . . . bars safety-valve relief for defendants who have any one of the enumerated criminal history characteristics in (A)–(C)."[93] "[T]he conjunctive presumption given the

85. Throughout this Comment, Chief Judge William H. Pryor is referred to by his current title, even in discussions of cases that predate his chief judgeship, to distinguish him from Judge Jill A. Pryor.

86. 18 U.S.C. § 3553(f)(1)(A)–(C) (2018).

87. 18 U.S.C. § 3553(f)(1) (2018) (emphasis added).

88. *Garcon*, 54 F.4th 1274 at 1276.

89. *Id.* at 1278.

90. *Id.* (citing SCALIA & GARNER, *supra* note 4, § 12, at 119).

91. *Id.*

92. *Id.* at 1295 (Branch, J., dissenting).

93. *Id.*

term 'and,'" the dissent explained, "is rebuttable."[94] Rather than reading the word "and" in a vacuum, the dissent pointed to statutory "context and structural cues," which, in her view, meant that "the best reading of 'and' in § 3553(f)(1) is that it operates disjunctively."[95]

The disagreement in *Garcon* demonstrates how self-identified textualists on the Eleventh Circuit can disagree over when statutory context should supersede the application of a canon of construction. The Eleventh Circuit's dueling textualist opinions in *Garcon* also underscores the potential impact of additional canons, like the anti-surplusage canon, on the textualist analysis.

e. Other Semantic Canons

Practitioners seeking additional case citations illustrating applications of semantic canons not thoroughly explored in this Comment, including the omitted-case canon,[96] the general-terms canon,[97] the presumption of nonexclusive "include,"[98] and the unintelligibility canon,[99] are encouraged to refer to the footnotes.

---

94. *Id.* at 1298 (Branch, J., dissenting).

95. *Id.*

96. *See* Samak v. Warden, FCC Coleman-Medium, 766 F.3d 1271, 1289 (11th Cir. 2014) (Pryor, C.J., concurring) (applying the omitted-case cannon, which provides that "where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied") (alterations adopted) (citation omitted); *see also* SCALIA & GARNER, *supra* note 4, § 8, at 93 (explaining the omitted-case canon of construction).

97. Barrientos v. CoreCivic, Inc., 951 F.3d 1269, 1279 (11th Cir. 2020) (explaining that, under the general-terms canon, the Eleventh Circuit "should give general terms their general meaning"). *See also* SCALIA & GARNER, *supra* note 4, § 9 at 103 ("The argument most frequently made against giving general terms their general meaning is the one made (and rejected) in the *Slaughter-House* cases—that those who adopted the provision had in mind a particular narrow objective (equal protection for blacks) though they expressed a more general one (equal protection for 'any person')."); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (Scalia, J.) (explaining that "[s]tatutory prohibitions often go *beyond the principal evil to cover reasonably comparable evils*, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.") (emphasis added).

98. *See* United States v. Lange, 862 F.3d 1290, 1295 (11th Cir. 2017), *abrogated by* United States v. Dupree, 57 F.4th 1269 (11th Cir. 2023) (en banc) (applying the "traditional rule[] of statutory construction . . . that the word *include* does not ordinary introduce an exhaustive list") (internal citation omitted).

99. *See* United States v. Matchett, 837 F.3d 1118, 1128 (11th Cir. 2016) (Pryor, C.J.) (denial of rehearing en banc) (explaining that, because "an unintelligible text is inoperative, judges do not apply gibberish-filled statutory language") (cleaned up); *see also* SCALIA & GARNER, *supra* note 4, § 16 at 32–33 (discussing the unintelligibility canon).

2. The Contextual Canons of Construction

While semantic canons focus on how statutory language is used, contextual canons remind textualists to look at a particular statutory provision in light of its complete context. This Comment turns now to a survey of how the Eleventh Circuit has applied the contextual canons.

a. The Anti-Surplusage Canon

Textualism rightfully instructs judges to look to the statutory context, in part, to avoid interpretations that "render certain statutory language redundant or otherwise superfluous."[100] This is known as the anti-surplusage canon of construction, which holds that a statute should be read in a manner that makes all of the provisions operable.[101] Following this "cardinal principle of statutory construction,"[102] the Eleventh Circuit reads a statutory provision and "attempt[s] to give effect to every word or provision" Congress used in drafting the statute.[103]

Self-identified textualists on the Eleventh Circuit have invoked the anti-surplusage canon to combat contrary interpretations that would essentially nullify the impact of a neighboring statutory provision.[104] But the anti-surplusage canon is not an absolute rule. In *Barton v. U.S. Attorney General*,[105] the Eleventh Circuit explained that the anti-surplusage canon may be overcome "when it would make an otherwise unambiguous statute ambiguous."[106] "[W]hen faced with a choice between a plain-text reading that" produces superfluity and "an interpretation that gives every word independent meaning, but in the doing, muddies up the statute," the Eleventh Circuit goes with the ordinary plain meaning of the text.[107] Notably, the proper role of both the presumption of consistent usage and the anti-surplusage canon

100. MANNING & STEPHENSON, *supra* note 8, at 342.

101. United States v. Hastie, 854 F.3d 1298, 1304 (11th Cir. 2017) (describing the anti-surplusage canon as the principle that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.") (citation omitted); *see also* SCALIA & GARNER, *supra* note 4, at 174.

102. TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001).

103. In Re Shek, 947 F.3d 770, 777 (11th Cir. 2020); *see also* United States v. Alabama, 778 F.3d 926, 938 (11th Cir. 2015) ("[W]hen we engage in statutory interpretation, it is our duty to give effect, if possible, to every clause and word of a statute.") (alterations adopted) (citation omitted).

104. *Garcon*, 54 F.4th at 1299 (Branch, J., dissenting) ("The surplusage canon 'is strongest when . . . an interpretation would render superfluous another part of the same statutory scheme.'") (quoting *Marx*, 568 U.S. at 386).

105. 904 F.3d 1294 (11th Cir. 2018).

106. *Id.* at 1301.

107. *Id.* (citation omitted).

continues to be a matter of substantial debate amongst self-textualists on the Eleventh Circuit.[108]

b. The Associated-Words Canon

The associated-words canon, also known as "[t]he interpretive maximum *noscitur a sociis*[,] counsels that a word is known by the company it keeps."[109] The associated-words canon is based on the presumption that the meaning of a statutory term can be deduced by the words that appear alongside it.[110] For example, "when general language, such as 'including,' *precedes* specific examples, the appropriate canon of statutory construction is *noscitur a sociis*."[111] The idea is that, like "birds of a feather flock together," so do statutory terms.[112]

The Eleventh Circuit applied the associated-words canon in *Paresky v. United States*.[113] In a matter of first impression, the Eleventh Circuit was asked to decide whether a taxpayer could bring suit against the United States for overpayment interest under 28 U.S.C. § 1346(a)(1).[114] The court focused in on "the word 'sum' used in the phrase 'any sum alleged to have been excessive or in any matter wrongfully collected'" to determine whether it encompassed overpayment interest.[115] The court properly applied the associated-words canon to discern the ordinary meaning of the term "sum" as used in the statute.[116] The court noted that "'sum' appears in a list of terms that describe amounts previously paid by a taxpayer to the government—a 'tax' and a 'penalty.'"[117] Moreover, the court observed that the statutory context revealed that "the terms used in the other two categories of § 1346(a)(1), which involve amounts of money assessed, collected, and retained by the government" likely meant that § 1346(a)(1)'s "'any sum' category likewise refers to an amount of money assessed, collected, and retained by the government."[118]

---

108. *Compare Garcon*, 54 F.4th at 1281–82 (Pryor, C.J.) *with id.* at 1290 (Newsom, J., concurring) *with id.* at 1301–03 (Branch, J., dissenting).

109. People for Ethical Treatment of Animals, Inc. v. Miami Seaquarium, 879 F.3d 1142, 1147 (11th Cir. 2018) (citation omitted).

110. United States v. Dawson, 64 F.4th 1227, 1237 (11th Cir. 2023) ("*[N]oscitur a sociis* 'counsels that a word is given more precise content by the neighboring words with which it is associated.'") (quoting United States v. Williams, 553 U.S. 285, 294 (2008)).

111. In re Piazza, 719 F.3d 1253, 1263 n.4 (11th Cir. 2013).

112. SCALIA & GARNER, *supra* note 4, § 31, at 195.

113. 995 F.3d 1281 (11th Cir. 2021).

114. 28 U.S.C. § 1346(a)(1) (2013).

115. *Paresky*, 995 F.3d at 1287.

116. *Id.* at 1288.

117. *Id.*

118. *Id.*

Applying the associated-words canon, the court concluded that overpayment interest was "not such an amount" and therefore not encompassed by the statute's "any sum" category.[119]

The Eleventh Circuit's opinion in *Paresky* illustrates how litigants can use the associated-words canon to argue that the meaning of a disputed statutory term should be determined by examining the words and phrases with which it is grouped, rather than in isolation.

c. The Absurdity Doctrine

The absurdity doctrine is a contextual canon that states that "[a] provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person can approve."[120] This doctrine empowers the courts to "depart from the literal meaning of an unambiguous statute only where a rational Congress could not conceivably have intended the literal meaning to apply."[121] In *Durr v. Shinseki*,[122] the Eleventh Circuit elaborated on the principle underlying the canon: "Because the legislature is presumed to act with sensible and reasonable purpose, a statute should, if at all possible, be read so as to avoid an unjust or absurd conclusion."[123]

The Eleventh Circuit appropriately reserves the absurdity doctrine for "'rare and exceptional circumstances.'"[124] Indeed, as the court explained in *In re Yerian*,[125] the Eleventh Circuit "applies an 'exacting standard for finding absurdity.'"[126] The court's caution to declare a statutory text "absurd" is appropriate because any other standard would place too much discretion in the hands of unelected, unaccountable judges.[127] Thus, litigants should not expect to invoke the absurdity doctrine and get

119. *Id.*

120. SCALIA & GARNER, *supra* note 4, § 37, at 234.

121. Vachon v. Travelers Home & Marine Ins. Co., 20 F.4th 1343, 1350 (11th Cir. 2021) (Pryor, C.J., concurring) (internal citations and punctuation omitted); *see also* Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc., 939 F.3d 1145, 1161 (11th Cir. 2019) ("We look beyond the plain language of a statute only if applying the statute in accordance with the plain language would lead to an absurd result.").

122. 638 F.3d 1342 (11th Cir. 2011).

123. *Id.* at 1349 (citation omitted).

124. *Garcon*, 54 F.4th at at 1283 (quoting *Vachon*, 20 F.4th at 1350 (Pryor, C.J., concurring)).

125. 927 F.3d 1223 (11th Cir. 2019).

126. *Id.* at 1232.

127. *Merritt*, 120 F.3d at 1188 (explaining that, without a high bar for finding absurdity, "clearly expressed legislative decisions would be subject to the policy predilections of judges.").

around an unfavorable application of the plain text. The court has stated that "[e]ven if a law produces a result that may seem odd, that oddity does not render the law 'absurd.' . . . And a law must be truly absurd before we can disregard its plain meaning."[128]

d. Other Contextual Canons

Practitioners seeking additional case citations to other contextual canons not thoroughly explored in this Comment, including the presumption of consistent usage,[129] the harmonious-reading canon,[130] the general-specific canon,[131] the *ejusdem generis* canon,[132] the

128. United States v. Jackson, 55 F.4th 846, 860 (11th Cir. 2022) (citations omitted).

129. *See* United States v. Bryant, 996 F.3d 1243, 1258 (11th Cir. 2021) (presuming, under the presumption of consistent canon, "that the same words will be interpreted in the same way in the same statute"); Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 11 F.4th 1266, 1278 (11th Cir. 2021) ("[W]e generally presume that identical words used in different parts of the same act are intended to have the same meaning.") (citation omitted); SCALIA & GARNER, *supra* note 4, § 25, at 170 ("A word or phrase is presumed to bear the same meaning throughout a text.").

130. *See Hylton*, 992 F.3d at 1159–60 (explaining that the harmonious-reading canon instructs that "'provisions of a text should be interpreted in a way that renders them compatible'" (quoting SCALIA & GARNER, *supra* note 4, § 27, at 180)).

131. Nguyen v. United States, 556 F.3d 1244, 1253 (11th Cir. 2009) ("The [general-specific] canon is that a specific statutory provision trumps a general one."); ConArt, Inc. v. Hellmuth, Obata + Kassabaum, Inc., 504 F.3d 1208, 1210 (11th Cir. 2007) ("[W]hen presented with a potential overlap between the broadly sweeping terms of a statute of general application that appear to apply to an entire class, and the narrow but specific terms of a statute that apply to only a subgroup of that class, we avoid conflict between the two by reading the specific as an exception to the general."); CSX Corporation v. United States, 18 F.4th 672, 683 (11th Cir. 2021). (explaining that the general-specific canon "only applies when 'conflicting provisions cannot be reconciled—when the attribution of no permissible meaning can eliminate the conflict.'" (quoting SCALIA & GARNER, *supra note 4*, § 28, at 183)).

132. *See, e.g.*, Allen v. Thomas, 161 F.3d 667, 671 (11th Cir. 1998); City of Delray Beach v. Agric. Ins. Co., 85 F.3d 1527, 1534 (11th Cir. 1996); United States v. Baxter Int'l, Inc., 345 F.3d 866, 906 (11th Cir. 2003); Snapp v. Unlimited Concepts, Inc., 208 F.3d 928, 934 (11th Cir. 2000) (applying the associated-words canon).

distributive-phrasing canon,[133] the interpretive-direction canon,[134] and the title-and-headings canon,[135] are encouraged to refer to the footnotes.

3. The Substantive Canons of Construction

As one self-identified textualist judge on the Eleventh Circuit has explained, substantive canons, which "have little (if anything) to do with a text's ordinary meaning, instruct courts to favor certain substantive policies in interpreting [the] text."[136] With this distinction in mind, this Comment turns to how a few of the most notable substantive canons have been applied at the Eleventh Circuit.

a. The Rule of Lenity

The granddaddy of all the substantive canons is the rule of lenity.[137] The Eleventh Circuit has stated that the rule of lenity functions as a

133. *Garcon*, 54 F.4th at 1281 ("The [distributive] canon recognizes that sometimes where a sentence contains several antecedents and several consequents, courts should read them distributively and apply the words to the subjects which, by context, they seem most properly to relate.") (citation omitted); Encino Motorcars, LLC v. Navarro, 584 U.S. 79, 87–88 (2018) (Thomas, J.) (explaining that "the distributive canon has the most force when the statute allows for one-to-one matching. . . . [and] when an ordinary, disjunctive reading is linguistically impossible."); SCALIA & GARNER, *supra* note 4, § 33, at 214 ("Distributive phrasing applies each expression to its appropriate referent (*reddendo singula singulis*).").

134. Stansell v. Revolutionary Armed Forces of Colombia, 704 F.3d 910, 915 (11th Cir. 2013) ("In general, statutory definitions control the meaning of a statute's terms."); CRI-Leslie, LLC v. Comm'r of Internal Revenue, 882 F.3d 1026, 1029–30 (11th Cir. 2018) (hewing closely to the definition sections in the relevant provisions of the Internal Revenue Code); SCALIA & GARNER, *supra* note 4, § 36, at 225 ("Definition sections and interpretation clauses are to be carefully followed."). *But see id.* at 228 ("Definitions are, after all, just one indication of meaning—a very strong indication, to be sure, but nonetheless one that can be contradicted by other indications.").

135. *See Bryant*, 996 F.3d at 1258 ("Titles are permissible indicators of meaning.") (citation omitted). *Fuerst*, 38 F.4th at 870 ("[Federal courts are not responsible for policing Congress's consistent use of headings throughout a large and complex act. Rather, where the statutory text is complicated and prolific, headings and titles can do no more than indicate the provisions in the most general matter.") (citation omitted); *see also* Scalia & Garner, *supra* note 4, § 35, at 221–22 ("[A] title or heading should never be allowed to override the plain words of a text."); Auriga Polymers Inc. v. PMCM2, LLC as Tr. for Beaulieu Liquidating Tr., 40 F.4th 1273, 1286 (11th Cir. 2022) (internal citations omitted); Avila v. U.S. Att'y Gen., 560 F.3d 1281, 1284 (11th Cir. 2009); Essex Ins. Co. v. Zota, 466 F.3d 981, 989–90 (11th Cir. 2006) (holding that titles and headings cannot overcome plain statutory text).

136. *Calderon*, 5 F.4th at 1219 (Newsom, J., concurring) (citing John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 96 (2001)).

137. Justice Thomas has explained that the rule of lenity "first emerged in 16th-century England in reaction to Parliament's practice of making large swaths of crimes capital offenses." Johnson v. United States, 576 U.S. 591, 613–14 (2015) (Thomas, J., concurring).

tie-breaking canon and applies "only when, after consulting traditional canons of statutory interpretation, the court is left with an ambiguous statute."[138] In *United States v. Hastie*,[139] the court explained, "'[t]he rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.'"[140] Under these narrow conditions, the court "construe[s] that statute in favor of criminal defendants."[141] The court has said that the canon's function is two-fold: (1) "to provide defendants with fair warning that their actions may trigger criminal consequences"; and (2) "to ensure that the legislature (and not the judiciary) remains responsible for criminalizing conduct."[142] In *United States v. Sanchez*,[143] the court was plain: "The rule of lenity cannot override the clear directive of a statute."[144]

b. The Clear-Statement Rule

In *Reading Law*, Justice Scalia and Bryan Garner explain that the clear-statement rule is "[a] doctrine holding that a legal instrument, esp. a statute, will not have some specified effect unless that result is unquestionably produced by the text."[145] One example is the "rule meant to protect state sovereignty and autonomy."[146] First recognized by the

---

138. *Dawson*, 64 F.4th at 1239 (citing Shular v. United States, 589 U.S. 154, 165 (2020)); *cf.* Gonzalez v. CoreCivic, Inc., 986 F.3d 536, 539 (5th Cir. 2021) (explaining that the rule of lenity "has force only where a law is 'grievously ambiguous, meaning that the court can make no more than a guess as to what the statute means'" (quoting *Shular*, 589 U.S. at 168 (Kavanaugh, J., concurring))).

139. 854 F.3d 1298 (11th Cir. 2017).

140. *Id.* at 1305 (quoting Callanan v. United States, 364 U.S. 587, 596 (1961)).

141. Romero v. Sec'y, U.S. Dep't of Homeland Sec., 20 F.4th 1374, 1383 (11th Cir. 2021). *But see* United States v. Svete, 556 F.3d 1157, 1169 (11th Cir. 2009) (en banc) (determining that "[t]he rule of lenity is inapplicable" where the statue "does not 'criminalize a broad range of apparently innocent conduct.'" (quoting Liparota v. United States, 471 U.S. 419, 426 (1985))).

142. *Romero*, 20 F.4th at 1383 (citing United States v. Bass, 404 U.S. 336, 348 (1971)); *see also* United States v. Phifer, 909 F.3d 372, 383 (11th Cir. 2018) (explaining that the principle underlying the rule of lenity is that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.") (citation omitted).

143. 30 F.4th 1063 (11th Cir. 2022).

144. *Id.* at 1075; *see also* Mulhall v. Unite Here Local 355, 667 F.3d 1211, 1216 (11th Cir. 2012) ("The rule of lenity applies only when a statute is ambiguous . . .") (citation omitted).

145. SCALIA & GARNER, *supra* note 4, at 426.

146. MANNING & STEPHENSON, *supra* note 8, at 425.

Supreme Court in *Gregory v. Ashcroft*,[147] this particular clear-statement rule holds "that if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute."[148] Notably, "Supreme Court precedent . . . 'requires Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power . . .'"[149] Moreover, Eleventh Circuit precedent stresses that "'[i]n the absence of such clarity of intent, Congress cannot be deemed to have significantly changed the federal-state balance.'"[150]

c. The Constitutional-Doubt Canon

The Eleventh Circuit is frequently called upon to resolve statutory interpretation disputes that implicate guarantees under the federal Constitution. In such cases, the court applies the constitutional-doubt canon, which holds that courts should construe statutes in favor of their constitutionality.[151] When weighing competing interpretations of a statute, the Eleventh Circuit applies the canon as a "'reasonable presumption that the legislature did not intend the alternative which raises serious constitutional doubts.'"[152]

In *Ovalles v. United States*,[153] the Eleventh Circuit, sitting en banc, adopted the Supreme Court's interpretation of the constitutional-doubt canon as a tie-breaking "tool for choosing between competing plausible interpretations of statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious

147. 501 U.S. 452, 461 (1991) ("This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.").

148. Brown v. Sec'y, U.S. Dep't of Health & Human Servs., 4 F.4th 1220, 1251 (11th Cir. 2021) (Branch, J., dissenting) (citation omitted), *vacated*, 20 F.4th 1385 (11th Cir. 2021).

149. *Id.* at 1251 n.24 (quoting U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 590 U.S. 604, 621–22 (2020)).

150. *Id.* at 1251 n.25 (quoting Fla. E. Coast Ry. Co. v. City of W. Palm Beach, 266 F.3d 1324, 1328 (11th Cir. 2001)).

151. Tilton v. Playboy Entm't Grp., Inc., 554 F.3d 1371, 1376 (11th Cir. 2009) (describing the doctrine of constitutional doubt as "instruct[ing] [courts] to construe a statute that is 'genuinely susceptible to two constructions' in favor of the construction that avoids 'a serious likelihood that the statute will be held unconstitutional'") (quoting United States v. Stone, 139 F.3d 822, 836 (11th Cir. 1998) (per curium)).

152. Pine v. City of W. Palm Beach, 762 F.3d 1262, 1270–71 (11th Cir. 2014) (quoting Clark v. Martinez, 543 U.S. 371, 381 (2005)) (alterations adopted).

153. 905 F.3d 1231 (11th Cir. 2018) (en banc), *abrogated by* United States v. Davis, 139 S. Ct. 2319, 2323–24 (2019).

constitutional doubts."[154] There, the issue was whether 18 U.S.C. § 924(c)[155]—which makes it a federal crime for an individual to use, carry, or possess a firearm in connection with a "'crime of violence'"—was unconstitutionally vague.[156]

The Eleventh Circuit began its analysis by stating that, under Supreme Court precedent, the court is "'*obligated* to construe a statute to avoid constitutional problems' if it is 'fairly possible' to do so."[157] And this command, the court emphasized, "is particularly true where . . . absent a reasonably saving construction, a statute might be unconstitutionally vague."[158] To determine whether the constitutional-avoidance canon applied in *Ovalles*, the court considered whether § 924(c)(3)(B)'s residual clause was "in fact susceptible of multiple interpretations . . . [that were] plausible . . . or fairly possible"[159] The defendant argued that the constitutional-avoidance canon should not apply because "the text of § 924(c)(3)(B) is not open to competing plausible interpretations."[160] But the court disagreed. After surveying Supreme Court precedent covering "similarly worded residual clauses," the court reasoned that the statute was, in fact, susceptible to two different meanings: a categorical approach, the one favored by the defendant, and a conduct-based approach.[161] Because the Supreme Court previously ruled that such categorical interpretations of similar residual clauses are unconstitutionally vague, if the court determined that a categorical interpretation was the only "fairly possible" interpretation of § 924(c)(3), the court would have to declare the residual clause unconstitutionally vague as well. Put simply, the case came down to whether § 924(c)(3)'s residual clause could be fairly interpreted using "the statute-saving" construction, the conduct-based approach.[162]

After a thorough, and, at times "downright clunky," examination of "whether § 924(c)(3)'s residual clause truly *compels* the categorical

154. *Id.* at 1240 (quoting *Clark*, 543 U.S. at 381).

155. 18 U.S.C. § 924(c) (1996).

156. *Ovalles*, 905 F.3d at 1233 (quoting 18 U.S.C. § 924(c)(1)(A)). Specifically, the appeal turned on whether § 924(c)(3)'s residual clause—defining the term "crime of violence" as a felony "that by its nature involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"—was void for vagueness under the Due Process Clause.

157. *Id.* at 1240 (quoting I.N.S. v. St. Cyr, 533 U.S. 289, 300 (2001)) (alterations adopted).

158. *Id.*

159. *Id.* (citations omitted).

160. *Id.*

161. *Id.* at 1234.

162. *Id.* at 1251.

approach," the Eleventh Circuit concluded that the evidence favoring one interpretation over the other was "something of a mixed bag."[163] In the end, the court correctly relied on the constitutional-doubt canon to resolve the uncertainty in the case. The court explained that "in constitutional-doubt land, the tie (or the toss-up, or even the shoulder-shrug) goes to the statute-saving option."[164]

d. The Debate Over Substantive Canons

Over the last decade, substantive canons have become the subject of increasing controversy for textualist judges. In her influential law review article, *Substantive Canons and Faithful Agency*,[165] Justice Barrett[166] questioned whether substantive canons were consistent with proper textualism.[167] Justice Barrett concluded that courts "cannot advance even a constitutional value at the expense of a statute's plain language."[168] She argued that, only if "the proposed interpretation" yielded by a substantive canon is "plausible," were courts then permitted to exercise their "limited power to push a statute in a direction that better accommodates constitutional values."[169] She conceded that the inherent "conflict between substantive canons" and "the judicial obligation of faithful agency"—the principle that judges should act as Congress's faithful agents when interpreting statutes—"pushes textualists to think hard"[170] about whether using a substantive canon "require[s] [them] to depart from a statute's most natural interpretation" according to its plain text.[171]

Other scholars, such as William Baude and Stephen Sachs, support the use of substantive canons.[172] They argue that substantive canons can

163. *Id.* at 1244, 1240, 1251.

164. *Id.* at 1251. The Supreme Court eventually rejected the Eleventh Circuit's reading of the statute, finding the residual clause unconstitutional. *See* United States v. Davis, 139 S. Ct. 2319 (2019).

165. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2010).

166. Justice Barrett is referred to by her current title of Associate Justice of the Supreme Court of the United States throughout this Comment.

167. *Id.* at 110 ("The courts' adoption of more aggressive substantive canons poses . . . a significant problem of authority . . . for textualists, who understand courts to be the faithful agents of Congress.").

168. *Id.* at 181.

169. *Id.* at 112.

170. *Id.* at 181.

171. *Id.* at 121.

172. *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017).

be justified as "a form of common law."[173] Under this view, those canons which "were rules of law at the Founding or have validly become law since" can legitimately be applied by courts.[174] These canons, validated by their longstanding place in the American legal order, permit "courts to depart from the most natural interpretation of a legal text, but only when the common law, a statute, or a constitution commands that departure."[175]

The judges on the Eleventh Circuit have yet to take a firm position on this debate in an opinion. "[W]hichever of these two camps has it right," one self-identified textualist judge on the Eleventh Circuit commented, new or novel substantive canons should be considered suspect.[176] A few open-ended questions include: If substantive canons are essentially judge-made, is it appropriate to argue for the creation of a new canon, or at least the modification of an existing canon, that will benefit one's client? What gives judges the power to create a substantive canon? Perhaps the Eleventh Circuit will offer answers in future opinions or separate writings.

C. Adams by and through Kasper v. School Board of St. Johns County and the Eleventh Circuit's Use of Dictionaries in Textualist Interpretation

In performing textualist analysis, the Eleventh Circuit appropriately relies upon dictionaries to determine the ordinary meaning of statutory terms.[177] As the court in *Paresky v. United States*[178] recently pointed out, the proper definitions of statutory terms are those found in dictionaries from the appropriate time period.[179] But, as the Eleventh Circuit explained in *United States v. Dawson*,[180] the plain meaning of a statutory provision "does not turn solely on dictionary definitions of its component words in isolation. Rather, the plainness or ambiguity of statutory language is determined not only by reference to the language itself, but

173. *Id.* at 1122.

174. *Id.* at 1127.

175. *Calderon*, 5 F.4th at 1220 (Newsom, J., concurring) (discussing Baude & Sachs, *supra* note 174, at 1122–24).

176. *Id.* (criticizing "substantive canons *not* firmly grounded in the written or common law").

177. CBS Inc. v. PrimeTime 24 Jt. Venture, 245 F.3d 1217, 1223 (11th Cir. 2001) ("In order to determine the common usage or ordinary meaning of a term, courts often turn to dictionary definitions for guidance."); *but see* David Foster Wallace, *Tense Present: Democracy, English, and the Wars Over Usage*, HARPER'S MAG., Apr. 2001.

178. 995 F.3d 1281 (11th Cir. 2021).

179. *Id.* at 1285–86 (citation omitted).

180. 64 F.4th 1227.

as well by the specific context in which that language is used, and the broader context" of the law read in its entirety.[181] Therefore, litigants who wrongly use dictionaries "to scavenge the world of English usage to discover whether there is any possible meaning" of a given statutory term are unlikely to provide the textualist Eleventh Circuit with a fair reading of the statute.[182] Because many words encompass varying definitions, litigants should use dictionaries to help the Eleventh Circuit identify the definition that conveys the "contextually appropriate ordinary meaning" of the statutory term.[183]

The Eleventh Circuit's decision in *Adams by and through Kasper v. School Board of St. Johns County*[184] demonstrates how dictionaries should be used to assist with textualist interpretation of statutes. In *Adams*, the question was whether a school board's bathroom policy violated a transgender student's rights under the Equal Protection Clause and Title IX.[185] Title IX provides in relevant part: "No person . . . shall, on the basis of *sex*, be excluded for participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal Financial assistance."[186] To interpret the ordinary meaning of "sex," the Eleventh Circuit surveyed multiple dictionaries from around the time Title IX was enacted in 1972. In total, the Eleventh Circuit surveyed six dictionaries[187] and found that "the overwhelming majority of dictionaries defin[ed] 'sex' on the basis of biology and reproductive function."[188] The Eleventh Circuit's opinion criticized the district court for consulting "only one dictionary definition" from the 1970 *American College Dictionary* "to support its conclusion that 'sex' was an ambiguous term at the time of Title IX's enactment."[189] This purported ambiguity, the Eleventh Circuit concluded, was simply not supported by the copious amounts of evidence of meaning found in the

181. *Id.* at 1237 (cleaned up).

182. Chisom v. Roemer, 501 U.S. 380, 410 (1991) (Scalia, J., dissenting).

183. SCALIA & GARNER, *supra* note 4, § 6, at 70 (noting that "[m]ost common English words have a number of dictionary definitions").

184. 57 F.4th 791 (11th Cir. 2022) (en banc).

185. Title IX, Education Amendments of 1972, 20 U.S.C. §§ 1681–88.

186. 20 U.S.C. § 1681(a) (1972) (emphasis added).

187. *Adams*, 57 F.4th at 812 (surveying multiple dictionaries from time of enactment of Title IX, including the 1976 and 1979 editions of *American Heritage Dictionary of English Language*, the 1978 edition of *Oxford English Dictionary*, the 1972 edition of *Webster's New World Dictionary*, the 1969 edition of *Webster's Seventh New Collegiate Dictionary*, and the 1980 edition of *Random House College Dictionary*).

188. *Id.* at 812.

189. *Id.*

range of available dictionaries.[190] The majority of dictionaries, the court held, supported the interpretation of "sex" in Title IX as referring to "biological sex." Therefore, the school board's policy of establishing separate bathrooms based on biological sex was lawful under the court's interpretation of Title IX.[191]

The Eleventh Circuit's en banc opinion in *Adams* illustrates how litigants should use dictionary definitions to illuminate the ordinary meaning of a statutory term, or to at least help the Eleventh Circuit narrow down the list of "possible ways to understand" the meaning of the term from the time of enactment.[192] Additionally, other tools for discerning ordinary meaning can be used to supplement the results of a dictionary search.[193] Litigants should be mindful that dictionary definitions rarely control the analysis.[194] As the court noted in *United States v. Lopez*,[195] "[a] dictionary definition of an undefined statutory term is not always dispositive, and [the Eleventh Circuit] may consider

190. *Id.*

191. *Id.* at 815 (holding that under its ordinary meaning, "Title IX prohibits discrimination on the basis of sex, but it expressly permits separating the sexes when it comes to bathrooms and other living facilities.").

192. United States v. Hall, 64 F.4th 1200, 1205 (11th Cir. 2023).

193. One such tool is corpus linguistics. As Utah Supreme Court Justice Thomas R. Lee and University of Chicago Law School Professor Stephen C. Mouritsen have explained, "[c]orpus linguistics is an empirical approach to the study of language that involves large, electronic databases of text . . . gleaned from 'real-world language . . . in books, magazines, newspapers, and even transcripts of spoken language." Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 828 (2018). Although the Eleventh Circuit has yet to employ corpus linguistics in a statutory case, one district court in the Eleventh Circuit has. In April 2022, the United States District Court for the Middle District of Florida performed a corpus linguistic search using the Corpus of Historical American English to identify the ordinary meaning of the term "sanitation" in the Public Health Services Act of 1944 ("PHSA"). Health Freedom Defense Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1160 (M.D. Fla. 2022). The search returned 507 results for public uses of the word "sanitation" around the time of the PHSA's enactment. *Id.* After consulting dictionaries and the statutory context, the district court concluded that the corpus linguistic search results were "consistent" with the dictionary definition and "the contextual clues." *Id.* In June 2023, the Eleventh Circuit reviewed *Health Freedom Defense Fund* and vacated the case as moot. *See* 71 F.4th 888, 894 (11th Cir. 2023). The Eleventh Circuit's opinion made no mention of the District Court's use of corpus linguistics as a tool of interpretation. So, whether corpus linguistics will gain greater usage by the district courts in the Eleventh Circuit, or by the circuit itself, remains to be seen.

194. See Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 67 (1994) (discussing the limitations of dictionaries, which often function as "a museum of words, an historical catalog rather than a means to decode the work of legislatures").

195. 590 F.3d 1238 (11th Cir. 2009).

the statutory term as it is used in the context of the statute as a whole."[196] Thus, a review of the statutory context is the logical next step in the court's textualist analysis.

D. Statutory Context: Reading the Text as a Whole and Avoiding Hyperliteralism

The textualist Eleventh Circuit appropriately reads statutory text in context because "[c]ontext is a primary determinant of meaning."[197] Relying on the whole-text canon of construction,[198] the court rightly reads the statutory text against the backdrop of the entire statute.[199] In other words, the Eleventh Circuit avoids reading a statutory term in a vacuum, where the court is less likely to ascertain the ordinary meaning.[200] As stated in *Wachovia Bank, N.A. v. United States*,[201] the Eleventh Circuit "avoid[s] slicing a single word from a sentence, mounting it on a definitional slide, and putting it under a microscope in an attempt to discern the meaning of an entire statutory provision."[202] Instead, the Eleventh Circuit looks at the relationship between different statutory terms, as well as the relationship between different statutory provisions.[203] The Eleventh Circuit's approach mirrors that of other self-identified textualists, including Justice Barrett, who has said that "textualism isn't a mechanical exercise, but rather one involving a

196. *Id.* at 1249.

197. SCALIA & GARNER, *supra* note 4, § 24 , at 167; *see also* In Re Shek, 947 F.3d 770, 776–77 (11th Cir. 2020) ("Statutory provisions are not written in isolation and do not operate in isolation, so we cannot read them in isolation.").

198. SCALIA & GARNER, *supra* note 4, § 24 , at 167 ("Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.").

199. *Auriga Polymers*, 40 F.4th 1273, 1285 (11th Cir. 2022) (explaining that the Eleventh Circuit "look[s] to the particular statutory language at issue, as well as the language and design of the statute as a whole") (citation omitted).

200. Catalyst Pharm., Inc. v. Becerra, 14 F.4th 1299, 1307 (11th Cir. 2021); *see also* Edison v. Douberly, 604 F.3d 1307, 1310 (11th Cir. 2010); In re Walter Energy, Inc., 911 F.3d 1121, 1143 (11th Cir. 2018); *Ruiz v. Wing,* 991 F.3d 1130, 1138 (11th Cir. 2021) (same).

201. 455 F.3d 1261 (11th Cir. 2006).

202. *Id.* at 1267.

203. Although a commitment to applying the whole-text canon is widely shared amongst the self-identified textualists on the Eleventh Circuit, these judges have split over its proper application in a few recent cases. *Compare* In re Wild, 994 F.3d 1244, 1272 (11th Cir. 2021) (Pryor, C.J., concurring) (contending that "although the dissents cite the whole-text canon, . . . they fail to apply it in their analysis") *with id.* at 1303 n.19 (Branch, J., dissenting) (arguing that "the Majority's purportedly whole-text reading not only renders certain portions of the statute superfluous, but impermissibly rewrites the statute by adding to the text [additional] . . . requirements").

sophisticated understanding of language as it's actually used in context."[204]

Litigants practicing before the court should remember, as Justice Scalia urged, "*why* context matters: It is a tool for understanding the terms of the law, not an excuse for rewriting them."[205] A statute's policy goal is not the same as the statutory context. For example, in *Regions Bank v. Legal Outsource PA*,[206] the Eleventh Circuit stated that "it is hornbook abuse of the whole-text canon to argue 'that since the overall purpose of the statute is to achieve *x*, any interpretation of the text that limits the achieving of *x* must be disfavored.'"[207] Under the Eleventh Circuit's appropriate textualist analysis, the policy objectives of a particular law do not take precedence over unambiguous text or the statutory context that may be gleaned from other provisions.[208]

1. The Importance of Both Structural and Linguistic Context

Litigants crafting textualist arguments before the Eleventh Circuit should address both the structural context and the linguistic context, including "the language itself, [and] the specific context in which the language is used."[209] Analyzing a statute's structural context requires looking at the words and "their place in the overall statutory scheme," cross-referencing the other statutory subsections, and keeping top-of-mind "[t]he entirety of the document," which provides "the context for each of its parts."[210] Linguistic context, on the other hand, refers to manner in which speakers of a particular language normally converse.[211]

---

204. Amy Coney Barrett, *Assorted Canards of Contemporary Legal Analysis: Redux*, 70 CASE W. RES. L. REV. 855, 859 (2020).

205. King v. Burwell, 576 U.S. 473, 501 (2015) (Scalia, J., dissenting).

206. 936 F.3d 1184 (11th Cir. 2019).

207. *Id.* at 1194–95 (quoting SCALIA & GARNER, *supra* note 4, § 24, at 168).

208. Bellitto v. Snipes, 935 F.3d 1192, 1201 (11th Cir. 2019) ("Since the statutory language is plain and unambiguous . . . , we have no occasion to examine statutory purpose.").

209. Warshauer v. Solis, 577 F.3d 1330, 1335 (11th Cir. 2009) (citation omitted).

210. SCALIA & GARNER, *supra* note 4, § 24 , at 167.

211. Manning, *supra* note 52, at 78 (describing linguistic context as "the way a linguistic community uses words and phrases in context"); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2392 (2003) ("[T]extual interpretation must account for the text in its social and linguistic context."). As demonstrated above, principled textualists regard dictionary definitions as "valuable because they are evidence of what people at the time of a statute's enactment would have understood its words to mean." *Bostock*, 590 U.S. at 704 (Alito, J., dissenting). But dictionaries are not the only source for the ordinary meaning of words in a linguistic community. Justice Alito's dissent in *Bostock* cites other forms of linguistic evidence from around the time of enactment, including other state and federal laws using similar language, executive orders, academic and scientific journals, as well as

In *Jones v. United States*,[212] the Eleventh Circuit explained that isolated constructions, which "narrowly focus[] on a small part" of a statute or set of statutes, "cut[] out the important differences" between provisions or large code sections—"that's not how we read statues," the Eleventh Circuit rightfully declared.[213] The Eleventh Circuit in *Jones* explained that "[a] reasonable statutory interpretation must account for both the specific context in which language is used and the broader context off the statute as a whole."[214]

2. The Eleventh Circuit's Caution Against "Wooden Literalism"

Some litigants may wrongly assume that the Eleventh Circuit's ordinary-meaning rule requires a purely semantic reading of statutory language at the expense of its context. But this kind of hyper-literalistic reading of statutes is simply not proper textualism.[215] Hyper-literalism, also termed "strict construction," is the misguided tendency to interpret statutes "according to the literal meaning of the words, as contrasted with what the words denote in context according to a fair reading."[216] By contrast, proper textualism at the Eleventh Circuit emphasizes a "natural" reading of the statutory language that "coherently harmonizes" the voluminous number of sections and subsections contained in modern statutes.[217] In this effort to construe the text "as a whole,"[218] the whole-text canon, linguistic context, and the canons of construction are all brought to bear to guide the court to the statute's ordinary public meaning. But reading a statute out of context undermines the entire ordinary meaning inquiry.[219] Making matters worse, by divorcing the

popular evidence of societal norms usage like newspaper and magazine articles. *Id.* at 703–17; *but see* Manning, *supra* note 52, at 76 (arguing that proper textualists "give determinative weight to clear semantic cues even then they conflict with evidence from the policy context").

212. 82 F.4th 1039 (11th Cir. 2023).

213. *Id.* at 1057.

214. *Id.* (internal punctation omitted) (citation omitted).

215. SCALIA, *supra* note 7, at 24 ("The good textualist is not a literalist."); *see also Bostock*, 590 U.S. at 784 (Kavanaugh, J., dissenting) ("[C]ourts must follow ordinary meaning, not literal meaning. And courts must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase.").

216. SCALIA & GARNER, *supra* note 4, app. B, at 427.

217. Callahan v. U.S. Dep't of Health & Human Servs., 939 F.3d 1251, 1262 (11th Cir. 2019).

218. SCALIA & GARNER, *supra* note 4, § 24, at 167.

219. Ruiz v. U.S. Att'y Gen., 73 F.4th 852, 864 (11th Cir. 2023) (Newsom, J., concurring) ("[W]rench[ing] [a] proviso out of context . . . elevates literalism over proper textualism."); *see also Heyman*, 31 F.4th at 1319 (urging courts to avoid engaging in "a wooden application of the canons [of construction that] would supplant rather supply" ordinary public

words Congress chose from their appropriate context and reading them in a vacuum, "wooden literalism"[220] deprives a statute of its *public* meaning which, in turn, undermines the legislature's ability to "prescribe[] the rules by which the duties and rights of every citizen are to be regulated."[221] In his concurrence in *Pictet Overseas Inc. v. Helvetia Trust*,[222] Chief Judge Pryor discussed the dangers posed by a hyper-literalistic approach to interpretation:

> The fatal flaw in [a literalist] interpretation is that it is "a 'viperine' construction that kills the text" by reading the text "hyperliterally," ignoring its context.[223] Or as Judge Learned Hand put it, it is "a sterile literalism which loses sight of the forest for the trees."[224] "A text should not be construed strictly"; instead, "it should be construed reasonably, to contain all that it fairly means."[225]

This warning against hyper-literalism is a reminder to practitioners who might mistake true textualism for a series of orthodox chants about starting with the text.[226] It is not enough to implore the court to "look at the words."[227] Instead, litigants must convince a majority of the court that the text in context aligns with a favorable interpretation for their client.[228]

---

meaning); *cf.* Franchise Tax Bd. of Cal. v. Hyatt, 587 U.S. 230, 247 (2019) (rejecting "ahistorical literalism" in constitutional interpretation).

220. *Callahan*, 939 F.3d at 1262.

221. The FEDERALIST NO. 78 (Alexander Hamilton).

222. 905 F.3d 1183, 1190–91 (11th Cir. 2018) (Pryor, C.J., concurring).

223. SCALIA & GARNER, *supra* note 4, at 40.

224. N.Y. Tr. Co. v. Comm'r of Internal Revenue, 68 F.2d 19, 20 (2d Cir. 1933).

225. SCALIA, *supra* note 7, at 23.

226. The Eleventh Circuit's rejection of hyper-literalism is consistent with other federal courts of appeal. In *United States v. Grant*, the Sixth Circuit advised litigants against "mechanistically parsing down each word of the statute to its dictionary definition no matter the resulting reading that would give the law." 979 F.3d 1141, 1144 (6th Cir. 2020). As the Fifth Circuit in *United States v. Graves* makes clear, "text may never be taken out of context" lest the interpretative enterprise devolve into bad textualism. 908 F.3d 137, 142 (5th Cir. 2018). And in *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, the Ninth Circuit stated that "literalism is not necessarily textualism," explaining that while "[d]ictionaries and [canons] of . . . construction can help determine plain meaning of specific words, . . . some phrases have a . . . meaning that cannot be stripped away from its historical context or subject matter area." 9 F.4th 1167, 1173 (9th Cir. 2021).

227. *Pictet*, 905 F.3d at 1190 (Pryor, C.J., concurring) (internal punctuation omitted).

228. SCALIA & GARNER, *supra* note 4, app. B, at 427 (explaining that textualist interpretation seeks to determine "what the words *denote in context* according to a fair reading") (emphasis added).

E. The Eleventh Circuit's Textualist Approach to Statutory Purpose

The Eleventh Circuit properly derives a statute's purpose from its text. In *United States v. Meyer*,[229] the Eleventh Circuit explained that it "assume[s] that the legislative purpose is expressed by the ordinary meaning of the words used."[230] Textualism as applied by the court has little patience for hypothesizing about the private intentions of individual legislators or, after accounting for the evolution of society, enforcing the judge's view of what a statute "ought to mean" now.[231]

1. Statutory Purpose Is Informed By The Text

The Eleventh Circuit has stressed that using statutory purpose "to contradict the text or supplement it'" is not sound textualism.[232] As the court explained in *United States v. Bryant*,[233] "purpose-driven statutory interpretation . . . [is] the familiar tactic of substituting the purpose of the statute for its text, freeing the Court to write a different guideline that achieves the same purpose."[234] Instead, the court in *Bryant* rightly observed that "a statute's purpose . . . must be derived from the text."[235] The court in *Bryant* explained that a text-informed purpose, rather than a subjective purpose, "is a constituent of meaning and can be helpful in understanding the ordinary, contemporary common meaning of the statute's language . . . [and] may reveal which reading is correct."[236]

Bryant involved the interpretation of 18 U.S.C. § 3582(c)(1)(A),[237] which allows criminal defendants to move for a reduction in their sentence, and U.S.S.G. § 1B1.13.[238] The primary issue in *Bryant* was whether § 1B1.13's prohibition on sentencing reductions absent an "extraordinary and compelling" reason applied to defendant-filed motions for sentence reductions under § 3582(c)(1)(A). In a case of first

229. 50 F.4th 23 (11th Cir. 2022).

230. *Id.* at 27 (citation omitted).

231. SCALIA, *supra* note 7, at 22; *see also* ITT Base Servs. v. Hickson, 155 F.3d 1272, 1275 (11th Cir. 1998) ("[W]e cannot speculate about what Congress' intent might have been when faced with the unambiguous language of a statute.").

232. Bellitto v. Snipes, 935 F.3d 1192, 1201 (11th Cir. 2019) (quoting SCALIA & GARNER, *supra* note 4, § 2, at 57).

233. 996 F.3d 1243.

234. *Id.* at 1257 (citations omitted).

235. *Id.*; *see also* United States v. Haun, 494 F.3d 1006, 1009 (11th Cir. 2007) ("In statutory interpretation cases, we are reminded that the language of the statutes that Congress enacts provides the most reliable evidence of its intent.") (citation omitted).

236. *Bryant*, 996 F.3d at 1257–58.

237. 18 U.S.C. § 3582(c)(1)(A) (1996).

238. U.S.S.G. § 1B1.13 (2006).

impression, the Eleventh Circuit said yes, relying, in part, on the statutory purpose as informed by the text.

The court sought to identify a "'textually permissible interpretation that furthers rather than obstructs' the statute's purposes."[239] The court determined that "[t]he statute's purpose . . . supports our reading" because the majority's interpretation furthered the purpose of the original Sentencing Reform Act of 1984[240] (SRA) and "effectuate[d] other congressional sentencing decisions, such as mandatory minimums and retroactivity."[241] The court explained that the aim of the SRA was "to limit discretion and to bring certainty and uniformity to sentencing." To achieve these goals, the court in *Bryant* explained, Congress set up the Sentencing Commission, which, in turn, issued its § 1B1.13 policy statement to instruct district courts not to grant sentencing reductions absent extraordinary and compelling circumstances.[242]

The court in *Bryant* reasoned that "[i]nterpreting 1B1.13 as inapplicable to defendant-filed Section 3582(c)(1)(A) motions" would run counter to Congress's purpose in enacting the SRA and its goal of granting authority to the Sentencing Commission to establish guidelines for sentence reductions.[243] Moreover, the court explained, a contrary interpretation would reintroduce the "disparity and uncertainty" in federal sentencing of the pre-SRA era by allowing sentence-modification proceedings inconsistent with the Sentencing Commission's policy statements.[244] The Eleventh Circuit's opinion in *Bryant* illustrates the textualist principle that statutory purpose alone cannot dictate statutory meaning. The court in *Bryant* concluded that while the purpose of the SRA—considered in light of the text, context, and statutory history—may support an interpretation, "it could not alone justify it."[245]

The role of statutory purpose in textualist analysis is cabined further by the Eleventh Circuit's refusal to use purpose as a way to fill gaps in an ambiguous statute, even at the risk of creating "loophole[s] in [Congress's] otherwise comprehensive regulation."[246] As the Eleventh Circuit noted in *Evanto v. Federal National Mortgage Association*,[247] the

239. *Bryan*t, 996 F.3d at 1256 (quoting SCALIA & GARNER, *supra* note 4, § 4, at 63).

240. 18 U.S.C. § 3551 (1984).

241. *Bryant*, 996 F.3d at 1256.

242. *Id.* at 1257.

243. *Id.*

244. *Id.*

245. *Id.* at 1258 (emphasis added).

246. United States v. Caniff, 916 F.3d 929, 936 (11th Cir. 2019), *vacated*, 955 F.3d 1183 (11th Cir. 2020).

247. 814 F.3d 1295 (11th Cir. 2016)

job of a textualist "is to follow the text even if doing so will supposedly 'undercut a basic objective of the statute.'"[248]

2. Atextual Interpretations In The Name of Purpose Are Disfavored

In *United States v. Caniff*,[249] Judge Newsom dissented from the majority's attempt to make a federal statute more coherent according to its perceived purpose. There, the question was whether the defendant's solicitation of sexually explicit photos via text message constituted a "notice or advertisement" under 18 U.S.C. § 2251(d)(1).[250] The defendant argued that "notice" should be interpreted to mean "sent to the general public or at least to a group of people."[251] Because the solicitation was made via text message, the defendant argued, there was insufficient evidence for a reasonable jury to convict him under § 2251(d)(1).[252] The court upheld the conviction, but the panel split over the meaning of "notice or advertisement." Ignoring the ordinary meaning of the provision, the majority relied on its conception of the statute's purpose, and declared that "Congress's 'clear statutory purpose' was to 'eradicate the child-pornography market.'"[253] Citing other circuit opinions that emphasized congressional intent, the majority opined that, "'Congress surely did not intend to limit § 2251(d)(1)'s reach to pedophiles who indiscriminately advertise through traditional modes of communication like television or radio.'"[254]

Judge Newsom, a self-identified textualist, concurred in the judgment but dissented from the majority's "purposive" interpretation of § 2251(d)(1).[255] "No ordinary speaker of American English," the concurrence asserted, "would describe a private person-to-person text message . . . as the 'making' of a 'notice.'"[256] "[E]ven in the service of such as noble purpose," like the conviction of child sex offenders, the concurrence declared, "we can't make one of the [child-pornography]

248. *Id.* at 1299 (quoting Baker Botts L.L.P. v. ASARCO LLC, 576 U.S. 121, 135 (2015)); *see also Encino Motorcars*, 584 U.S. at 90 ("Even if Congress did not foresee all of the applications of the statute, that is no reason not to give the statutory text a fair reading.") (citation omitted).

249. 916 F.3d 929.

250. 18 U.S.C. § 2251(d)(1) (1996).

251. *Caniff*, 916 F.3d at 933.

252. *Id.* at 932.

253. *Id.* at 936–37 (quoting United States v. Peterson, No. CR 12-228-GW, 2015 WL 13657215, at *5 (C.D. Cal. Mar. 20, 2015) (unreported)) (alterations adopted).

254. *Id.* at 936–37 (alterations adopted) (citation omitted).

255. *Id.* at 946 (Newsom, J., concurring in part and dissenting in part).

256. *Id.*

statutes . . . say what it doesn't say."[257] The concurrence explained that a statute's "ordinary meaning should inform what we take to be Congress's purpose, not the other way around."[258] The opinion criticized the majority's for being too concerned "that interpreting § 2251(d)(1) in accordance with . . . its ordinary meaning would create a 'loophole' in the child pornography laws," asserting that numerous laws in Title 18 addressed such offenses, including offenses involving text messaging.[259] The court should not, in the concurrence's view, adopt "a strained, acontextual interpretation" of § 2251(d)(1) in the name of statutory purpose.[260]

In sum, rather than favoring an interpretation based on the perceived background purpose, textualism as broadly practiced by the Eleventh Circuit appropriately seeks to identify a statute's *objective* purpose: the purpose revealed through and constrained by the statutory text.

3. The Tension Between Ordinary Meaning and Statutory Purpose

Eleventh Circuit practitioners will no doubt spot the tension between the textualist commitment to the ordinary meaning of the text and considerations of statutory purpose, especially in cases in which a semantic reading of the text might yield a result that was clearly not in the mind of Congress. This tension reflects a broader debate between competing forms of textualism: those who apply the purely semantic meaning of the text and textualists who are open to considering a statute's policy context.[261] Although the Eleventh Circuit has not taken a firm stance either way, a balanced textualist theory might entail embracing textualism's commitment to a formalistic interpretation of statutory language while, at a minimum, rejecting interpretations that "ordinary Americans . . . would not have dreamed [of]" at the time of a statute's adoption.[262] In other words, if a textualist interpretation leads to a reading that clearly goes beyond what Congress had in mind when the statute was enacted, an alarm bell should sound that a semantic approach has failed to uncover the ordinary meaning of the text. The

257. *Id.* at 946–47.

258. *Id.* at 947 (citing United States v. Wiltberger, 18 U.S. 76, 96 (1820) (Marshall, C.J.) (stating that "[t]he intention of the legislature is to be collected from the words they employ" and elaborating that "[t]o determine that a case is within the intention of a statute, its language must authorise us to say so")).

259. *Id.*

260. *Id.*

261. *See* Grove, *supra* note 23, at 266–67.

262. *Bostock*, 590 U.S. at 706 (Alito, J., dissenting).

extent to which judges will draw inferences from a statute's policy context will vary from case to case. But if a literalist reading of the statutory text is one that would confound "every single living American [if they] had been surveyed"[263] at the law's enactment, the textualist should reassess their analysis utilizing contextual references, including dictionaries, analogous legislation, periodicals, and academic journals, to understand and apply what the statutory terms "mean[t] . . . to reasonable people at the time they were written."[264]

F. "Legislative History is Not the Law:" The Eleventh Circuit's Skepticism of Legislative History as a Tool of Interpretation

The Eleventh Circuit is firmly textualist in its skepticism of legislative history. The Eleventh Circuit has recently declared that "[l]egislative history is anathema to sound statutory analysis"[265] and "'[l]egislative history is not the law.'"[266] In the past, the more purposivist Eleventh Circuit held that statutory interpretation was guided first by "the act's purpose as indicated in the legislative history" and second by "the plain meaning of the statute's language."[267] To the purposivist, the text of the statute is only one data point among many that a judge considers when performing interpretation. The Eleventh Circuit rightly emphasizes "it is the *text's* meaning, and not the content of anyone's expectations or intentions, that binds us as law."[268]

The Eleventh Circuit has said that the part "legislative history plays . . . in modern statutory interpretation is limited to 'shedding light on the enacting Legislature's understanding of otherwise ambiguous

263. *Id.* at 685.

264. SCALIA & GARNER, *supra* note 4, at 16.

265. Smith v. Marcus & Millichap, Inc., 991 F.3d 1145, 1160 n.10 (11th Cir. 2021).

266. Gil v. Win-Dixie Stores, Inc., 993 F.3d 1266 (11th Cir. 2021), *vacated*, 21 F.4th 775 (2021) (quoting Azar v. Allina Health Servs, 139 S. Ct. 1804, 1814 (2019)); *see also* United States v. R.L.C., 503 U.S. 291, 312 (1992) (Thomas, J., concurring in part) ("[C]ommittee reports and floor statements . . . are not law.").

267. Caro-Galvan v. Curtis Richardson, Inc., 993 F.2d 1500, 1505 (11th Cir. 1993). *See also* Nat'l Wildlife Fed'n v. Marsh, 721 F.2d 767, 778 (11th Cir. 1983); WTWV, Inc. v. Nat'l Football League, 678 F.2d 142, 143 (11th Cir. 1982); Loc. Div. 732, Amalgamated Transit Union v. Metro. Atlanta Rapid Transit Auth., 667 F.2d 1327, 1334 (11th Cir. 1982) (appealing to legislative intent and purpose).

268. Ruhlen v. Holiday Haven Homeowners, Inc., 28 F.4th 226, 229 (11th Cir. 2022) (quoting SCALIA & GARNER, *supra* note 4, § 68, at 398); *see also* United States ex rel. Cairns v. D.S. Med. LLC, 42 F.4th 828, 836 (8th Cir. 2022) ("Starting with legislative history and purpose . . . is no way to read a statute. After all, when a statute is unambiguous, we start and end in the same place: with the words of the statute itself. The reason is simple: our duty is to interpret laws, not reconstruct legislators' intentions.") (citations omitted).

terms.'"[269] In 2000, in *Harris v. Garner*,[270] the court, sitting en banc, appropriately rejected the use of legislative history to interpret unambiguous statutes: "When the import of the words Congress has used is clear, as it is here, we need not resort to legislative history, and *we certainly should not do so to undermine the plain meaning of the statutory language*."[271] Since then, the court has consistently stated that legislative history has no role where the statutory text is clear. In 2002, in *In re Paschen*,[272] the Eleventh Circuit declared, "we need not resort to extrinsic evidence, such as legislative history, to discern a statute's meaning if the statute's language is unambiguous."[273] Ten years later, in *Shockley v. C.I.R.*[274] in 2012, the court explained, "if the statute's language is clear, there is no need to go beyond the statute's plain language into legislative history."[275] And in 2016, the Eleventh Circuit, sitting en banc, in *Villarreal v. R.J. Reynolds Tobacco Company*[276] stated unequivocally that the court "do[es] not consider legislative history when the text is clear. . . . When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete."[277]

Textualism as broadly practiced by the Eleventh Circuit is rightly dedicated to steering clear of reliance on legislative history, even if that means rejecting positions taken by individual members of Congress or congressional committees during legislative deliberations.[278] In *Merritt v. Dillard Paper Co.*,[279] the court explained that "policy concerns cannot alter our interpretation and application of clear statutory language."[280] After the floor debates have ended and "Congress has expressed its

269. *Garcon*, 54 F.4th at 1285 (quoting Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005)) (alterations adopted).

270. 69 F.4th 762.

271. *Id.* at 976 (emphasis added); *see also* United States v. Rush, 874 F.2d 1513, 1514 (11th Cir. 1989) ("Where the language of a statute is a clear expression of congressional intent we need not resort to legislative history.").

272. 296 F.3d 1203 (11th Cir. 2002).

273. *Id.* at 1207.

274. 686 F.3d 1228 (11th Cir. 2012).

275. *Id.* at 1235.

276. 839 F.3d 958.

277. *Id.* at 969 (citations omitted).

278. *Id.* ("Even if a statute's legislative history evinces an intent contrary to its straightforward statutory command, we do not resort to legislative history to cloud a statutory text that is clear.") (internal citation and punctuation omitted).

279. 120 F.3d 1181.

280. *Id.* at 1188.

resolution . . .in a statute, it is the duty of the courts to give effect to that resolution by applying the statue according to its terms."[281]

Even to its subscribers, legislative history is of limited value because of the difficulty in deriving a collective legislative intent. As the Eleventh Circuit explained in *Greater Birmingham Ministries v. Secretary of State for State of Alabama*,[282] "[a]s a general matter, determining the intent of the legislature is a problematic and near-impossible challenge."[283] At least one self-identified textualist judge on the Eleventh Circuit has explained that, because talented lawyers "can mine from [a law's] legislative history other—and sometimes conflicting—congressional 'purposes,'" an advocate's misplaced reliance on legislative history can be "'utterly unenlightening.'"[284] Textualists prefer analyzing the text a legislature in fact enacted rather than guessing at what it may have said during the drafting of legislation. The Constitution's separation of powers, textualists argue, prevents the federal judiciary from wielding the legislative committee chairman's gavel and making assumptions about the legislature's intent in the name of judicial interpretation.[285] In *Autauga Quality Cotton Association v. Crosby*,[286] a case involving an Alabama state statute, the Eleventh Circuit rightfully hammered this point home: "It's certainly not [the] place [of federal judges] . . . to speculate whether [a] [l]egislature might have secretly intended (or might even today prefer) a different rule."[287]

Appropriately, the Eleventh Circuit does not consider post-enactment legislative history to be any more enlightening than pre-enactment legislative history. In *CSX Corporation v. United States*,[288] the government's proffered interpretation relied on a "a House Conference Report for a separate bill, enacted nearly seventeen years after" the relevant statute.[289] The government argued that the report demonstrated

281. *Id.*

282. 992 F.3d 1299 (11th Cir. 2021) (en banc).

283. *Id.* at 1324.

284. *Kroner*, 48 F.4th at 1281–82 (Newsom, J., concurring) (quoting Oak Grove Res., LLC v. Director OWCP, 920 F.3d 1283, 1292 n.6 (11th Cir. 2019)).

285. *See* SCALIA, *supra* note 7, at 35 ("The legislative power is the power to make laws, not the power to make legislators. It is nondelegable. Congress can no more authorize one committee to 'fill in the details' of a particular law in a binding fashion than it can authorize a committee to enact minor laws. Whatever Congress has not itself prescribed is left to be resolved by the executive or (ultimately) the judicial branch. That is the very essence of the separation of powers.").

286. 893 F.3d 1276 (11th Cir. 2018).

287. *Id.* at 1285–86.

288. 18 F.4th 672.

289. *Id.* at 684.

Congress's "stated desire and expectation that [certain regulations] would be applied by analogy" in similar circumstances.[290] However, the court strongly rejected this post-enactment legislative history as illegitimate.[291] The court viewed the report, at best, as "evidence that some members of Congress (or their staff) thought the [government] *should* promulgate similar rules," emphasizing that post-enactment legislative history could not have influenced the congressional vote and was therefore utterly unpersuasive.[292]

The Eleventh Circuit's emphasis on adhering to the statutory text rather than to other sources, such as legislative history, positively impacts the legislative process as a whole. In *CRI-Leslie, LLC*,[293] the court explained that a "conscientious adherence to the statutory text best ensures that citizens have fair notice of the rules that govern their conduct, incentivizes Congress to write clear laws, and keeps courts within their proper lane."[294] In other words, the Eleventh Circuit's embrace of textualism ensures that the people are governed by the ordinary meaning of the laws passed by their representatives, forces Congress to clearly say what it sets out to do, and upholds the separation of powers by emphasizing judicial humility and restraint.

IV. CONCLUSION

Over the past several decades, the Eleventh Circuit has fully adopted a textualist methodology for discerning the ordinary public meaning of statutes. Despite ongoing debates among self-identified textualist judges and scholars, the Eleventh Circuit's methodological heading is sound. Textualism as it is broadly practiced by the Eleventh Circuit is grounded in the fundamental principle that only the written word is law and the role of the interpretation begins and often ends with the words themselves. Through enhancing their understanding of textualist methodology, practitioners in the Eleventh Circuit can better advocate for their clients and effectively assist the court in interpreting legal texts.

---

290. *Id.* (alterations adopted) (internal punctuation omitted).

291. *Id.* (citing Bruesewitz v. Wyeth LLC, 562 U.S. 223, 242 (2011) and Pitch v. United States, 953 F.3d 1226, 1240 (11th Cir. 2020) (en banc)).

292. *Id.*

293. 882 F.3d 1026.

294. *Id.* at 1033. *But see* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 906 (2013) (arguing, based on interviews with close to 150 legislative drafters on Capitol Hill, that "[i]nterpretive doctrines designed to reflect how members actually participate in the drafting process would look very different, and *certainly less text oriented*, than the ones that we currently have.") (emphasis added).