PLAYING THE UNFAIR GAME: APOSTATES, ABUSE & RELIGIOUS ARBITRATION

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INTRODUCTION: THE UNFAIR GAME

A woman joins a church on the promise of eternal spiritual freedom. Some years later, another member rapes her. Because the church encourages members to handle disputes internally, the woman reports it to a church leader. In accordance with church doctrine, she is interrogated for her past crimes and for her evil intentions toward her alleged rapist, the church, and mankind. Other victims come forward and receive similar treatment. Frustrated with their church's failure to acknowledge the trauma, the women finally report the rapes to law enforcement. The church considers this a high crime. Accordingly, it excommunicates them.

Excommunication exposes the women to the church's strict rules regarding apostates who bring negative attention to the church or any of its members. These rules mandate an aggressive campaign of harassment, which begins promptly. The women are followed day and night, their pets are killed, and their cars are broken into. Fake advertisements soliciting sex from strangers, purportedly on behalf of the women, appear on the internet. After a decade of terror at the hands of their former faith, the women band together to file suit against their rapist, the church, and the religious leader who oversaw the systematic harassment.

But the church's earlier promise of eternal spiritual freedom came at a cost. After the women file suit, the church produces a document that each of the women signed as a condition of membership in the faith. This document reveals that, in exchange for a chance at complete spiritual freedom, the women signed away any right to sue the church or any of its members. The agreement clearly states that it is valid in perpetuity: any dispute with the church or any of its members, now and forever, must be resolved through the church's unique form of religious arbitration. The same policies that directed the church to attack them for apostasy will control this arbitration. Church doctrine will compel the arbitrators to find against the apostates or suffer their fate.

Terrified at the possibility of judicial oversight of religious doctrine, a skittish court quickly orders the parties into religious arbitration. In doing so, the court holds that the women's First

Amendment right to freely choose a religion must yield to the church's First Amendment right to impose ecclesiastical discipline on them. Even though the church excommunicated them more than a decade prior for reporting the rapes to law enforcement, the court holds that the women must still honor their end of the spiritual bargain. They may have successfully forfeited their opportunity at spiritual freedom, but they must forever submit to the discipline of their former faith.

This is the story of *Bixler v. Church of Scientology*.[1] The plaintiffs are alleged rape victims of actor Danny Masterson; the defendants are Masterson, the Church of Scientology, and its ecclesiastical leader.[2] Through clever use of contract, the Church has exploited an unintended synergy between the Federal Arbitration Act (FAA) and the First Amendment's protection of religious freedom to force ex-members into Church-controlled internal arbitration.[3] Handcuffed by the religious abstention doctrine, courts routinely enforce these agreements without further inquiry.[4]

Until now. In *Bixler v. Superior Court*, the California Court of Appeal overturned the trial court's decision to enforce the arbitration agreement, finding that the plaintiffs' First Amendment right to leave a religion trumped their contractual submission to religious

1. Complaint at 1, Bixler v. Church of Scientology Int'l, Super. Ct. Cal., Cnty. of L.A. (Aug. 22, 2019) (No. 19STCV29458); Bixler v. Super. Ct. Cal, L.A. Cnty., No. B310559, 2022 WL 167792 (Cal. Ct. App. Jan. 19, 2022), *cert. denied* (Cal. Apr. 20, 2022), *cert. denied sub nom.*, Church of Scientology v. Bixler, No. 22-60, 143 S. Ct. 280 (Mem.), (Oct. 3, 2022).

2. Amended Complaint at 1, Bixler v. Church of Scientology Int'l, Super. Ct. Cal. Cnty. of L.A. (Feb. 28, 2020) (No. 19STCV29458).

3. *See, e.g.*, Garcia v. Church of Scientology Flag Serv. Org., No. 18-13452, 2021 WL 5074465, at *2 (11th Cir. Nov. 2, 2021); *Bixler*, 2022 WL 167792, at *1.

4. *See, e.g.*, Elmora Hebrew Ctr. v. Fishman, 593 A.2d 725, 728-32 (N.J. 1991); *see also* Michael J. Broyde, *Faith-Based Arbitration Evaluated: The Policy Arguments For and Against Religious Arbitration in America*, 33 J.L. & RELIGION 340, 357-60 (2018) (describing how "[t]he religious question doctrine places major limitations on courts' abilities to review religious arbitrations for duress or procedural or substantive injustice"); Michael A. Helfand, *Between Law and Religion: Procedural Challenges to Religious Arbitration Awards*, 90 CHI.-KENT L. REV. 141, 155 (2015) (explaining how parties to a religious arbitration "are foreclosed from challenging ... [the] award under the manifest disregard of the law standard"); *cf.* Minker v. Balt. Ann. Conf. of United Methodist Church, 894 F.2d 1354, 1361 (D.C. Cir. 1990) (holding that "[a] church, like any other employer, is bound to perform its promissory obligations in accord with contract law," while noting that the First Amendment can complicate matters when a religious entity is a party).

discipline.[5] The decision marks the first time that a court has declined to enforce Scientology religious arbitration.[6] After a denial of certiorari by both the Supreme Court of California and the Supreme Court of the United States, *Bixler* stands as an outlier in the legal landscape.[7]

This Note argues that the *Bixler* approach should become the standard for evaluating the enforceability of religious arbitration against ex-members. Courts should not enforce agreements to religious arbitration against ex-members of a faith when the relevant conduct occurred after their religious affiliation ended. The First Amendment right of believers to leave their faith should prevail over the First Amendment right of churches to police their internal religious doctrine. Siding with the institutions on this issue allows them the power to exert control over apostates in perpetuity through an unintended synergy of the First Amendment and American contract law.

Part I of this Note discusses the state of the law, beginning with the Federal Arbitration Act (FAA) and concluding with a survey of religious arbitration. Part II serves as a brief introduction to the complex world and culture of Scientology to better understand the dynamics of *Bixler* and other Scientology-adjacent litigation. Part III examines the approaches of various courts to Scientology's religious arbitration contracts, concluding with *Bixler*. Part IV applies the *Bixler* holding to the other Scientology cases and religious arbitration cases involving other faiths. Part V addresses counterarguments.

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5. *Bixler*, 2022 WL 167792, at *1.

6. Michael A. Helfand, *Who Arbitrates? Arbitrator Qualification Clauses in Religious Arbitration Agreements*, CANOPY F. (Mar. 16, 2022), https://canopyforum.org/2022/03/16/who-arbitrates-arbitrator-qualification-clauses-in-religious-arbitration-agreements/ [https://perma.cc/R5W7-K828] (describing *Bixler* as "the first of its kind"); Tony Ortega, *Scientology Arbitration Denied: Appeals Court Revives Lawsuit by Masterson Accusers,* UNDERGROUND BUNKER (Jan. 19, 2022), https://tonyortega.org/2022/01/19/scientology-arbitration-denied-appeals-court-revives-lawsuit-by-masterson-accusers/ [https://perma.cc/ UDN4-QFB5] (noting that "this is the first defeat Scientology's arbitration gambit has received in court") [hereinafter Ortega, *Scientology Arbitration Denied*].

7. *See supra* note 6. *Compare Bixler*, 2022 WL 167792, at *14-16 (reversing an order to compel Scientology arbitration), *with Garcia*, 2021 WL 5074465, at *6-10, *12 (affirming an order to compel Scientology arbitration).

I. THE ARENA: STATE OF THE LAW ON ARBITRATION

A. The Rise of Arbitration in the American Court System

Arbitration is "the out-of-court resolution of a dispute between parties to a contract, decided by an impartial third party (the arbitrator)."[8] It can be binding or nonbinding on the parties, and the mechanics of the process vary.[9] As one of the most common methods of alternate dispute resolution, binding arbitration serves as an alternative to the traditional legal system.[10] Arbitration typically stems from contractual agreements made *ex ante* to resolve future disputes through arbitration.[11]

Any such contractual agreement implicates the Federal Arbitration Act (FAA), which compels courts to enforce these agreements as a general matter.[12] The FAA creates a rebuttable presumption in favor of arbitration, and its passage in 1925 changed the paradigm: prior to the passage of the FAA, many courts were reluctant to enforce arbitration agreements.[13] That reluctance has vanished, and the FAA has greatly expanded the prevalence of arbitration. The Supreme Court of the United States embraced the FAA as evidence of a corresponding federal policy in favor of arbitration.[14]

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8. *What We Do*, AM. ARB. ASS'N, https://adr.org/index.php/Arbitration [https://perma.cc/W4Z7-KYZ7].

9. *Id.* Binding arbitration is a substitute for litigation, while nonbinding arbitration serves as a prerequisite to legal remedies. *See* Koons Ford of Balt., Inc. v. Lobach, 919 A.2d 722, 736 (Md. 2007).

10. *What is Arbitration?*, WORLD INTELL. PROP. ORG., https://www.wipo.int/amc/en/arbitration/what-is-arb.html [https://perma.cc/36EN-RD5X]. The American Arbitration Association resolved some 415,362 cases between January 1, 2023, and September 25, 2023. AM. ARB. ASS'N, https://www.adr.org/ [https://perma.cc/4NLC-ZBXS].

11. *See, e.g.*, Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 303-06 (2010) (discussing an arbitration clause in a collective bargaining agreement between a labor union and the counterparty employer); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 442-43 (2006) (describing an arbitration clause in a written check-cashing agreement).

12. 9 U.S.C. §§ 1-14.

13. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018) ("Congress adopted the [Federal] Arbitration Act in 1925 in response to a perception that courts were unduly hostile to arbitration.").

14. *See Granite Rock*, 561 U.S. at 298, 302 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985)) (applying the "national policy favoring arbitration"). *But see* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stan. Junior Univ., 489 U.S.

The Supreme Court's interpretation of the FAA has broadened in recent decades; what was once a narrowly construed tool for resolving business disputes in federal court is now an overwhelming presumption in favor of arbitration across the spectrum of civil litigation.[15] This presumption also arises when the dispute concerns the scope of the arbitrable issues within an agreement.[16] Where an agreement between parties clearly intends to submit *some* types of future disputes to arbitration, other disputes arising out of the same agreement are presumed arbitrable unless the party opposing arbitration can prove otherwise.[17]

The broad applicability of the FAA is also evident in the vast array of scenarios where arbitration appears. In addition to handling run-of-the-mill commercial contract cases, arbitrators can adjudicate federal rights.[18] In recent decades, the Supreme Court has extended the FAA to provide for compelled arbitration of statutory rights.[19] In the twenty-first century, there are precious few issues left outside the reach of arbitration.[20]

It is very difficult for the party opposing arbitration to rebut this presumption of enforceability. The FAA's enforceability provision

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468, 476 (1989) ("There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.").

15. *See* Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1426-32 (2008).

16. *Granite Rock*, 561 U.S. at 298 (quoting First Options of Chic., Inc. v. Kaplan, 514 U.S. 938, 945 (1995)) ("[A]ny doubts concerning the scope of arbitral issues should be resolved in favor of arbitration.").

17. *Id.*

18. *See* Sophia Chua-Rubenfeld & Frank J. Costa, Jr., *The Reverse-Entanglement Principle: Why Religious Arbitration of Federal Rights is Unconstitutional*, Comment, 128 YALE L.J. 2087, 2099 (2019). It is important to note that, while arbitrators *may* adjudicate federal rights, they are not obliged to *uphold* them. *See id.* ("[U]nder the FAA, the fact that a religious tribunal failed to enforce federal rights because of a contrary scriptural commandment might not be enough to overturn an arbitral judgment.").

19. Originally, the Supreme Court held that the FAA did not apply to purely statutory claims without a contractual component. *See* Wilko v. Swan, 346 U.S. 427, 438 (1953). In the 1980s, the Court extended the FAA beyond contractual agreements. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

20. One narrow exception that remains is that a party cannot waive the right to *assert* statutory rights. Am. Exp. Co. v. Italian Colors Rest., 570 U.S. 228, 235-37 (2013). It may, however, make waivers that increase the *cost* or *difficulty* of asserting those rights, such as waiving the right to a class action. *See id.* at 237 n.4; *see also Mitsubishi Motors Corp.*, 473 U.S. at 637 n.19.

dictates that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[21] As such, a party's only defense against compelled arbitration is to attack the agreement itself.[22] Should the reviewing court determine that the agreement to arbitrate is valid, the next question is whether it encompasses the dispute at issue. The arbitration agreement itself may send this second question to the arbitrator.[23] Whereas states were previously free to prohibit arbitration agreements in certain contexts on policy grounds, the FAA now preempts state laws to the contrary.[24] Nor is there refuge outside of federal courts: the FAA controls in state courts, as well.[25]

Congress, of course, retains the right to craft legislation that limits the reach of the FAA. The recently enacted Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 provides a rare example of Congress exercising its authority to limit the reach of arbitration agreements.[26] This law provides no help to the *Bixler* plaintiffs, however, because their claims arise from harassment they suffered after reporting sexual assaults, not the sexual assaults themselves.[27]

B. Religious Arbitration: Roots and Reach

Religious arbitration falls under the broad umbrella of the FAA.[28] Other than providing a default mechanism for the selection of an

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21. 9 U.S.C. § 2.

22. *See* Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 530 (2019).

23. *Id.* ("This Court has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence.") (quoting First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (alteration omitted in original).

24. Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 478 (2006).

25. *See generally* 9 U.S.C. § 2. *See also* Burton, *supra* note 24, at 478. This is a relatively modern change; the FAA was not originally interpreted to control proceedings in state courts. Bruhl, *supra* note 15, at 1427.

26. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, § 2(a), 136 Stat. 26 (codified at 9 U.S.C. § 402).

27. *See infra* note 148 and accompanying text.

28. The FAA makes no distinction between religious arbitration and secular arbitration. *See* 9 U.S.C. §§ 1-14.

arbitrator and some grounds for relief in the event of corrupt arbitrators or arbitral misconduct, the FAA is silent on the mechanics and processes of arbitration.[29] Before proceeding, it is important to distinguish between religious arbitration and arbitration that happens to involve a religious party. This Note employs the term "religious arbitration" to describe arbitration in which the arbitrator employs religious principles or doctrine to reach their decision. In practice, the arbitrator will be a member of (and often an official of) the faith that provides the guiding principles or doctrine.[30] This Note uses the neutral term "arbitration," by contrast, to refer to arbitration that does not rely on religious principles to reach a decision.[31] This usage includes arbitrations involving a religious entity as a party if the arbitration process itself is otherwise secular. An agreement between two parties to submit any future disputes between them to arbitration does not become religious arbitration merely by virtue of the two parties sharing the same faith. Nor does an agreement between a church and its neighbors to arbitration of future land disputes become religious arbitration merely because one of the parties is a church.

Religious arbitration is perhaps the oldest of all arbitration, predating recorded history.[32] In the United States, the three major Abrahamic religions all conduct religious arbitrations.[33] In modern times, religious arbitration and the secular court system work side-by-side in some respects. Courts routinely affirm religious

29. *See id.* §§ 5, 10.

30. *See, e.g.*, Lieberman v. Lieberman, 566 N.Y.S.2d 490, 492 (Sup. Ct. 1991) (describing rabbinical arbitration of a divorce action).

31. The author recognizes that the choice of the neutral term to refer to *secular* arbitration is an idiosyncratic one, given that religious groups have conducted arbitrations for millennia. *See, e.g.*, I Kings 3:16-28 (describing how the biblical King Solomon arbitrated a dispute). A historically accurate nomenclature could easily refer to religious arbitration as the "default" form. *See* Frank D. Emerson, *History of Arbitration Practice and Law*, 19 CLEV. ST. L. REV. 155, 155 (1970).

32. *See supra* note 31.

33. *See* Chua-Rubenfeld & Costa, *supra* note 18, at 2094-95 (describing the prevalence of religious arbitration processes in Christianity, Judaism, and Islam).

arbitration awards.[34] Courts also have the power to vacate them, although this requires a significant showing.[35]

Although religious arbitration may differ from secular arbitration in only venue and procedure, it is typical for religious arbitration to also employ religious principles as part of the rules of decision.[36] Religious tribunals can adjudicate most disputes that would otherwise end up in the secular court system, provided that the parties have entered into the agreement beforehand.[37] Some categories of disputes that are typically nonarbitrable *can* be resolved through religious arbitration.[38] Religious bodies have sole jurisdiction, however, over disputes regarding religious doctrine.[39]

II. THE RULES OF THE UNFAIR GAME: A CRASH COURSE IN SCIENTOLOGY

A. The Origins and Prevalence of Scientology

Understanding the dynamics of the arbitration at issue in *Bixler* and similar litigation also requires an understanding of Scientology.[40] The character of Scientology is inextricably intertwined with the personality of its founder. Any study of Scientology,

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34. *See, e.g.*, Meisels v. Uhr, 593 N.E.2d 1359, 1365 (N.Y. 1992) (affirming arbitration award rendered by religious tribunal); *Lieberman*, 566 N.Y.S.2d at 496.

35. Parties seeking to vacate religious arbitration awards must make the same showing as parties seeking to vacate secular arbitration awards. *See Lieberman*, 566 N.Y.S.2d at 493.

36. Rabbinical courts provide an example. *See, e.g.*, *About*, BETH DIN OF AMERICA, https://bethdin.org/about/ [https://perma.cc/D4YU-4FA3] ("Firmly anchored in the principles of halacha (Jewish law), the Beth Din has earned a reputation for conducting its affairs with confidentiality, competence, fairness, and integrity."); *see also* Chua-Rubenfeld & Costa, *supra* note 18, at 2096 (criticizing religious tribunals for "explicitly subordinat[ing] American law to religious precepts").

37. *See, e.g.*, Spivey v. Teen Challenge of Fla., Inc., 122 So. 3d 986, 988-89 (Fla. Dist. Ct. App. 2013).

38. Ginnine Fried, *The Collision of Church and State: A Primer to* Beth Din *Arbitration and the New York Secular Courts*, 31 FORDHAM URB. L.J. 633, 648 (2004) (noting that child custody and child support cases cannot be arbitrated, but *can* be settled by a *beth din*, even if those awards are vulnerable to appeal in some jurisdictions).

39. The First Amendment bars secular courts from reviewing issues of religious doctrine. Jones v. Wolf, 443 U.S. 595, 602 (1979).

40. Bixler v. Super. Ct. Cal, L.A. Cnty., No. B310559, 2022 WL 167792, at *3, *7 (Cal. Ct. App. Jan. 19, 2022), *cert. denied* (Cal. Apr. 20, 2022), *cert. denied sub nom.*, Church of Scientology v. Bixler, No. 22-60, 143 S. Ct. 280 (Mem.), (Oct. 3, 2022).

therefore, must involve at least a cursory introduction to Lafayette Ronald Hubbard.[41] Hubbard was born in Tilden, Nebraska, on March 13, 1911, the son of an officer in the United States Navy.[42] Hubbard himself served in the Navy during World War II, captaining a subchaser in the Pacific.[43] Before he found his ultimate calling in life as a spiritual leader, Hubbard's most noteworthy success came as a writer of pulp fiction.[44] Among his specialty genres—and there were many—was science fiction, and he would later incorporate ideas from his writing career into Scientology.[45] Hubbard died in 1986, and after a brief power struggle, David Miscavige succeeded him at the helm of the Church.[46]

What is today the Church of Scientology traces its roots to Hubbard's 1950 publication *Dianetics: The Modern Science of Mental Health*.[47] The book was a marked departure from his previous work as a fiction writer and was a resounding financial success for Hubbard, who had spent most of his literary career churning out pulp stories for a penny per word.[48] *Dianetics* spent more than six months on the *New York Times* best-seller list.[49] After the initial frenzy of the *Dianetics* movement burned out, Hubbard repackaged the core

41. This is no easy task, as Hubbard led a remarkable life: by the age of thirty, he had visited Asia, traversed the Panama Canal, toured the United States as a barnstorming glider pilot, attended (and dropped out of) college, and hunted for treasure in the Caribbean. *See* JANET REITMAN, INSIDE SCIENTOLOGY 4-6 (2011).

42. *Id.* at 4.

43. The details of Hubbard's military career are highly disputed. *See* LAWRENCE WRIGHT, GOING CLEAR: SCIENTOLOGY, HOLLYWOOD, AND THE PRISON OF BELIEF 35-36, 38-39 (2013).

44. For Depression-era pulp fiction, "the standard rate was a penny a word," but Hubbard was so prolific that he made a decent living. *Id.* at 27-28.

45. During his time at sea with Scientology's Sea Organization in the 1960s and 1970s, Hubbard routinely entertained his young crew with elaborate yarns about happenings around the galaxy. *Id.* at 99-102.

46. *See id.* at 183-86. Miscavige was not Hubbard's designated successor, but he seized control of the Church in the power vacuum following Hubbard's death. *See id.* at 187, 190-93.

47. In *Dianetics*, Hubbard first proposed his theory that the human mind has two parts: the analytical mind and what he termed the "reactive mind." *Id.* at 61. Scientologists refer to *Dianetics* as "Book One." *Id.*

48. *See supra* note 43 and accompanying text.

49. WRIGHT, *supra* note 43, at 63. A renewed advertising campaign in the 1980s, centered around television advertisements, put *Dianetics* on the *Times*' best-seller list again. *See* Robert W. Welkos & Joel Sappell, *Costly Strategy Continues to Turn Out Bestsellers,* L.A. TIMES (June 28, 1990, 12:00 AM), https://www.latimes.com/local/la-scientology062890-story.html [https://perma.cc/Y7L8-RTTF].

principles of *Dianetics* to found the Church of Scientology in 1954.[50] The new Church rode the era's counterculture boom, experiencing rapid growth through the 1960s and 1970s and into the 1980s.[51] During this period, a number of celebrities joined the Church, including Danny Masterson's mother, Carol.[52] Most outside observers estimate that the Church reached its peak membership in the early 1990s, and it has been shrinking since.[53] Current estimates of the Church's membership vary wildly depending on the source; outside observers place current membership in the tens of thousands.[54] The Church, however, claims far greater numbers.[55]

B. Scientology's Strict Mandates to Adherents

To Scientologists, Hubbard is "Source," and his word is unquestionable.[56] As a matter of doctrine, Scientologists have no discretion

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50. WRIGHT, *supra* note 43, at 82-83. The first Church of Scientology was in California; the second, founded shortly thereafter, was in Washington D.C. *Id.* at 83.

51. *See* Geoff McMaster, *Once Thriving Church of Scientology Faces Extinction, Says Cult Tracker*, UNIV. OF ALBERTA (Jan. 11, 2018), https://www.ualberta.ca/folio/2018/01/once-thriving-church-of-scientology-faces-extinction-says-cult-tracker.html [https://perma.cc/DWY4-RKWQ].

52. *See* Tony Ortega, *Danny Masterson's Scientology Upbringing: An Interview with His Former Stepdad, Joe Reaiche*, UNDERGROUND BUNKER (June 24, 2020), https://tonyortega.org/2020/06/24/danny-mastersons-scientology-upbringing-an-interview-with-his-former-stepdad-joe-reaiche/ [https://perma.cc/67U8-E4PP]. Hubbard actively sought to recruit celebrities from the very beginning, viewing them as an asset for further recruiting and influence. WRIGHT, *supra* note 43, at 163; McMaster, *supra* note 51.

53. *See* Hailey Eber, *Scientology Is Looking Abroad for New Stars and Vulnerable Recruits*, L.A. MAG. (May 10, 2019), https://www.lamag.com/citythinkblog/scientology-foreign-recruitment/ [https://perma.cc/GXB9-RUSH] ("Scientology's numbers peaked in the early '90s with roughly 100,000 members worldwide, but membership has recently dipped to about 20,000.").

54. *See* Tony Ortega, *Updated for 2022: Where in the World Are Scientologists Actually Located?*, UNDERGROUND BUNKER (Apr. 16, 2022), https://tonyortega.org/2022/04/16/updated-for-2022-where-in-the-world-are-scientologists-actually-located/ [https://perma.cc/JL2M-V7XU] ("We think the total number of active Scientologists is around 20,000.").

55. *See What is the Sea Organization?*, SCIENTOLOGY, https://www.scientology.org/faq/church-management/what-is-the-sea-organization.html [https://perma.cc/VFV5-BJ7T] (referring to "the millions of Scientology parishioners who live and work outside the Church.").

56. *See Essay Part 2*, STUDY TECH, https://studytech.org/?PAGE_id=16 [https://perma.cc/VSS2-K78H]; see a*lso* Urbano Alonso Galan, *Scientology: A True Religion*, SCIENTOLOGY (June 1996), https://www.scientologyreligion.org/religious-expertises/scientology-a-true-religion/philosophical-and-doctrinal-aspect.html [https://perma.cc/Y3L3-NWVV].

to deviate from written policy.[57] Hubbard issued written directives to his followers on a regular basis.[58] These directives were often compiled by topic in what the Church calls a "series."[59] One of the most fundamental series to Scientology doctrine is "Keeping Scientology Working," and Scientologists read the first issue of that series at the beginning of most Scientology courses.[60] Near the beginning of the issue is a special message from Hubbard to the reader that explains, with typical Hubbardian subtlety, the importance of following his directions:

> THE FOLLOWING POLICY LETTER MEANS WHAT IT SAYS.
>
> IT WAS TRUE IN 1965 WHEN I WROTE IT. IT WAS TRUE IN 1970 WHEN I HAD IT REISSUED. I AM REISSUING IT NOW, IN 1980, TO AVOID AGAIN SLIPPING BACK INTO A PERIOD OF OMITTED AND QUICKIED FUNDAMENTAL GRADE CHART ACTIONS ON CASES, THEREBY DENYING GAINS AND THREATENING THE VIABILITY OF SCIENTOLOGY AND OF ORGS. SCIENTOLOGY WILL KEEP WORKING ONLY AS LONG AS *YOU* DO YOUR PART TO KEEP IT WORKING BY APPLYING THIS POLICY LETTER.
>
> WHAT I SAY IN THESE PAGES HAS ALWAYS BEEN TRUE, IT HOLDS TRUE TODAY, IT WILL STILL HOLD TRUE IN THE YEAR 2000 AND IT WILL CONTINUE TO HOLD TRUE FROM THERE ON OUT.
>
> NO MATTER WHERE YOU ARE IN SCIENTOLOGY, ON STAFF OR NOT, THIS POLICY LETTER HAS SOMETHING TO DO WITH YOU.[61]

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57. *See infra* note 61 and accompanying text.

58. "On a regular basis" is, perhaps, an understatement. The former pulp fiction author generated an astonishing amount of material during his years at the head of the Church. *See The Basics*, BRIDGE PUBL'NS, https://www.bridgepub.com/introduction/the-basics.html [https://perma.cc/WP7M-ZJU7] (describing how Hubbard's output has been codified in "hundreds of books and more than 3,000 recorded lectures").

59. *See, e.g.*, L. RON HUBBARD, MANAGEMENT SERIES 1 (1974), https://www.tep-online.info/laku/usa/reli/scien/SECRETDOX/MGMT_SERIES_1970-74.pdf [https://perma.cc/HHN3-HQDN].

60. *See* Tony Ortega, *Claire Headley Tells Us How to Keep Scientology Working*, UNDERGROUND BUNKER (Apr. 24, 2013), https://tonyortega.org/2013/04/24/claire-headley-tells-us-how-to-keep-scientology-working/ [https://perma.cc/SQ25-KG83].

61. L. RON HUBBARD, KEEPING SCIENTOLOGY WORKING SERIES *1* 7 (1991) [hereinafter KSW] (emphasis in original), http://suppressiveperson.org/1965/02/07/hcopl-keeping-scientology-working/#fnref-144-6 [https://perma.cc/LB89-BSB8].

As viewed by a dedicated Scientologist, the universe is a terrifying place: teeming with life and yet decaying towards nothingness.[62] For trillions of years, the physical universe has been trapped on a path to total ruin.[63] The only way to reverse the death spiral that threatens to consume all of existence itself is through Scientology, applied exactly as specified by Hubbard.[64] The unique concoction of impossibly high stakes and a singular, narrow path to eternal salvation for all of existence inculcates impressive levels of dedication and discipline among Scientologists.

C. How Scientology Handles Naysayers and Turncoats

Scientology's internal discipline stems from more than just a broad mandate to follow Hubbard's directions. Over the years, the Church has developed a highly structured ethics system that administers "justice."[65] This complex system is built upon Hubbard's thesis of the anti-social personality.[66] Hubbard originally opined that "there are 80% of us trying to get along and only 20% trying to prevent us."[67] Of that 20 percent, he clarified, only 2.5 percent "are truly dangerous."[68] He also provided a detailed list of the attributes of the antisocial personality, so that his followers might better identify them. Some of these attributes are relatively straightforward: "[h]e or she speaks only in broad generalities" and "[s]uch a person

62. *See Does Scientology Have Doctrines Concerning Heaven or Hell?*, SCIENTOLOGY NEWSROOM, https://www.scientologynews.org/faq/scientology-doctrines-heaven-hell.html [https://perma.cc/4FV8-E5QD].

63. *See* KSW, *supra* note 61, at 10, 13; *see also* L. RON HUBBARD, SCIENTOLOGY: A HISTORY OF MAN 1 (1951), https://vinaire.files.wordpress.com/2013/07/history_of_man.pdf [https://perma.cc/MC96-2ECY] ("This is a cold-blooded and factual account of your last sixty trillion years.").

64. *See* KSW, *supra* note 61, at 8, 10, 12-13.

65. Hubbard wrote thousands of pages on the subject over the years. For an overview of Scientology ethics procedures, see generally L. RON HUBBARD, INTRODUCTION TO SCIENTOLOGY ETHICS (1968), https://stss.nl/stss-materials/English/Books%20Original%20PDF%20Scan%20OCR/Introduction%20to%20Scientology%20Ethics%2C%20ITSE%201968.pdf [https://perma.cc/3FXE-26E4].

66. Hubbard used the label "anti-social personality" and "anti-Scientologist" interchangeably. *See id.* at 9.

67. *Id.* at 10.

68. *Id.* at 9. Hubbard gives as examples, *inter alia*, Napoleon and Hitler. *Id.*

deals mainly in bad news."[69] These antisocial personalities, he posited, are the cause of all life's ills.[70]

Hubbard's novel thesis of the anti-social personality quickly outgrew this definition. As the organization grew larger, possible threats and rivals multiplied, and the antisocial personality crystallized into the true boogeyman of Scientology: the "Suppressive Person" (commonly shortened to "SP").[71] Suppressive Persons are those who commit "Suppressive Acts."[72] There are many Suppressive Acts; one of them is bringing a civil suit against any Scientologist or Scientology organization.[73] Other Suppressive Acts include reporting or threatening to report Scientology or Scientologists to civil authorities, testifying as a hostile witness against Scientology, and giving anti-Scientology or anti-Scientologist evidence to the media.[74] It is easy to see how the *Bixler* plaintiffs, who each violated all four of these "rules," ended up on the list of Scientology's most despised enemies.[75]

In Scientology, the danger of Suppressive Persons extends beyond the impact of their evil deeds. Anyone who is "connected" to a Suppressive Person is a "Potential Trouble Source" (PTS), and their own spiritual well-being is in grave danger.[76] The remedy to PTS status is to identify the Suppressive Person and "disconnect"—cut all ties—from them.[77] Critics argue that the Church weaponizes the disconnection policy to crush dissenters by breaking up their families.[78] Potential Trouble Sources who fail to "disconnect" from Suppressive

69. *Id.* at 10.

70. *See id.* at 9-10 (describing how "such personalities" are responsible for crime, failing businesses, and family problems).

71. *See id.* at 48.

72. *Id.*

73. *Id.* at 49.

74. *Id.*

75. *See infra* Part III.B.

76. HUBBARD, *supra* note 65, at 48.

77. *See id.*

78. *See* Robert Farley, *Scientologists' Policy Toward Outcasts Under Fire*, ORLANDO SENTINEL (June 26, 2006, 12:00 AM), https://www.orlandosentinel.com/news/os-xpm-2006-06-26-scientology26-story.html [https://perma.cc/8HZ3-6YTD]. The Church disputes this. *What is Disconnection?*, SCIENTOLOGY, https://www.scientology.org/faq/scientology-attitudes-and-practices/what-is-disconnection.html [https://perma.cc/GS73-WFL4].

Persons are at risk of being declared Suppressive Persons themselves.[79] This leads to devastating chain reactions.

In addition to ostracism from the Church, Suppressive Persons lose the protection of Scientology justice. Here, as it does in all respects, the Church operates out of a straightforward playbook written by Hubbard. The respective policy is called "Fair Game," after the original order:

> ENEMY: SP Order. Fair game. May be deprived of property or injured by any means by any Scientologist without any discipline of the Scientologist. May be tricked, sued, or lied to or destroyed.[80]

Hubbard later issued another order that purported to cancel "Fair Game," but in effect served only to discontinue the official use of the now-infamous title:

> The practice of declaring people FAIR GAME will cease.
>
> FAIR GAME may not appear on any Ethics Order. It causes bad public relations.
>
> This P[olicy]/L[etter] does not cancel any policy on the treatment or handling of an SP.[81]

In the past, Scientologists have waged Fair Game campaigns against, among others, journalists and local officials.[82] "Fair Game" was also responsible for an extensive infiltration of the United States government: in the late 1970s, the Church used undercover agents to steal thousands of government documents as part of a

79. *See* HUBBARD, *supra* note 65, at 51 (declaring that the "[f]ailure to handle or disavow or disconnect from a person demonstrably guilty of Suppressive Acts" is itself a Suppressive Act).

80. Policy Letter from L. Ron Hubbard, Founder to all Church of Scientology Orgs. on Penalties for Lower Conditions (1967).

81. Policy Letter from L. Ron Hubbard, Founder to all Church of Scientology Orgs. on Cancellation of Fair Game (1968).

82. MARK RATHBUN, MEMOIRS OF A SCIENTOLOGY WARRIOR 148-50 (2013) (describing harassment campaigns against journalist Paulette Cooper and the mayor of Clearwater, Florida).

campaign to clear Hubbard's name and regain the Church's tax exemption.[83]

This background information on Hubbard, Scientology doctrine, and the structure of the Church is overwhelming, but critical. An observer cannot fully evaluate cases like *Bixler* without first understanding the dynamics of the relationship between the parties and the nature of the conflict between them. The alleged conduct in *Bixler* was part of a "Fair Game" campaign. Scientology policies drove the defendants' alleged conduct.[84] Those same policies would govern the proposed arbitration.[85] The *Bixler* plaintiffs—ex-members of the Church—are keenly familiar with these policies, having lived under them.[86] They are Suppressive Persons, and they know what treatment awaits them in Scientology arbitration.

Equally important is the fact that Scientology arbitration requires the arbitrator to be a Scientologist in good standing.[87] As the preceding Part shows, for a Scientologist to be in good standing, they must strictly abide by the organization's extensive body of doctrine. This doctrine dictates that anyone bringing a claim against the Church, or any of its members, automatically becomes simply by virtue of bringing the claim.[88] Regardless of the merit of the claim, the Scientologist arbitrator is under immense pressure to find in favor of the Church and against the apostate. To do otherwise is to risk sharing the apostate's fate as a Suppressive Person, disconnected from friends and loved ones.[89] These are the rules of the unfair game: a hopelessly lopsided arbitration process, helmed by an arbitrator who zealously maintains the uneven playing field.

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83. *See* RUSSELL MILLER, BARE-FACED MESSIAH: THE TRUE STORY OF L. RON HUBBARD 334-36 (1987). Hubbard's third wife was sentenced to five years in federal prison for her role in the conspiracy. *See* United States v. Heldt, 668 F.2d 1238, 1242 n.5 (D.C. Cir. 1981).

84. Bixler v. Super. Ct. Cal, Cnty. of L.A., No. B310559, 2022 WL 167792, at *1 (Cal. Ct. App. Jan. 19, 2022), *cert. denied* (Cal. Apr. 20, 2022), *cert. denied sub nom.*, Church of Scientology v. Bixler, No. 22-60, 143 S. Ct. 280 (Mem.) (Oct. 3, 2022).

85. *Id.*

86. *Id.*

87. *Id.* at *5.

88. *See supra* notes 72-74 and accompanying text.

89. *See supra* notes 76-79 and accompanying text.

III. TWO COURTS CONFRONT THE UNFAIR GAME

Legal disputes between the Church and ex-members are not a new phenomenon.[90] The Church's use of religious arbitration to fend off apostates, however, is a relatively recent trend.[91] Only four judicial opinions have considered the enforceability of Scientology's agreements to religious arbitration of all future disputes.[92] Only one—the first—was a final judgment after an arbitration.[93] The second is *Bixler*, where the California Court of Appeal overturned the trial court's order compelling arbitration.[94] In the third, the trial court ordered the parties into Scientology arbitration.[95] The fourth also ordered Scientology arbitration; an interlocutory appeal to the Eleventh Circuit is pending.[96]

This Part analyzes the reasoning of the various courts that have been called upon to enforce Scientology's agreements to religious arbitration. While there are four such opinions as of August 2023, this Part constrains its analysis to *Garcia v. Church of Scientology*

90. *See, e.g.*, Religious Tech. Ctr. v. Wollersheim, No. CV 85-7197, 1985 WL 72663, at *1 (C.D. Cal. Nov. 23, 1985).

91. *See* Garcia v. Church of Scientology Flag Serv. Org., No. 18-13452, 2021 WL 5074465, at *3 (11th Cir. Nov. 2, 2021) (describing the arbitration between Mr. Garcia and the Church as "the first in the history of the Church of Scientology.").

92. *See* Ortega, *Scientology Arbitration Denied*, *supra* note 6 (discussing the impact of *Bixler* on two other cases—*Garcia v. Church of Scientology Flag Service Organization* and *Haney v. Church of Scientology International*—in which the trial court had ordered the parties into Scientology arbitration). A fourth group of ex-Scientologists filed suit against the Church after *Bixler*. *See* Baxter v. Miscavige, No. 8:22-cv-986, 2023 WL 1993969 (M.D. Fla. filed Apr. 28, 2022).

93. *See* Ortega, *Scientology Arbitration Denied*, *supra* note 6.

94. *See* Bixler v. Super. Ct. Cal., 2022 WL 167792, at *1.

95. *See* Haney v. Super. Ct. Cal., *ex rel.* Church of Scientology Int'l, No. S265314, 2020 BL 481524 (Cal. Dec. 9, 2020). The *Haney* plaintiffs are former members of Scientology's Sea Organization who allege that the Church abused them while they were members. *See* Tony Ortega, *Valerie Haney Facing New Court Hearing: Why Hasn't Scientology 'Arbitration' Happened Yet?*, UNDERGROUND BUNKER (June 16, 2022), https://tonyortega.org/2022/06/16/valerie-haney-facing-new-court-hearing-why-hasnt-scientology-arbitration-happened-yet/ [https://perma.cc/RQW6-83BY].

96. *See Baxter v. Miscavige*, No. 8:22-cv-986, 2023 WL 2743144, at *7 (M.D. Fla. Mar. 31, 2023) (ordering the parties into arbitration because "[t]his Court's hands are tied"); *Baxter v. Miscavige*, 2023 WL 3863287, at *3 (M.D. Fla. June 7, 2023) (certifying the March 31, 2023 order to allow an interlocutory appeal to the Eleventh Circuit). Like the *Haney* plaintiffs, the *Baxter* plaintiffs are ex-Sea Organization members alleging abuse that occurred while they were members. *Baxter*, 2023 WL 2743144, at *1.

Flag Service Organization and *Bixler* for two reasons.[97] First, *Baxter v. Miscavige* and *Haney v. Church of Scientology International* involve allegations of abuse that occurred while the plaintiffs were still members of the Church, making those two cases poor candidates to demonstrate the virtues of the *Bixler* decision.[98] Second, *Baxter* and *Haney* have not advanced far enough to provide much to discuss. As of August 2023, the significance of the two cases is limited to the fact that they have thus far followed *Garcia*'s lead in enforcing Scientology's agreement to religious arbitration against ex-members.[99] This Part, therefore, omits *Baxter* and *Haney* from its detailed discussion.

In contrast, *Garcia* is an important touchstone. It is historically important as a starting point, in that the underlying dispute generated the first (and, to date, only) Scientology arbitration ever conducted.[100] While it is factually more similar to *Baxter* and *Haney* than *Bixler*, *Garcia* provides an on-the-ground account of how Scientology arbitration actually functions in practice.[101] Finally, *Garcia* is completed litigation: a wire-to-wire journey through the life of an apostate's claim against the Church under the arbitration paradigm, culminating in a federal appellate court confirming the award.

This Part begins its analysis by examining how the Middle District of Florida granted the Church's motion to compel religious arbitration.[102] The Part then continues to the Eleventh Circuit's decision affirming the arbitration award over the Garcias' objections.[103] This Part then concludes with an in-depth analysis of the California Court of Appeal's abrupt break from the *Garcia* framework in *Bixler*.[104]

97. *See Garcia*, 2021 WL 5079465; *Bixler*, 2022 WL 167792.
98. *See Baxter*, 2023 WL 1998969; *Haney*, 2020 BL 481524.
99. *See Baxter*, 2023 WL 1993969; *Haney*, 2020 BL 481524.
100. *See supra* note 84 and accompanying text.
101. *See infra* Part III.A.
102. *See infra* notes 117-26 and accompanying text.
103. *See infra* notes 131-43 and accompanying text.
104. *See infra* Part III.B.

A. Garcia*: An Apostate Plays the Unfair Game*

The first test of Scientology's religious arbitration agreements came in 2015.[105] Luis Garcia and his wife were ex-Scientologists who had left the Church several years before filing suit.[106] They brought claims against the Church for fraud, breach of contract, and unfair and deceptive trade practices.[107] The named defendants in the case were the Church of Scientology Flag Service Organization and the Church of Scientology Flag Ship Service Organization.[108]

Mr. Garcia had signed contracts with various Scientology organizations during his membership in the Church.[109] The court found that Mr. Garcia had signed "approximately 40 Enrollment Applications" between October 2002 and September 2008, when he was "a committed Scientologist."[110] The Church introduced twenty-one of them as a composite exhibit; each contained some variation of the Church's arbitration clause.[111] The nucleus of the dispute was approximately $400,000 that the Garcias had donated to various Church entities.[112] The Garcias wanted that money back: they alleged that the Church defrauded them by soliciting donations for one purpose and using the money for something entirely different.[113] The Garcias also sought refunds for money they had deposited with the Church for future services and accommodations.[114]

To avoid Scientology arbitration, the Garcias attempted to prove that the arbitration agreements were unconscionable under Florida

105. *See* Garcia v. Church of Scientology Int'l Flag Serv. Org., Inc., No. 8-13-cv-220, 2015 WL 10844160, at *1 (M.D. Fla. Mar. 13, 2015).

106. *Id.*

107. *Id.*

108. *Id.* The Church of Scientology Flag Service Organization (known as "Flag") is the corporate entity that operates Scientology's "spiritual headquarters" in Clearwater, Florida. *Churches*, SCIENTOLOGY, https://scientology.org/churches/flag-land-base/ [https://perma.cc/6RRG-TDQH]. The similarly-named Church of Scientology Flag Ship Service Organization operates the *Freewinds*, a cruise ship Scientology maintains as a "religious retreat" for high-level members. *See Welcome to the Freewinds*, FREEWINDS, https://www.freewinds.org/inside-our-church/?video-play=inside_scn_church [https://perma.cc/Q9LK-2BLM].

109. *Garcia*, 2015 WL 10844160, at *1.

110. *Id.*

111. *Id.* Mrs. Garcia had signed several agreements. *Id.* at *1 n.1.

112. *Id.* at *1 n.2.

113. *Id.* at *1.

114. *Id.* at *1 n.3.

law.[115] They argued that the contracts they signed with the Church were contracts of adhesion.[116] They also sought to prove that the arbitration agreements were substantively unconscionable.[117] As Suppressive Persons, they argued, they would never receive a "fair and neutral arbitration."[118] To support this argument, the Garcias offered testimony from several former members of the Church who had been declared Suppressive Persons and subsequently excommunicated.[119] In response, the Church offered its own witness, who testified that the arbitrators "would be instructed to be fair and neutral."[120]

The trial court held an evidentiary hearing on the subject of the arbitration procedures themselves.[121] In this hearing, the Church made a tepid showing in support of its claim that the arbitration procedures referred to in the agreements actually existed.[122] Despite finding the Garcias' argument for substantive unconscionability "compelling," the trial judge held that the First Amendment precluded him from considering their assertions, and that the Garcias, therefore, had failed to prove the arbitration agreements were unconscionable.[123] Accordingly, the court found itself without jurisdiction to entertain the Garcias' claims against the Church and ordered the parties into Scientology arbitration.[124]

A lengthy delay ensued, during which the parties battled over the selection of arbitrators, but the arbitration did eventually take place.[125] In arbitration, the Garcias won a refund of $18,495.36 for

115. *Id.* at *5. Florida applies a "sliding scale" approach that weighs both procedural and substantive unconscionability. *Id.* at *5.

116. *Id.* Contracts of adhesion are "form contracts offered on a take-or-leave basis by a party with stronger bargaining power to a party with weaker power." Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 600 (1991) (Stevens, J., dissenting). The Garcias eventually conceded that "they [were] not in a position to argue surprise or lack of choice." *Garcia*, 2015 WL 10844160, at *5.

117. *Garcia*, 2015 WL 10844160, at *11.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at *6.

122. *Id.*

123. *Id.* at *11.

124. *Id.* at *12.

125. *See* Garcia v. Church of Scientology Flag Serv. Org., Inc., No. 18-13452, 2021 WL 5074465, at *2-3 (11th Cir. Nov. 2, 2021).

religious services paid for but never rendered.[126] The arbitrators rejected outright their claim for the approximately $380,000 in donations solicited under false pretenses.[127] The Garcias then moved to vacate the arbitration award, and the district court dismissed their motion.[128] They appealed to the Eleventh Circuit, challenging both the district court's order to compel arbitration in the first instance and its later denial of their motion to vacate the resulting arbitration award.[129]

The Eleventh Circuit noted in detail the irregularities of the arbitration process that produced the award now on appeal.[130] For example, the Garcias' lawyer was excluded from the arbitration proceedings.[131] The Garcias also submitted documentary evidence to Scientology's International Justice Chief, who reviewed it for "entheta" and ultimately blocked the bulk of the Garcias' evidence from the arbitrators' review.[132] The International Justice Chief also barred the Garcias from bringing witnesses to the hearing.[133] The interactions between Mr. Garcia and the arbitrators were strained, at best: in an affidavit, Mr. Garcia wrote that the lead arbitrator "explode[ed]" when Mr. Garcia complained about not receiving a fair hearing.[134] According to Mr. Garcia, the lead arbitrator claimed that he "knew the [C]hurch's promotional statements about the program were true," and that Suppressive Persons "working to destroy the [C]hurch" had sold the Garcias "a bill of goods."[135]

Despite all of this, the Eleventh Circuit rejected the Garcias' claims and affirmed the district court's decisions.[136] The Garcias' unconscionability argument failed both the procedural and substantive prongs, and the Eleventh Circuit affirmed the order to compel arbitration.[137] The motion to vacate the award also failed, with the

126. *Id.* at *3.
127. *Id.*
128. *Id.* at *1.
129. *Id.*
130. *Id.* at *3.
131. *Garcia*, 2015 WL 5074465, at *3.
132. *Id.* "Entheta" is Scientology parlance for material critical of the Church. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at *13.
137. *Id.* at *6-9.

Eleventh Circuit rejecting the Garcias' arguments of arbitrator bias and misconduct.[138] Curiously, the Eleventh Circuit *did* find that the arbitrators were biased, but nevertheless held that the bias did not save the Garcias' claims, declaring that "[t]he Garcias agreed to a method of arbitration with inherent partiality and cannot now seek to vacate that award based on that very partiality."[139] The Eleventh Circuit denied that misconduct by the arbitrator warranted vacatur.[140] The Eleventh Circuit affirmed the award of $18,495.36, which is the only award that a Scientology arbitration has ever produced as of the publication of this Note.[141]

B. Bixler*: The First Amendment Right to Leave*

With the groundwork laid, the analysis turns to *Bixler*. Most of the *Bixler* plaintiffs are alleged rape victims of Danny Masterson.[142] Three of the plaintiffs were Scientologists at the time but have since left the Church; the fourth was never a Scientologist and was thus never subject to the arbitration agreement.[143] The fifth is Cedric Bixler-Zavala, husband of lead plaintiff Chrissie Carnell Bixler and lead singer of rock band The Mars Volta.[144]

Unlike *Garcia*, in which the plaintiffs sought to recover for fraudulent solicitation of donations and deposits, *Bixler* concerns a "Fair Game" campaign of retaliatory harassment connected with Masterson's alleged rapes.[145] The plaintiffs allege that the Church and its members "engage[d] in a vicious campaign of harassment against

138. *Id.* at *11-13.
139. *Id.* at *12.
140. *Id.* at *13.
141. *Id.*
142. *See* Bixler v. Super. Ct. Cal., 2022 WL 167792, at *1. Four of the five plaintiffs are women who claim that Masterson raped them. *Id.*
143. *Id.*
144. *See* Meghann Cuniff, *The Mars Volta Singer Testifies in Danny Masterson Trial About Emotional Conversation with Ex-Scientologist Wife: 'She Had Been Raped'*, LAW & CRIME (Oct. 29, 2022, 9:24 PM), https://lawandcrime.com/celebrity/the-mars-volta-singer-testifies-in-danny-masterson-trial-about-emotional-conversation-with-ex-scientologist-wife-she-had-been-raped/ [https://perma.cc/5XHM-Z8S4]. Bixler-Zavala signed several arbitration agreements but asserts that he was never a member of the Church. *See Bixler*, 2022 WL 167792, at *2-4 nn.5 & 9.
145. *See Bixler*, 2022 WL 167792, at *3.

them" after they reported the rapes to the police.[146] The plaintiffs collectively allege that Scientology's agents committed a coordinated campaign of harassment pursuant to Scientology's directives and the organization's procedures.[147] The court provided a concise summary of the allegations:

> [C]ollectively plaintiffs allege Scientology's agents committed the following acts against them: surveilled them, hacked their security systems, filmed them, chased them, hacked their email, killed (and attempted to kill) their pets, tapped their phones, incited others to harass them, threatened to kill them, broke their locks, broke into their cars, ran them off the road, posted fake ads purporting to be from them soliciting anal sex from strangers, broke their windows, set the outside of their home on fire, went through their trash, and poisoned trees in their yards.[148]

The Church moved to compel arbitration, seeking to enforce the agreements to religious arbitration that four of five plaintiffs had signed.[149] The plaintiffs opposed the motion on several grounds, but the primary thrust of their argument was that the procedure that the Church wanted to compel was a religious ritual, not arbitration.[150] Specifically, the plaintiffs described it as "a form of religious punishment for nonbelievers who did not follow [C]hurch doctrine."[151]

Encompassed within this argument were two subsidiary arguments. The first was the same one made and rejected in *Garcia*: that any arbitration panel composed of Scientologists "would be required, by the Fair Game doctrine, to rule against them, or risk being declared Suppressive Persons themselves."[152] The *Bixler* plaintiffs, however, added an additional argument: that their "constitutional

146. *Id.* at *1. The *Bixler* defendants are Masterson, three Scientology entities, and Church leader David Miscavige. *Id.*
147. *Id.* at *2.
148. *Id.*
149. *Id.* at *1.
150. *Id.* at *7.
151. *Id.*
152. *Id.*

right to change religions" rendered it "unconstitutional to force them to participate in such a ritual."[153]

The Church maintained that its arbitration procedure was not a religious ritual, although it did agree that Scientology law would govern.[154] The common thread of the Church's argument was that basic principles of contract law should control, and any acknowledgment of a First Amendment right to leave a religion would itself "create[ ] an impermissible and unconstitutional separate standard for adjudicating agreements entered into by churches."[155] The Church also denied ever declaring the plaintiffs Suppressive Persons and insisted that the "Fair Game" doctrine had been canceled decades ago.[156]

As in *Garcia*, the trial court held a hearing on the issue and ended up siding with the Church.[157] The trial court construed the complaints as alleging misconduct that occurred after the ex-Scientologist plaintiffs had left the Church, but nevertheless held that the alleged conduct was arbitrable.[158] The trial court rejected the argument that Scientology arbitration was a religious ritual, and with it the plaintiffs' argument that the First Amendment protected their right to leave a religion.[159] According to the trial court, the First Amendment preempted any challenge to the fairness of Scientology arbitration.[160] The plaintiffs petitioned for review.[161]

In a surprising move, the California Court of Appeal reversed the trial court's order compelling arbitration.[162] Where the lower court had rejected outright the plaintiffs' argument that they had the constitutional right to leave a faith, the Court of Appeal began by recognizing that right.[163] The Court of Appeal sidestepped the debate

153. *Id.*

154. *Id.*

155. *Id.*

156. *See id.* at *8. The Church pointed to the 1968 order purporting to cancel "Fair Game." *See supra* note 81 and accompanying text.

157. *See Bixler*, 2022 WL 167792, at *8-9.

158. *Id.* at *9.

159. *See id.*

160. *Id.* Reasoning that evaluating the fairness of the process would constitute a judicial inquiry into faith, the court invoked the doctrine of ecclesiastical abstention. *Id.*

161. *Id.* at *1.

162. *Id.* at *15-16.

163. *Id.* at *10 ("We begin by considering the constitutional implications of a member's decision to leave a faith.").

over whether Scientology arbitration was a religious ritual.[164] Instead, the court framed the issue as whether the religious arbitration agreement could be enforced in perpetuity against ex-members.[165]

The court found the religious abstention doctrine inapplicable because the dispute concerned questions that could be settled by neutral principles of law.[166] In a surprising twist, the court looked to *Garcia* as support for this proposition. Although *Garcia* held otherwise with respect to a motion to compel religious arbitration, the California Court of Appeal found its decision to assess the resulting award sound, noting that the review of an arbitration award is not review of a dispute that is "ecclesiastical in its character" and thus controlled by religious abstention.[167] Because the *Bixler* plaintiffs alleged that the Church and its members committed torts in order to adhere to Scientology doctrine, and not in spite of it, the underlying dispute between the parties was secular, and not religious.[168] Ecclesiastical abstention was not appropriate when the plaintiffs had withdrawn their consent to Scientology doctrine.[169]

Having recognized that the plaintiffs' free exercise rights encompassed the right to separate themselves from Scientology practices, the court turned to the Church's argument that any refusal to enforce the agreements was impermissible hostility towards religion.[170] The court rebuffed the Church's premise that the religious arbitration agreements were enforceable in perpetuity.[171] Instead, the court zeroed in on the heart of the dispute—the conflicting Free Exercise rights in play—and sided with the plaintiffs, overturning the lower court's order to compel arbitration.[172] Resolving the

164. *Id.* at *11 ("Whether Scientology arbitration is a ritual is immaterial to our analysis.").
165. *Id.*
166. *Id.*
167. *Id.* at *13.
168. *Id.*
169. *Id.* at *14 ("Here, petitioners withdrew their consent when they left.... [C]onsent no longer exists as the necessary predicate for religious abstention.").
170. *Id.*
171. *Id.* ("We reject Scientology's premise; it has provided no authority upholding an arbitration agreement ad infinitum.").
172. *Id.* ("As we recognized at the outset, this case involves two free exercise rights: petitioners' right to leave a faith *and* Scientology's right to resolve disputes with its members without court intervention.").

tension, according to the court, did *not* evidence hostility to religion.[173]

In doing so, the *Bixler* court charted a course out of the morass. Other courts should follow: the constitutional right to leave a faith is worthy of protection. Courts should not enforce agreements to religious arbitration against ex-members when the underlying dispute arises after their membership ended. The right to leave one's faith should prevail over the right to impose ecclesiastical discipline on ex-members in perpetuity. "The Constitution forbids a price that high."[174]

IV. *BIXLER* AS A NEW RULESET

This Note proposes that courts follow *Bixler* when considering whether to enforce agreements to religious arbitration against ex-members. As stated in *Bixler*, the approach is as follows: when "the claims at issue ... are based on alleged tortious conduct occurring after [the ex-member's] separation from the Church and do not implicate resolution of ecclesiastical issues," the religious body's internal dispute resolution procedures do not bind the ex-member.[175] This standard applies whether the party seeking to compel arbitration is a current member of the faith or the religious entity itself.[176] In all other respects, it is a narrow standard: the *Bixler* court was careful to limit its holding to those claims arising from conduct that allegedly took place *after* the plaintiffs had left the faith.[177] It also applies only to tort claims.[178]

In the battle between the constitutional right to leave one's faith and the faith's right to enforce its internal rules, the individual's right to leave wins the tie. What follows in this Part is a summary of the advantages of employing *Bixler* to resolve these dilemmas

173. *See id.* at *14.
174. *Id.* at *15.
175. *Id.* at *1.
176. *Bixler* itself dealt with both categories of movant. *See id.* at *1-2.
177. *Id.* at *3-4.
178. The *Bixler* plaintiffs alleged a laundry list of misconduct, but their allegations all sounded in tort. *See supra* note 148 and accompanying text. A broader reading of *Bixler* that includes contract claims is compelling but outside the scope of this Note.

and application of *Bixler* to the other cases involving forced Scientology arbitration.

A. The Comparative Advantages of Bixler

The benefits of *Bixler* over other approaches are numerous. Chief among these advantages is that it achieves justice by closing a glaring loophole found at the intersection of the FAA and the First Amendment.[179] Before the California Court of Appeal reversed the trial court's order, the *Bixler* plaintiffs were headed towards a hopelessly-lopsided arbitration presided over by the defendants themselves.[180] Win or lose, any appeal would be an uphill slog, because "[j]udicial review of an arbitration award 'is among the narrowest known to the law.'"[181] Given the egregiousness of the alleged misconduct in *Bixler*, forcing the plaintiffs to submit to internal arbitration at the mercy of the defendants is particularly troublesome.[182] In a vacuum, the approach that avoids such an outcome is inherently preferable to those that do not.

Another advantage of *Bixler* is that it charts a middle course between dueling constitutional protections. When ex-members and their former faiths battle over contractual agreements to religious arbitration, there are free exercise rights at issue on both sides.[183] It does not follow, however, that the individual's right to leave a religion must therefore yield to the equal but opposing right of the faith to establish and enforce its own internal rules. The *Bixler* court acknowledged this basic proposition.[184]

Although the two sides' rights are symmetrical, stemming from the same constitutional provision, the *Bixler* court correctly recognized that to accept the Church's arguments would be to destroy

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179. *See supra* notes 3-4 and accompanying text.

180. *See supra* notes 157-60 and accompanying text. For an example of Scientology's internal arbitration process, see discussion of *Garcia*, *supra* notes 131-35 and accompanying text.

181. Garcia v. Church of Scientology Flag Serv. Org., Inc., No. 18-13452, 2021 WL 5074465, at *10 (11th Cir. Nov. 2, 2021) (quoting AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc., 508 F.3d 995, 1001 (11th Cir. 2007)).

182. See *supra* Section II.C for an explanation of Scientology's policies mandating hostility towards apostates.

183. *See* Bixler v. Super. Ct. Cal., 2022 WL 167792, at *14.

184. *See id.* at *15.

that symmetry.[185] The Church argued that the agreements should be enforceable in perpetuity, regardless of the plaintiffs' membership status or when that membership terminated.[186] To succeed in its motion to compel arbitration, the Church had to take this position: two of the *Bixler* plaintiffs had left the Church a full decade before the Fair Game harassment campaign started, and a third was never a member in the first place.[187]

Bixler demonstrates one problematic scenario with a perpetually enforceable agreement to religious arbitration, but it is not the most egregious example imaginable. According to the Church's logic, there is no expiration date to the agreements, and thus, no ex-member is immune.[188] The Church could relentlessly commit torts against an ex-member over a fifty-year period, and the ex-member would be powerless to bring a civil suit at any point during that half-century. A single agreement to arbitrate all future disputes, even if signed to obtain a "single religious service," would *forever* submit the signer to Scientology ethics and justice procedures.[189] This would be ludicrous even if the Church's arbitration processes were unimpeachable.[190]

Additionally, *Bixler* is straightforward to apply. In essence, it requires the court to answer only three questions: (1) Is the arbitration that one party seeks to compel religious in nature? (2) Has the party opposing religious arbitration left the faith? (3) Did the alleged misconduct occur after the ex-member departed the faith? For the party opposing religious arbitration to prevail and avoid the arbitration, all three answers must be "yes." Each of the three questions is simple. The first question typically resolves naturally, as the party seeking to enforce religious arbitration generally acknowledges it as such.[191] The second question also tends to handle

185. *See id.* at *10-11.

186. *Id.* at *14.

187. *Id.* at *3-4.

188. *See id.* at *1.

189. *See id.* at *15.

190. *Cf.* Coleman v. Retina Consultants, P.C., 687 S.E.2d 457, 461 (Ga. 2009) (holding that a non-compete clause with no limitation regarding duration was invalid).

191. *See, e.g.*, Bixler, 2022 WL 167792, at *12 ("Scientology's motion described itself as a motion to compel 'religious arbitration.'"). If the arbitration is secular, there are no First Amendment implications. *See supra* notes 30-31 and accompanying text.

itself.[192] The third can present contested questions of fact, as in *Bixler*, but courts can resolve such questions.[193] A "no" to any of these questions renders *Bixler* inapplicable, and the court would enforce the agreement to religious arbitration.

The final key benefit of *Bixler* is that it does not require in-depth judicial examination or evaluation of religious doctrine or practices. In fact, the *Bixler* court was very careful to structure its holdings to avoid such judicial review.[194] Although the parties agreed that Scientology law controlled the proposed arbitration, the question of whether Scientology arbitration constituted a religious *ritual* was hotly contested, as was the fairness of the arbitration process itself.[195] The California Court of Appeal avoided these sticky questions altogether; instead, the question of enforceability turned on consent.[196] This question had an easy answer: each of the plaintiffs had clearly left the faith, either on their own or because the Church declared them a Suppressive Person.[197]

B. Why Bixler *Matters: Application to Other Scenarios*

The widespread adoption of the *Bixler* standard would have the important effect of deterring the most disturbing abuses, but it would not affect the outcome of most cases involving disputes over religious arbitration. Furthermore, it is important to remember that the *Bixler* standard does not determine liability. A party who succeeds on a *Bixler* argument wins nothing more than the right to proceed in the underlying civil case. In *Bixler*, this meant the plaintiffs' claim continued in California state court.[198]

The greatest effect of *Bixler* would be prophylactic, because the scenario presented in *Bixler*—a religious entity trying to force its

192. Unsurprisingly, litigants who oppose religious arbitration on the grounds that they have left the faith typically make their position clear. *See, e.g.*, *Bixler*, 2022 WL 167792, at *1-2.

193. *See id.* at *8-9 (describing how the court sought, and received, clarification that the claims arise from conduct *after* the plaintiffs had left the Church).

194. *See id.* at *13 ("The issue is not one of Scientology doctrine, but generally applicable principles of law.").

195. *Id.* at *11.

196. *See id.* at *14.

197. *Id.* at *1-3.

198. *Id.* at *15-16.

brand of religious arbitration on ex-members who have clearly renounced the faith—is unusual.[199] The facts underlying *Bixler* are unique even among the landscape of ex-Scientologist cases; *Bixler*'s logic would not likely change the outcome of the other cases even if it were applied to them. After all, the misconduct alleged in *Garcia* occurred *before* the Garcias left the Church, during the period when they were implicitly agreeing to the Church's internal rules of conduct.[200] As such, the outcome of *Garcia* would not change even if it were decided under *Bixler*. This is also true of *Haney* and *Baxter*, in which the allegations arose from abuse allegedly suffered while the plaintiffs were active Scientologists.[201]

The prophylactic effects of *Bixler* can reach beyond the Scientology (and ex-Scientology) community as well. Scientology may be relatively unique in its beliefs and its creative use of contracts, but it is by no means the only religious group regularly sued by its members and ex-members.[202] As long as the door remains open to leverage contract law to dodge accountability in the courts, there is no guarantee that other, larger religious groups will not follow Scientology's lead. Recent congressional action has undercut the ability of religious institutions to hide behind arbitration for the most grievous misconduct, but there remains a wide spectrum of claims for which religious arbitration is entirely legal.[203] In the hands of larger religious institutions, the possibility for harm is great.[204]

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199. In cases where a defendant religious entity seeks to compel religious arbitration, the plaintiff is typically a member in good standing. *See, e.g.*, Matahen v. Sehwail, 2016 WL 1136602, at *1-2 (N.J. Super. Ct. App. Div. 2016) (describing a defendant mosque's motion to compel Islamic arbitration of a claim brought by members of the mosque for misuse of funds).

200. *See* Garcia v. Church of Scientology Flag Serv. Org., Inc., No. 18-13452, 2021 WL 5074465, at *1-2 (11th Cir. Nov. 2, 2021).

201. *See* Ortega, *supra* note 95; Baxter v. Miscavige, No. 8:22-cv-00986, 2023 WL 1993969 (M.D. Fla. filed Apr. 28, 2022).

202. Insights from the past two decades prove that even the largest religious institutions in American society are not immune to scandal. *See, e.g.*, Jim Mustian, *FBI Opens Investigation Into Sex Abuse in the Roman Catholic Church in New Orleans*, PBS (June 29, 2022, 10:36 AM), https://www.pbs.org/newshour/nation/fbi-opens-investigation-into-sex-abuse-in-the-roman-catholic-church-in-new-orleans [https://perma.cc/KZC3-W88J].

203. *See supra* note 26 and accompanying text.

204. As an example, while the total ranks of Scientology number only in the tens of thousands, there are over a billion Catholics around the world. *Compare supra* notes 53-54 and accompanying text, *with The Global Catholic Population*, PEW RSCH. CTR. (Feb. 13, 2013), https://www.pewresearch.org/religion/2013/02/13/the-global-catholic-population/ [https://perma.cc/S5T3-23DQ].

Bixler provides an avenue to cut off the most blatant abuse of religious arbitration.

V. COUNTERARGUMENTS ADDRESSED

This Part addresses three potential counterarguments to the *Bixler* approach of invalidating agreements to religious arbitration when they are leveraged against ex-members who bring claims arising after the termination of their membership. The first, and most common, of these arguments is that the standard defenses to contract liability are sufficient to prevent unjust enforcement of religious arbitration agreements. The second argument flows from a fear that widespread use of the *Bixler* formula would create an unconstitutional entanglement between the courts and religion by requiring judicial determinations of religious sincerity and validity. The last argument points to possible abuses by future litigants who could strategically dodge contract liability through convenient losses of faith. This Part refutes these arguments in order.

A. The Paper Tigers of Contract Defenses

This argument begins with the proposition that religious arbitration poses no unique problem at all, because basic contract defenses are sufficient to guard against any exploitation of agreements to arbitration, whether religious or secular. This is the starting point under the FAA.[205] On paper, contract defenses nullify religious arbitration agreements when those agreements are abusive or exploitative.[206] In practice, however, these defenses routinely fail to live up to their supporters' expectations.[207]

Although there exists a contractual defense—unconscionability—that seemingly addresses the problem of abusive religious arbitration, this defense is a paper tiger.[208] Moreover, the presence of First Amendment religious rights in the equation makes judicial

205. *See* 9 U.S.C. § 2.

206. *See* Michael A. Helfand, *The Peculiar Genius of Private-Law Systems: Making Room for Religious Commerce*, 97 WASH. U. L. REV. 1787, 1805-06 (2020).

207. *See id.* at 1807-08.

208. *See* Bruhl, *supra* note 15, at 1442 ("[I]t is well known that unconscionability is generally a loser of an argument.").

determinations of unconscionability particularly unreliable as a defense against abusive use of religious arbitration—*Garcia* provides a prime example.[209] The district court refused to even consider the Garcias' unconscionability argument because to do so "would constitute a prohibited intrusion into religious doctrine, discipline, faith, and ecclesiastical rule, custom, or law by the court."[210] In declining to recognize the unconscionability argument, the court denied the Garcias the chance to make the most natural argument for their facts.

Even if the district court in *Garcia* could be forgiven because it had to decide the issue on only the hypothetical deficits of a proposed future arbitration, that excuse does not extend to the Eleventh Circuit on appeal. The Eleventh Circuit had a full record and a completed arbitration to consider when evaluating the Garcias' unconscionability argument.[211] Despite significant evidence of unconscionability, the court upheld both the award and the lower court's decision to order arbitration.[212] The question lingering after *Garcia* was what showing *could* support the mythical unconscionability defense. The answer was, seemingly, nothing: should the court even show the mercy of considering an unconscionability argument, the bar was set impossibly high.

B. Determinations of Religious Sincerity by Skittish Courts

Courts are justifiably reluctant to peer under the hood of religious arbitration agreements, but the First Amendment does not impose a universal bar on judicial examination of religion. Courts can, and do, make determinations of religious sincerity: one notable example is that of the conscientious objector.[213] In a wide variety of religious accommodations cases, courts must determine the sincerity of the

209. Garcia v. Church of Scientology Flag Serv. Org., 2015 WL 10844160, at *11-12 (M.D. Fla. Mar. 13, 2015).

210. *Id.* at *11.

211. *See* Garcia v. Church of Scientology Flag Serv. Org., Inc., No. 18-13452, 2021 WL 5074465, at *3-4, *6-9 (11th Cir. Nov. 2, 2021).

212. *Id.* at *5-6, *9-11.

213. *See* Welsh v. United States, 398 U.S. 333, 343-44 (1970) (basing a conscientious objector exemption, in part, on the "strength" of the petitioner's religious convictions).

claimant's religious beliefs to weed out meritless claims.[214] If a court can find that a party's religious belief is a "parody," then surely that court could determine whether a party had abandoned its prior religious beliefs.[215]

In light of this, one commentator has proposed that an expanded conscientious objector standard is the appropriate safety valve for "otherwise binding religious arbitration agreements" when the enforcement of those agreements infringes upon the ex-member's religious freedom.[216] In application, the conscientious objector standard would typically produce the same results as the *Bixler* approach.[217] The Garcias' claim, however, may very well have survived: they were ex-members and Suppressive Persons, after all, much like the *Bixler* plaintiffs.[218]

Where the conscientious objector standard would struggle is in its complexity. The military uses an eight-step process to evaluate conscientious objector claims.[219] Both a chaplain and a psychiatrist are required to complete the evaluation.[220] Claimants bear the burden of proving sincere and deeply held beliefs, and only certain kinds of pacifistic beliefs can qualify one as a conscientious objector.[221] The court is tasked with making these decisions.[222] On the other hand, the *Bixler* inquiry requires no such determination, and the corresponding evaluative burden on the court is relatively simple.[223]

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214. *See, e.g.*, Cavanaugh v. Bartelt, 178 F. Supp. 3d 819, 823-24 (D. Neb. 2016) (dismissing a prisoner's claim for religious accommodations because his belief in the divine "Flying Spaghetti Monster" was "a parody, intended to advance an argument").

215. *See id.*

216. Skylar Reese Croy, *In God We Trust (Unless We Change Our Mind): How State of Mind Relates to Religious Arbitration*, 20 PEPP. DISP. RESOL. L.J. 120, 123, 138-39 (2020).

217. The *Bixler* plaintiffs easily met the burden of proving that they were no longer members of the Church or adherents to Scientology doctrine. *See* Bixler v. Super. Ct. Cal., No. B310559, 2022 WL 167792, at *14-15 (Cal. Ct. App. Jan. 19, 2022), *cert. denied* (Cal. Apr. 20, 2022), *cert. denied sub nom.*, Church of Scientology v. Bixler, No. 22-60, 143 S. Ct. 280 (Mem.) (Oct. 3, 2022).

218. *See* Garcia v. Church of Scientology Flag Serv. Org., Inc., No. 18-13452, 2021 WL 5074465, at *9 (11th Cir. Nov. 2, 2021).

219. *See* Croy, *supra* note 216, at 135-36.

220. *Id.*

221. *See id.*; *see also* Gillette v. United States, 401 U.S. 437, 461-63 (1971) (holding that a conscript who objected on religious grounds to *certain* wars could not qualify as a conscientious objector).

222. *See* Croy, *supra* note 216, at 134-35.

223. *See* Bixler v. Super. Ct. Cal., 2022 WL 167792, at *15.

C. Keeping Opportunistic Litigants in Check

The final concern is one of gamesmanship. As with any paradigmatic shift expanding the universe of contract defenses, opponents fear that tomorrow's plaintiffs (or defendants) will exploit the new defenses to escape contract liability they should justifiably bear. The narrowness of the *Bixler* holding, however, would make it difficult to abuse.[224] In its simplicity, *Bixler* would prove surprisingly robust and unsusceptible to exploitation by opportunists.[225]

A hypothetical demonstrates the point. Suppose that Adherent X joins Religion Y, signing an agreement to religious arbitration along the way. The agreement specifies that all disputes—present and future—that Adherent X has with Religion Y, or any of its members, may only be resolved through Religion Y's internal dispute resolution process. Religion Y clergy conduct this process in accordance with Religion Y principles. Adherent X, at this point a strong believer in Religion Y, happily signs the agreement.

Adherent X remains a dedicated Y-er for a decade. Every Thursday she suffers intense verbal criticism that non-believers would find abusive but is a core part of Religion Y doctrine on building spiritual resilience. Additionally, Adherent X is locked in a cupboard for five hours every Monday morning as dictated by Religion Y teachings. This is physically painful for Adherent X, but she complies because she believes it is important for her spiritual growth.

As the years go by, however, the repeated verbal criticism and confinement in the cupboard begin to feel less enlightening and more like abuse. At this point, however, the only remedy for Adherent X is to participate in Religion Y's internal dispute resolution, so Adherent X does so several times. At first, these arbitrations yield satisfactory results for Adherent X, but over time Adherent X finds these processes less and less rewarding. Eventually, Adherent X begins to wonder if her faith itself is the problem and considers leaving.

This is the key inflection point upon which the *Bixler* analysis turns.[226] Should Adherent X decide to leave the faith, she withdraws

224. *See supra* Section IV.A.
225. *See id.*
226. *See Bixler*, 2022 WL 167792, at *14-15.

her consent, and she may no longer be subjected to Religion Y's internal arbitration in place of a civil suit.[227] The trade-off, of course, is her membership in the faith, with all its benefits.[228] Adherent X would have to balance her desire to remain a member of the faith, subject to all its requirements, with her desire to pursue relief in the courts. This is a natural balancing process that requires no judicial intervention whatsoever. Adherent X herself would determine her own religious beliefs, evaluate those of Religion Y as they apply to her, and determine the appropriate course of action.

Irrespective of whether Adherent X brings a civil suit, should she leave, she would no longer be bound by Religion Y's doctrine, including its tenets of religious arbitration.[229] If, like the *Bixler* plaintiffs, Adherent X is then continually subjected to tortious conduct *after* leaving Religion Y, Adherent X would have the full suite of options available to pursue the appropriate remedy against the tortfeasor, whether it be Religion Y or one of its remaining members.[230] Should Adherent X decide to remain a member of the faith, however, she would do so knowing that she remained under the purview of Religion Y's internal rules and discipline.[231] Either way, the choice of whether to consent would remain with Adherent X: this consent could not be bargained away in perpetuity.[232]

It is possible, of course, for Adherent X to pursue a civil suit in court *and* end up as a member of Religion Y in the long run. This could happen unintentionally (perhaps Adherent X, after winning her lawsuit, has a change of heart and returns to the faith) or intentionally (if Adherent X opportunistically "quit" the faith just to pursue a civil suit, intending all the while to rejoin later after collecting on a judgment). Regardless of the motive, Religion Y has an easy remedy for religious opportunism that is entirely within its control: it can refuse Adherent X re-entry into the faith.[233] In this

227. *See id.*
228. *See id.*
229. *See id.* at *14-15.
230. *See id.* at *15.
231. *See id.* at *13-14.
232. *See id.* at *15.
233. While individuals have a First Amendment right to leave their religion, religious organizations have a corresponding First Amendment right to police their membership ranks. *See id.* at *12-13.

way, *Bixler* is self-policing on both ends: it allows members to leave their faiths to pursue judicial relief while also allowing churches to defend themselves from opportunists.[234]

CONCLUSION

The constitutional right to leave one's faith is deserving of judicial protection. This protection matters most when ex-members allege ongoing abuse at the hands of their former faiths. Although it is rare for religious arbitration to be used as a weapon, *Bixler* presents a warning of the potential for harm in the unintended synergy between the First Amendment and the Federal Arbitration Act.[235]

At the same time, *Bixler* provides a guiding light. Courts should adopt the *Bixler* approach and refuse to enforce agreements to religious arbitration against ex-members when their claims arise from conduct occurring after they left the faith. Should courts decline to follow *Bixler*, religious arbitration could be used as both a shield against the pursuit of justice and a sword to strike out against ex-members and apostates. The price of religious affiliation cannot be so high as eternal submission to ecclesiastical discipline.

Thomas Floyd[*]

234. *See id.* at *14-15.

235. The Scientology cases stand out for their contractual flavor, but Scientology is not the only high-control group that uses strict codes of behavior and garden-variety intimidation tactics to silence dissenters. *See* Sharon Otterman, *Abuse Verdict Topples a Hasidic Wall of Secrecy*, N.Y. TIMES (Dec. 10, 2012), https://www.nytimes.com/2012/12/11/nyregion/hasidic-man-found-guilty-of-sexual-abuse.html [https://perma.cc/P56S-SMSN]; *see supra* Section III.B.

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