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Editor's Note

Chapman Law Review is proud to release the second issue of Volume 29. This is the second of two general law review issues in this year's volume, to be followed by the Symposium Issue. This Issue features scholarship from practitioners and scholars who bring the law to life with concrete proposals on timely topics, as well as two student Notes from a *Chapman Law Review* Managing Editor and myself.

First, Peter Constable Alter examines the Supreme Court's decision in *Morgan v. Sundance* and its impact on a different aspect of arbitration law—the "pro-arbitration canon." In *Arbitration Overcorrection?*, Alter critiques the canon, which instructs courts to resolve contractual ambiguities in favor of arbitration, and explains that the Federal Arbitration Act intended only to place arbitration agreements on equal footing with other contracts and not, as courts have incorrectly interpreted, to favor them over other forms of dispute resolution. Alter's ultimate proposal restores consistency, neutrality, and fidelity to the statute's text and purpose.

Next, Christopher Ligatti critiques the procedures available to federal employees in *Escaping the Labyrinth*. Ligatti argues that the current system of overlapping forums and repeated appeals is unnecessarily complex and inefficient. Ligatti explains that the problem is not constitutional due process protections, but the extensive statutory and regulatory framework that allows employees to pursue claims across multiple overlapping forums, often with repeated appeals and even full "do-over" trials in federal court. He ultimately proposes reforms to streamline the process and promote consistency, fairness, and timely resolution.

Professor Jessica Lynn Wherry then examines how military discharge review boards (DRBs) misuse the "presumption of regularity" to deny discharge upgrade requests in *The Military Discharge Review Boards' Irregular Presumption of Regularity*. Professor Wherry argues that, rather than serving as a rebuttable analytical tool, the presumption operates as a rubber-stamp that unfairly blocks relief for veterans despite serious consequences. She identifies several irregularities in the doctrine's overbroad and inconsistent application, showing how it departs from established legal frameworks. Finally, Professor Wherry proposes reforms to better define and limit the presumption, promoting more transparent, fair, and impartial review.

Next, Aubrey Adams, a third-year student at Chapman University Dale E. Fowler School of Law, examines the limits of the FTC's consumer review regulations in the digital age. In *Muted by the Machine*, Adams explains that the FTC's current rule fails to address algorithmic review suppression—where platforms quietly hide or downrank negative reviews—leaving consumers with a misleading picture of products. Adams shows how this problem appears across platforms like Amazon, Yelp, and TikTok. Adams ultimately proposes clearer definitions, more transparency, and shifting the burden to platforms to prove their systems are fair.

Finally, I outline a strategy for the National Football League to combat the inevitable challenges to its agreements with streaming providers in *The NFL's Collision with Antitrust Law*. I chronicle the NFL's unique relationship with antitrust law and apply the Sports Broadcasting Act of 1961 to modern-day television. I provide a rationale for sports leagues to expand the use of the statute beyond what is currently applied and outline the benefits of such a strategy. I conclude by setting forth options for sports leagues and consumers to benefit from the current sports broadcasting landscape.

This Issue would not have been possible without the faculty and administration at Chapman University Dale E. Fowler School of Law. Our faculty advisor, Professor Celestine McConville, and the Research Librarians of the Hugh & Hazel Darling Library were especially prominent in the publication of our final general issue of Volume 29.

Our *Chapman Law Review* editing team, specifically the Staff Editors, Senior Articles Editors, and Managing Editors, contributed countless hours, provided crucial suggestions, and employed a meticulous attention to detail. Our article selection team went above and beyond by discovering and procuring intriguing, timely, and on-theme articles in an efficient manner, improving the journal tremendously. Our Executive Managing Editor, Brianna Gerth, and Executive Production Editor, Kirsten Marsteller, were impeccable editors and a pleasure to work with. Brianna and Kirsten are the heart of Volume 29, and without them, this would not have been possible. Please read my Editor's Note in Issue 3, our Symposium Issue, for my final thoughts on an incredible year.

Jack Mays
Editor-in-Chief

Arbitration Overcorrection? Interpreting Arbitration Clauses After *Morgan v. Sundance*

Peter Constable Alter

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Arbitration Overcorrection? Interpreting Arbitration Clauses After *Morgan v. Sundance*

Peter Constable Alter∗

In 2022's Morgan v. Sundance, Inc.*, the Supreme Court ruled that the Federal Arbitration Act (FAA) does not allow courts to "devise novel rules to favor arbitration over litigation." Applying that principle, the Court held that the Eighth Circuit erred by grafting an arbitration-specific prejudice requirement onto the generally applicable waiver standard when deciding whether a defendant waived its right to arbitrate by proceeding in court. The Supreme Court traced this error to a misunderstanding of the FAA's core purpose. While courts, including the Supreme Court itself, routinely interpreted the FAA as establishing a liberal "policy favoring arbitration," the Court explained that this policy was "merely an acknowledgement" that the FAA was meant to place arbitration agreements "upon the same footing as other contracts." Thus, that purpose could not justify a rule favoring arbitration relative to other forums.*

Against the backdrop of decades of arbitration-friendly decisions from the Supreme Court, Morgan*—a unanimous decision striking down a rule making it easier to arbitrate—is a landmark. The waiver-prejudice rule it invalidated had been applied for decades and was precedent in all but two circuits. And the broader "policy favoring arbitration" was even more widely accepted, a mantra oft-recited in arbitration decisions addressing myriad issues under the FAA. But as explained in* Morgan*, arbitration is only "favored" relative to historic judicial hostility to arbitration, which the FAA sought to correct by ensuring equal treatment of arbitration agreements and other contracts. So, arbitration-favoring rules are just as suspect as arbitration-disfavoring rules, and represent an overcorrection out of step with the FAA.*

In this Article, I argue that Morgan *requires courts to reconsider another widely accepted doctrine: the "pro-arbitration canon," which directs courts to construe ambiguous arbitration agreements in favor of arbitra-*

∗ Peter Constable Alter practices consumer and class-action law in Pennsylvania. He has served as a law clerk for the United States Court of Appeals for the Sixth Circuit and the United States District Court for the Western District of Pennsylvania. In law school, Peter was an Executive Board Member for the *UC Irvine Law Review*, serving as Editor-in-Chief for Volume 9. The views expressed in this Article are his own.

tion. The canon has been applied in every circuit and recited repeatedly by the Supreme Court (albeit usually in dicta). But it is rooted in the same misunderstanding of the "policy favoring arbitration" that led courts to the waiver-prejudice rule at issue in Morgan *and lacks any basis in the text or legislative history of the FAA. Thus, it is precisely the sort of "novel rule[]" favoring arbitration that* Morgan *forbade, and must be abandoned. Instead, consistent with the FAA's equal-treatment purpose, courts faced with an ambiguous arbitration agreement should rely on the generally applicable tools courts use to resolve ambiguity in other contracts.*

I. INTRODUCTION

For decades, the United States Supreme Court has been a hospitable forum for parties hoping to compel arbitration. A few examples tell the tale. Begin with the 1970s and 1980s, when the Court issued decisions affirming the arbitrability of statutory rights like those established by the Securities Act of 1933,[1] Sherman Act,[2] and Racketeer Influenced and Corrupt Organizations Act.[3] Continue into the 1990s, when the Court invalidated state laws imposing arbitration-specific notice requirements[4] and limiting the relief arbitrators could award.[5] Arrive, finally, in the 2000s and 2010s, when the Court issued landmark opinions enforcing arbitration agreements with class-action waivers[6] and confirming the breadth of issues arbitrators may decide.[7] These and other decisions interpreting the Federal Arbitration Act (FAA)[8] reflect a Supreme Court that has played a starring role in expanding arbitration's place on the American dispute-resolution stage.

This decidedly pro-arbitration bent is what makes the Court's 2022 decision in *Morgan v. Sundance, Inc.* so interesting—it is one of the few decisions in recent decades to make it *harder* for a party to compel arbitration.[9] The case addressed a discrete procedural question: What standard applies when analyzing whether a defendant has waived its right to compel arbitration by litigating a case brought in federal court?[10] Before *Morgan*, the answer was relatively uncontroversial. Relying on the FAA's "liberal national policy favoring arbitration,"[11] a supermajority of circuit courts required a showing that the proponent of arbitration acted inconsistently with a known right to ar-

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1 Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484–85 (1989).

2 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985).

3 Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 242 (1987).

4 Dr.'s Assocs., Inc. v. Casarotto, 517 U.S. 681, 683 (1996).

5 Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63–64 (1995).

6 *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351–52 (2011); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 238–39 (2013); Epic Sys. Corp. v. Lewis, 584 U.S. 497, 502–03 (2018).

7 Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 442 (2006) (deciding that whether a contract containing an arbitration clause was void for illegality was an issue for arbitration, not the courts).

8 9 U.S.C. §§ 1–16.

9 *See* 596 U.S. 411, 413–14 (2022).

10 *Id.* at 413.

11 *Id.* at 418 (quoting Carolina Throwing Co. v. S & E Novelty Corp., 442 F.2d 329, 331 (4th Cir. 1971) (per curiam)).

bitrate, *plus* a showing of prejudice to the opposing party.[12] This widely accepted rule arose first in 1960s Second Circuit decisions, and had been adopted in every circuit save the Seventh and District of Columbia (both of which applied the standard rule for waiver, conventionally defined as the "intentional relinquishment or abandonment of a known right," a standard lacking any prejudice requirement).[13]

The petitioner in *Morgan* insisted that the supermajority had it wrong, connecting the purported error to a fundamental misunderstanding of the FAA's central purpose.[14] She maintained that the FAA does *not* favor arbitration over litigation, that the statute merely obliges courts to treat arbitration agreements the same as any other contract, and that court-made arbitration-favoring rules are therefore invalid.[15] Given the Court's penchant for enforcing arbitration agreements, even a seasoned observer would have been forgiven for thinking that it would reject the petitioner's argument and uphold the decidedly pro-arbitration prejudice requirement. But that's not what happened.

Instead, in a unanimous opinion, the Court held the arbitration-specific waiver rule invalid under the FAA.[16] The cornerstone of the Court's reasoning was its rejection of longstanding precedent interpreting the FAA as establishing a "policy *favoring* arbitration."[17] Tracing the prejudice requirement's roots to that reading, the Court concluded that courts had been overzealous in their interpretation and application of the FAA's fundamental purpose.[18] Acknowledging that the Court itself had, on occasion, used similar language in analyzing the FAA, it explained that the policy "is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the *same footing* as other contracts."[19] Accordingly, the Court held that the FAA does not allow courts to "devise novel rules to favor arbitration over litigation."[20] Turning to the procedural question

12 *Id.* at 416 n.1 (collecting cases).

13 *See id.* at 416 n.2 (collecting cases).

14 Brief for Petitioner at 34–35, *Morgan*, 546 U.S. 411 (No. 21-328).

15 *Id.*

16 *Morgan*, 596 U.S. at 419.

17 *See id.* at 418–19 (emphasis added).

18 *See id.*

19 *Id.* at 418 (emphasis added) (quoting Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 302 (2010)).

20 *Id.*

at issue, the Court held that if courts found waiver at issue, they must simply ask whether there has been an "intentional relinquishment or abandonment of a known right," as they would in any other context, without assessing prejudice.[21]

In this Article, I argue that the implications of *Morgan* go well beyond the discrete waiver doctrine at issue, and undermine a fundamental assumption about how to interpret arbitration agreements.[22] My target is the so-called "pro-arbitration canon."[23] That canon—expressly grounded in the FAA's supposed "policy favoring arbitration," occasionally referenced by the pre-*Morgan* Supreme Court, and followed by every circuit court of appeals—posits that courts must resolve ambiguities in an arbitration provision *in favor of* arbitration.[24] My thesis is this: a literally pro-arbitration canon of construction is incompatible with the FAA as interpreted in *Morgan*, and must be rejected. Instead, courts must interpret ambiguous arbitration agreements using the myriad generally applicable tools used to interpret other ambiguous contracts.

I proceed in four further parts. First, in Part II, I explore the evolution of the "liberal policy favoring arbitration," tracing courts' shifting interpretations of the FAA and concluding with *Morgan*. I continue, in Part III, by examining the pro-arbitration canon's evolution, revealing the canon's inextricable connection to that "liberal policy favoring arbitration." In Part IV, I offer my argument that the pro-arbitration canon is incompatible with the FAA, and that the FAA compels courts to interpret ambiguous arbitration agreements the same as they would any other ambiguous contract. I conclude, in Part V, with the stakes. Courts have applied the canon to compel the arbitration of claims of discrimination, underpayment, and fraudulent inducement, to list just a few examples—even in the face of serious doubts as to whether the parties ever contemplated arbitrating such claims.[25] *Morgan* calls these conclusions into question, and rightly so.

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21 *See id.* at 417 (quoting United States v. Olano, 507 U.S. 725, 733 (1993)).

22 *See* Karla Gilbride, *In* Morgan v. Sundance*, the Supreme Court Strikes a Blow Against Arbitration Exceptionalism*, 26 J. CONSUMER & COM. L. 15, 16 (2022) (arguing that *Morgan*'s implications are broader than the waiver question addressed by the Court).

23 Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1212 (11th Cir. 2021).

24 *See infra* notes 125, 182–85 and accompanying text.

25 *See infra* Section IV.C.

II. THE "LIBERAL POLICY FAVORING ARBITRATION"

In this Part, I recount the birth, life, and rebirth of the FAA's "liberal policy favoring arbitration." I begin with the FAA's genesis, a reaction to and correction of judicial hostility to arbitration that existed in early American law. I then show how courts' understanding of the FAA evolved from one of a statute meant to place arbitration agreements on level footing with other contracts to one of a statute imposing a "liberal . . . policy *favoring* arbitration."[26] I conclude with *Morgan*, its rejection of that interpretation of the FAA, and its retelling of the "policy favoring arbitration" as a doctrine that merely compels courts to treat arbitration agreements the same as any other contract.

A. Judicial Hostility to Arbitration and the FAA's Origins

The FAA's origin story is oft-recited. It begins with the judicial hostility to arbitration that arrived in America with early colonists.[27] Across the Atlantic, pre-dispute arbitration agreements were nonbinding under English common law's "ouster" doctrine—parties could not "oust the power of the court through contract."[28] This common-law approach found footing early in American courts up to and including the United States Supreme Court.[29] Sometimes ruing arbitrators' competence or the absence

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26 *Morgan*, 596 U.S. at 418 (quoting Carolina Throwing Co. v. S & E Novelty Corp., 442 F.2d 329, 331 (4th Cir. 1971) (per curiam)).

27 Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RSRV. L. REV. 91, 98 (2012).

28 Kenneth F. Dunham, Southland Corp. v. Keating *Revisited: Twenty-Five Years in Which Direction?*, 4 CHARLESTON L. REV. 331, 333–34 (2010) ("The British courts consistently held pre-dispute arbitration agreements to be non-binding."); *see also* Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 982–83 (2d Cir. 1942) (discussing "the history of the judicial attitude towards arbitration" in England); Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789, 793–96 (2002) (providing an overview of the English common-law treatment of arbitration agreements).

29 *See, e.g.*, Riddlesbarger v. Hartford Ins. Co., 74 U.S. (7 Wall.) 386, 390–91 (1868) ("A stipulation in a policy to refer all disputes to arbitration stands upon a different footing. That is held invalid, because it is an attempt to oust the courts of jurisdiction by excluding the assured from all resort to them for his remedy."); Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445, 451–52 (1874); *see also* Matteo Godi, Note, *Administrative Regulation of Arbitration*, 36 YALE J. ON REGUL. 853, 857 (2019) ("Courts generally saw arbitration agreements as either 'oust[ing] the courts of jurisdiction' or potentially 'becom[ing] the instrument of injustice.'" (alteration in original)); Wilson, *supra* note 27, at 99 ("Judicial refusal to enforce arbitration agreements was premised primarily on the theory that parties could not 'oust' the jurisdiction of the courts.").

In fact, some pre-FAA American courts refused to enforce arbitration agreements because they "could not guarantee fairness in arbitration and, therefore, needed to protect the rights of citizens by granting access to the courts." *Id.*; *Kulukundis Shipping Co.*, 126

of a full battery of procedural protections in arbitration, courts generally held that pre-dispute arbitration agreements were revocable.[30] Thus, arbitration occurred, but only if the parties agreed to arbitrate an existing dispute.[31]

The winds of change began to blow in the early 1900s. Scholars attribute the turnaround to a comprehensive lobbying effort on behalf of a collection of industries that saw arbitration as a cost-effective alternative to the courts.[32] The effort paid off with laws in several states making pre-dispute arbitration agreements enforceable. The Arbitration Law of New York, for example, "declare[d] that a provision in a written contract to settle by arbitration a controversy thereafter arising between the parties 'shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.'"[33] Illinois, New Jersey, Massachusetts, and Oregon enacted similar laws around the same time.[34]

The lobbying effort eventually reached Congress, where the United States Chamber of Commerce and the American Bar Association, on behalf of a slew of interested parties, pushed for a federal law resembling New York's.[35] The American Bar Association presented a draft, which Congress enacted with minimal edits as the United States Arbitration Act (USAA) in 1925.[36] As told by one scholar, the legislative history is relatively limited but does include a couple notable points.[37] First, the bill's House Report by the Committee on the Judiciary "identified the purpose of

F.2d at 984 ("That English attitude was largely taken over in the 19th century by most courts in this country.").

30 *See, e.g.*, *Morse*, 87 U.S. at 451 ("Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights. . . . In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.").

31 *See id.*

32 *See* Godi, *supra* note 29, at 858–59; Wilson, *supra* note 27, at 99.

33 Red Cross Line v. Atl. Fruit Co., 264 U.S. 109, 118 (1924).

34 *See* Godi, *supra* note 29, at 858.

35 Wilson, *supra* note 27, at 99 ("This [New York] state legislation ultimately provided the model for the United States Arbitration Act . . . .").

36 Godi, *supra* note 29, at 858–59 ("[T]he FAA was enacted in 1925—practically unchanged from the draft that the American Bar Association presented.").

37 *Id.*

the bill as making 'valid and enforcible [sic] agreements for arbitration.'"[38] Second, the Report "explained that 'arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement.' In other words, through the Act, an 'arbitration agreement is placed upon the same footing as other contracts, where it belongs.'"[39] In short, the legislative history is early evidence that the law was not intended to favor arbitration over litigation; its purpose was merely to ensure that arbitration agreements received equal treatment under the law.

Since its enactment as the USAA in 1925 and subsequent codification as the FAA in 1947, the law's provisions—which impose substantive and procedural requirements[40]—have remained largely constant. Section 2 is the FAA's "substantive mandate"[41] and makes pre-dispute arbitration agreements enforceable:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.[42]

Section 4, in turn, sets forth the procedures applicable where a party wishes to bring a suit to compel arbitration, while section 3 provides a mechanism for the district court to stay proceedings pending the arbitration on application of the parties.[43] The balance of the statute focuses on procedural considerations such as the appointment of an arbitrator,[44] arbitrators' authority to compel testimony and record production,[45] and the vacation, modification, confirmation, and enforcement of arbitration awards.[46]

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38 *Id.* at 858 (alteration in original) (quoting H.R. REP. NO. 68-96, at 1 (1924)).

39 *Id.* at 858–59 (quoting H.R. REP. NO. 68-96, at 1 (1924)).

40 *But see* Dunham, *supra* note 28, at 332, 345 (arguing that the FAA was initially viewed as a procedural statute, not one establishing substantive rights); Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1960–62 (2014) (making a similar argument as Dunham's article).

41 Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 629 (2009).

42 9 U.S.C. § 2.

43 *See id.* §§ 3–4.

44 *See id.* § 5.

45 *See id.* § 7.

46 *See id.* §§ 9–13.

With notable exceptions for transportation workers' employment contracts,[47] the FAA covers all arbitration agreements in any "contract evidencing a transaction involving commerce" or "maritime transaction."[48] It thus represented a dramatic shift in the American dispute-resolution landscape, with eventual implications for all sorts of private agreements.[49] Unsurprisingly then, the FAA has been litigated heavily, offering courts countless opportunities to opine on its meaning and purpose.

B. Toward a "Liberal Policy Favoring Arbitration"

Early on, courts applying the USAA and then the FAA appreciated that the statute was a response to historic judicial hostility to arbitration and was intended to ensure the equal treatment of arbitration agreements and other contracts.[50] That began to change in the late 1940s and 1950s, with courts first describing the FAA as imposing a policy *favoring* arbitration in cases involving inter-merchant commercial disputes.[51] From there, this favoring-arbitration interpretation spread to every circuit, with help from Supreme Court dicta, in cases touching on not just commercial agreements but also consumer and employment contracts.[52]

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47 *See id.* § 1; New Prime Inc. v. Oliveira, 586 U.S. 105, 108 (2019).

48 9 U.S.C. § 2.

49 Although the FAA has since been applied widely to consumer and employment agreements, there are serious doubts as to whether Congress intended for the statute to apply beyond commercial disputes between merchants. *See* Christopher R. Leslie, *Conspiracy to Arbitrate*, 96 N.C. L. REV. 381, 387–88 (2018) ("All of the congressional testimony, hearings, and reports demonstrate that the FAA applied only to commercial disputes between merchants."); *id.* at 388–89, 388 nn.17–18, 389 n.19 (providing a collection of authority to show how American dispute resolution has changed).

50 Note, *Deference and the Federal Arbitration Act: The NLRB's Determination of Substantive Statutory Rights*, 128 HARV. L. REV. 907, 910 (2015).

51 Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 4 (1983). Some scholars have argued that the "liberal policy favoring arbitration" emerged from the Supreme Court's 1983 decision in *Moses H. Cone*, while recognizing earlier statements of policy in cases analyzing the Labor Management Relations Act. *See* Richard Frankel, *The Arbitration Clause as Super Contract*, 91 WASH. U. L. REV. 531, 546–47 (2014) ("In fact, the [liberal policy favoring arbitration] appears to represent an entirely new development in arbitration law. For most of the period following the enactment of the FAA, the Court was 'at most, policy-neutral respecting the desirability of arbitration,' with the 'emphatic federal policy in favor of arbitral dispute resolution' emerging only in the wake of Moses H. Cone." (quoting Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 701, 703 (2001))).

This Article, with the benefit of the Supreme Court's decision in *Moses H. Cone*, offers a deeper history, illustrating how the "liberal policy favoring arbitration" developed in lower court FAA decisions for decades before it reached the Supreme Court.

52 Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 704–05 (2001).

The early cases involving the FAA (then the USAA) show courts implicitly or explicitly treating arbitration agreements the same as other contracts, despite some lingering reservations. In one eloquent example, Judge Noble Hand (in an opinion joined by his cousin, Judge Learned Hand) observed that "[a]rbitration sometimes involves perils that even surpass the 'perils of the seas.'"[53] Nevertheless, he continued, parties could not "expect the courts to relieve them from the effect of their deliberate choice" "if they consent to submit their rights to" arbitration.[54] In another early decision, the Southern District of New York explained that the Act merely made specific performance available and that its task was to give an arbitration agreement "'a fair and equitable interpretation,' in line with the dominant intent of the parties," the same as it would any other contract. [55]

The most comprehensive early analysis of the Act's purpose, came in the Second Circuit's 1942 decision *Kulukundis Shipping v. Amtorg Trading Corp.*, authored by Judge Jerome Frank and joined by Judge Learned Hand.[56] Beginning with the hostility shown to arbitration under English common law, the court described the ouster doctrine as a "rationalization" of preexisting prejudices that "became fashionable in the middle of the 18th century."[57] "Give a bad dogma a good name," the court explained of the ouster doctrine, "and its bite may become as bad as its bark."[58] Turning to early American decisions, the court offered what may have been revisionist history, noting that while the "English attitude was largely taken over in the 19th century by most courts in this country," federal courts "feeling bound to comply with the precedents, nevertheless became critical of this judicial hostility" to arbitration agreements.[59] Quoting the House Committee Report, which stated that the Act "placed [an arbitration agreement] upon the same footing as other contracts, where it belongs," the Second Circuit concluded that "[t]he purpose of [the USAA] was deliberately to alter the judicial atmosphere previously existing."[60]

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53 *In re* Canadian Gulf Line, Ltd., 98 F.2d 711, 714 (2d Cir. 1938).

54 *Id.*

55 *In re* Util. Oil Corp., 10 F. Supp. 678, 680 (S.D.N.Y. 1934).

56 *See generally* 126 F.2d 978 (2d Cir. 1942) (analyzing what is permitted under the Federal Arbitration Act).

57 *Id.* at 983.

58 *Id.* at 984.

59 *Id.*

60 *Id.* at 985 (quoting H.R. REP. NO. 68-96, at 1 (1924)).

Nevertheless, lower courts slowly began to describe the FAA as establishing a policy "favoring" arbitration. One of the earliest examples is the 1947 case, *Tejas Development Co. v. McGough Bros.*, where the Fifth Circuit noted "that courts favor arbitrations."[61] Later in the same opinion, however, the court tempered that language, explaining that "the law favors *willing* arbitrations" but "does not favor *unwilling* arbitrations."[62] In another example from 1947, the Northern District of California charted a more aggressive course, writing, "[i]t is axiomatic that the law favors arbitration and that it will be afforded every presumption of validity."[63] A few years later, the Second Circuit in 1953's *Wilko v. Swan* similarly declared that the FAA "evidences a congressional policy to favor arbitration," in holding that the FAA made enforceable an arbitration agreement even if the parties' dispute concerned alleged violations of the federal Securities Act of 1933.[64] The Supreme Court, however, reversed the Second Circuit without invoking the same language, and held Securities Act claims to be nonarbitrable.[65]

Despite the setback of *Wilko*, lower courts through the 1960s and 1970s continued—with gaining momentum—to ascribe a "policy favoring arbitration" to the FAA. One of the most notable examples (given this Article's focus on the implications of *Morgan*) is *Carcich v. Rederi A/B Nordie*, where the Second Circuit cited the "overriding federal policy favoring arbitration" in holding that a party that delayed invocation of an arbitration agreement did not waive its right to arbitrate absent a showing of

61 165 F.2d 276, 279–80 (5th Cir. 1947).

62 *Id.* at 280 (emphasis added).

63 Lundblade v. Cont'l Ins. Co., 74 F. Supp. 795, 797 (N.D. Cal. 1947).

64 201 F.2d 439, 445 (2d Cir.), *rev'd*, 346 U.S. 427 (1953), *overruled by*, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).

65 Wilko v. Swan, 346 U.S. 427, 434–35, 38 (1953), *overruled by*, *Rodriguez de Quijas*, 490 U.S. 477. The Court began by observing that the USAA "establishe[d] by statute the desirability of arbitration as an alternative to the complications of litigation"—a more tepid description than the Second Circuit's straightforward declaration. *Id.* at 431. The Court then concluded that courts' and legislatures' "hospitable attitude . . . toward arbitration" was not enough to save the agreement at issue. *Id.* at 432. Contrasting commercial arbitrations concerning simple questions like "the quality of a commodity or the amount of money due under a contract," the Court explained that arbitrators were ill-equipped to address Securities Act violations, which raised complex questions about, for example, the seller's "purpose and knowledge." *Id.* at 435–36. The Court also expressed concerns that such arbitrations did not require an explanation of the award, essentially frustrating the limited judicial review available under the USAA. *Id.* at 436. Thus, the Court reasoned that although the Securities Act would apply in the contemplated arbitration, the significant protections that the Securities Act offered securities purchasers could not be as effectively protected as they would be in courts. *Id.* at 434–38.

prejudice to their adversary.[66] But the Second Circuit was not the only culprit. For example, in 1966 the Seventh Circuit noted that "[w]e look with favor upon arbitration as a means of removing contentions from the area of litigation," in justifying the rule that arbitrators should determine the scope of arbitrability where the question was "fairly debatable" or "reasonably in doubt."[67] Other circuits joined, too.[68]

The Supreme Court was slower on the uptake. Through 1967 and its decision in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, the Court recognized that "the purpose of Congress [passing the FAA] in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so."[69] And in 1974's *Scherk v. Alberto-Culver Co.*, the Court quoted legislative history for the proposition that the FAA was "designed to . . . place arbitration agreements 'upon the same footing as other contracts.'"[70] So while the circuits were embracing the "policy favoring arbitration," the Supreme Court held back.

That changed in the 1980s. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Court for the first time noted that section 2 of the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."[71] This statement was dicta, however, because it came in the context of an analysis of *Colorado River* abstention where the issue was whether state or federal law applied—not the precise nature of the federal law in question.[72] Nevertheless, *Moses H. Cone* became widely cited for the proposition that the FAA reflects a "federal policy favoring arbitration," including in subsequent Supreme Court decisions like *Rodriguez de Quijas v. Shearson/American Express, Inc.*,[73] where the Court

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[66] 389 F.2d 692, 696 (2d Cir. 1968), *abrogated by*, Morgan v. Sundance, Inc., 596 U.S. 411 (2022).

[67] Butler Prods. Co. v. Unistrut Corp., 367 F.2d 733, 736 (7th Cir. 1966) (quoting Sch. Dist. v. Del Bianco, 215 N.E.2d 25, 29–30 (Ill. App. Ct. 1966)).

[68] *See, e.g.*, Kanazawa Ltd. v. Sound, Unlimited, 440 F.2d 1239, 1241 (9th Cir. 1971); Hart v. Orion Ins. Co., 453 F.2d 1358, 1360 (10th Cir. 1971); J.S. & H. Constr. Co. v. Richmond Cnty. Hosp. Auth., 473 F.2d 212, 214–15 (5th Cir. 1973); Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH, 585 F.2d 39, 44 (3d Cir. 1978).

[69] 388 U.S. 395, 404 n.12 (1967).

[70] 417 U.S. 506, 510–11 (1974) (quoting H.R. REP. NO. 68-96, at 1–2 (1924)).

[71] 460 U.S. 1, 24 (1983).

[72] *See id.* at 23.

[73] 490 U.S. 477, 480 (1989).

overruled its earlier decision in *Wilko* and held enforceable arbitration agreements that covered securities law violations.[74]

Notably, *Moses H. Cone* and *Rodriguez de Quijas* did not mark an absolute shift in conception. To be sure, after *Moses H. Cone*, references to the "liberal policy favoring arbitration" could be found in every circuit and it became the dominant interpretation of the FAA's core purpose.[75] But some courts resolved arbitration issues without reference to a policy "favoring" arbitration, noting only that the FAA required equal treatment of arbitration agreements.[76] Indeed, courts frequently blended these seemingly contradictory concepts—how can something be equal if it is favored?[77]—invoking the federal "policy favoring arbitration" while also acknowledging that the FAA's purpose was merely "placement of arbitration agreements on equal footing with all other contracts."[78]

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74 *See, e.g.*, Johnson Controls, Inc. v. City of Cedar Rapids, 713 F.2d 370, 373 (8th Cir. 1983) (citing *Moses H. Cone*, 460 U.S. at 24); Com. Park at DFW Freeport v. Mardian Constr. Co., 729 F.2d 334, 339 (5th Cir. 1984) (citing *Moses H. Cone*, 460 U.S. at 24); Sweater Bee by Banff, Ltd. v. Manhattan Indus., Inc., 754 F.2d 457, 461 (2d Cir. 1985) (citing *Moses H. Cone*, 460 U.S. at 24); Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc., 776 F.2d 269, 270 (11th Cir. 1985) (citing *Moses H. Cone*, 460 U.S. at 24); Wasyl, Inc. v. First Bos. Corp., 813 F.2d 1579, 1581 (9th Cir. 1987) (citing *Moses H. Cone*, 460 U.S. at 24); Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis, 849 F.2d 264, 267 (7th Cir. 1988) (citing *Moses H. Cone*, 460 U.S. at 24); Sargent v. Paine Webber Jackson & Curtis, Inc., 882 F.2d 529, 532 (D.C. Cir. 1989) (citing *Moses H. Cone*, 460 U.S. at 24); MidAmerica Fed. Sav. & Loan Ass'n v. Shearson/Am. Express, Inc., 886 F.2d 1249, 1260 (10th Cir. 1989) (citing *Moses H. Cone*, 460 U.S. at 24); Sec. Indus. Ass'n v. Connolly, 883 F.2d 1114, 1123 (1st Cir. 1989) (citing *Moses H. Cone*, 460 U.S. at 24); Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 812 (4th Cir. 1989) (citing *Moses H. Cone*, 460 U.S. at 24); Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1160 (3d Cir. 1989) (citing *Moses H. Cone*, 460 U.S. at 24); Wilson Elec. Contractors, Inc. v. Minnotte Contracting Corp., 878 F.2d 167, 169 (6th Cir. 1989) (citing *Moses H. Cone*, 460 U.S. at 24).

75 *See infra* text accompanying notes 180–87.

76 Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 67 (2010); Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 581 U.S. 246, 248 (2017) ("The Federal Arbitration Act . . . requires courts to place arbitration agreements 'on equal footing with all other contracts.'"); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 474 (1989).

77 *See* Stephen Friedman, *Arbitration Provisions: Little Darlings and Little Monsters*, 79 FORDHAM L. REV. 2035, 2038 (2011) ("There cannot be both equality and favoritism. The current status of arbitration provisions is probably akin to that of the pigs in George Orwell's Animal Farm—all contract provisions are equal, but some (like arbitration provisions) are more equal than others."); Wilson, *supra* note 27, at 102.

78 Zurich Am. Ins. Co. v. Watts Indus., 466 F.3d 577, 580 (7th Cir. 2006) (citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006)); *see, e.g.*, Santoro v. Accenture Fed. Servs., LLC, 748 F.3d 217, 221 (4th Cir. 2014) (citations omitted); *In re* Remicade (Direct Purchaser) Antitrust Litig., 938 F.3d 515, 519 (3d Cir. 2019) (citations omitted); Grand Wireless, Inc. v. Verizon Wireless, Inc., 748 F.3d 1, 6 (1st Cir. 2014) (quoting Soto-Fonalledas v. Ritz-Carlton San Juan Hotel Spa & Casino, 640 F.3d 471, 474 (1st Cir. 2011)).

This trend was especially apparent in Supreme Court opinions from the 2000s and 2010s, where the Court continued to emphasize the FAA's equal-treatment principle even while acknowledging the "policy favoring arbitration." For example, in *Buckeye Check Cashing, Inc. v. Cardegna*, the Court opened its analysis by explaining that "[t]o overcome judicial resistance to arbitration, Congress enacted the Federal Arbitration Act (FAA)" and that "[s]ection 2 embodies the *national policy favoring arbitration* and *places arbitration agreements on equal footing with all other contracts*."[79] In *Granite Rock Co. v. International Brotherhood of Teamsters*, the Court reiterated that "the federal policy favoring arbitration . . . is merely an acknowledgement of the FAA's commitment to 'overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts.'"[80] The Supreme Court's reluctance to wholeheartedly embrace the "liberal federal policy favoring arbitration" was an omen of things to come.

C. *Morgan* and the Rebirth of the "Policy Favoring Arbitration"

Leading up to the Supreme Court's decision in *Morgan*, the "liberal policy favoring arbitration" was relatively uncontroversial. Despite some academic criticism[81] and the Supreme Court's tepid embrace, the policy served as a substantive justification for several decidedly pro-arbitration doctrines.[82] Among them was the arbitration-specific waiver rule at issue in *Morgan*, which placed the "policy favoring arbitration" squarely at issue.

The petitioner in *Morgan* was a former Taco Bell employee who filed a collective action under the Fair Labor Standards Act in the Northern District of Iowa, alleging violations of the Act's overtime provisions.[83] Her employer initially litigated the suit without reference to the arbitration clause in its employment agreements.[84] It moved to dismiss the complaint on other grounds, and when that failed, it filed an answer that did not

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79 546 U.S. at 443 (emphasis added); *see also* EEOC v. Waffle House, Inc., 534 U.S. 279, 289 (2002) (explaining that the FAA was enacted to overcome judicial hostility to arbitration); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (reaffirming that arbitration agreements are enforced according to their terms).

80 561 U.S. 287, 302 (2010) (quoting Volt Info. Scis., Inc., 489 U.S. at 478).

81 *See, e.g.*, Gilbride, *supra* note 22, at 16; Wilson, *supra* note 27, at 96; Frankel, *supra* note 51, at 546–47.

82 Morgan v. Sundance, Inc., 596 U.S. 411, 413–14 (2022).

83 *Id.*

84 *Id.*

mention arbitration.[85] Some eight months later, the employer moved to compel arbitration under section 4 of the FAA and to stay the case under section 3, citing the arbitration clause in its employment agreement.[86] The district court denied the motion, and the employer appealed.[87]

The Eighth Circuit reversed. In doing so, it invoked the rule—accepted by all but the Seventh and District of Columbia Circuits—that a party waives its right to arbitrate only "if it knew of the right; 'acted inconsistently with the right'; and 'prejudiced the other party by its inconsistent actions.'"[88] Concluding that the petitioner had not been prejudiced by the employer's delay, the court remanded the case to the district court.[89] Judge Steven M. Colloton dissented, maintaining that the petitioner had been prejudiced and that, in any case, prejudice was "a debatable prerequisite" for waiving the right to arbitrate, given that it would not be required when considering other contractual rights.[90]

The petitioner sought certiorari, arguing that arbitration-specific waiver rules, such as the Eighth Circuit's, violate the FAA's equal-treatment principle by favoring arbitration over other contractual rights.[91] Instead, she argued, courts should apply the ordinary rule that waiver is merely the "intentional relinquishment or abandonment of a known right," a rule with no prejudice requirement.[92] She maintained that courts had long erred in invoking the "liberal federal policy favoring arbitration" when analyzing the FAA, and that her position found support in the FAA's true purpose—equal treatment of arbitration agreements and other contracts.[93] Noting a circuit split, the Supreme Court accepted review.[94]

A unanimous Court held that "the Eighth Circuit was wrong to condition a waiver of the right to arbitrate on a showing of prejudice."[95] The Court's reasoning turned on a critical examina-

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85 *Id.*

86 *Id.*

87 *Id.* at 415.

88 *Id.* at 411 (quoting Erdman Co. v. Phx. Land & Acquisition, LLC, 650 F.3d 1115, 1117 (8th Cir. 2011)).

89 Morgan v. Sundance, Inc., 992 F.3d 711, 715 (8th Cir. 2021), *vacated*, 596 U.S. 411 (2022).

90 *Id.* at 716–17 (Colloton, J., dissenting).

91 *See Morgan*, 596 U.S. at 415–16.

92 Brief for Petitioner at 13–14, *Morgan*, 546 U.S. 411 (No. 21-328).

93 *Id.* at 29, 34–35.

94 *Morgan*, 596 U.S. at 416.

95 *Id.* at 417.

tion of the "policy favoring arbitration."[96] Noting that waiver in other contexts does not include a prejudice requirement, the Court traced the Eighth Circuit's rule to *Carcich* and the Second Circuit's invocation of the "overriding federal policy favoring arbitration."[97] From there, the Court found, "[c]ircuit after circuit (with just a couple of holdouts) justified adopting a prejudice requirement based on the 'liberal national policy favoring arbitration.'"[98] This, the Court held, was error.[99]

Acknowledging its own "frequent use" of the phrase "policy favoring arbitration," the Court explained that the policy "does not authorize federal courts to invent special, arbitration-preferring procedural rules."[100] Quoting *Granite Rock*, the Court explained that the "policy favoring arbitration" "is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts."[101] Putting a finer point on it, the Court concluded "[t]he federal policy is about treating arbitration contracts like all others, not about fostering arbitration."[102] Thus, the Court extended *Granite Rock* and explained that "a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation."[103]

With this fundamental misinterpretation of the FAA corrected, the Court rejected the waiver-prejudice requirement as an inappropriate "arbitration specific procedural rule[]," which is inconsistent with the FAA's equal-treatment requirement.[104] The Court also pointed to section 6 of the FAA, which provides that motions to compel arbitration and stay litigation "shall be made and heard in the manner provided by law for the making and hearing of motions."[105] The Court reasoned that this section was a textual "command to apply the usual federal procedural rules, including any rules relating to a motion's timeliness. Or put con-

96 *Id.* at 415–19.
97 *Id.* at 417 (quoting Carcich v. Rederi A/B Nordie, 389 F.2d 692, 696 (2d Cir. 1968)).
98 *Id.* at 418.
99 *Id.* at 416.
100 *Id.*
101 *Id.* (quoting Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 302 (2010)).
102 *Id.*
103 *Id.*
104 *Id.* at 419.
105 *Id.* (citing 9 U.S.C. § 6).

versely, it is a bar on using custom-made rules, to tilt the playing field in favor of (or against) arbitration."[106] The Court remanded the case to the Eighth Circuit, instructing it to apply generally applicable waiver rules to determine whether the petitioner's employer waived its right to arbitrate (if it concluded that waiver was the appropriate framework for the analysis—an issue the Supreme Court deferred).[107]

Morgan is significant for several reasons. For one, it is a continuation of the Court's effort to correct lower courts' understanding of the "policy favoring arbitration." Like in *Granite Rock*, the Court insisted that the policy is merely a shorthand for the FAA's directive that arbitration agreements be treated the same as other contracts.[108] There is obvious tension in that explanation. As Professor Stephen Friedman has observed in criticizing the Court's seemingly contradictory approach, "[t]here cannot be both equality and favoritism."[109] But that tension can be mitigated by reconsidering what arbitration is favored over. For years, courts have applied the "policy favoring arbitration" as though it directs them to favor arbitration relative to litigation. That's a reasonable reading of the language, certainly, but the Court's recent gloss on the phrase demonstrates that arbitration is favored only relative to its previously *dis*favored status under the historic judicial hostility to arbitration. So, while the FAA was designed to correct that judicial hostility by compelling equal treatment, courts *over*corrected when they began to favor arbitration relative to litigation.

Morgan is also significant because it goes a step further than *Granite Rock*. It is the first case in which the Court rejected an established judicial rule founded on the "policy favoring arbitration" that favored arbitration over litigation. Although the Court had previously expressed skepticism regarding courts' interpretation of the FAA's purpose, until *Morgan* this had not been the focal point of the Court's analysis. The case therefore calls into question other court-made rules prioritizing arbitration over litigation based on the same, now corrected, reading of the FAA's central purpose.[110] The pro-arbitration canon, which I turn to now, is one of those rules.

106 *Id.*
107 *Id.*
108 *Id.* at 417–18.
109 Friedman, *supra* note 77, at 2038.
110 *See* Gilbride, *supra* note 22, at 16.

III. The Pro-Arbitration Canon

Courts facing a motion to compel arbitration must determine whether there is a valid agreement to arbitrate and whether the dispute falls within the scope of that agreement.[111] In making the former determination, there is no presumption in favor of arbitration.[112] Courts merely "apply ordinary state-law principles that govern the formation of contracts" to determine whether the parties agreed to arbitrate.[113] The pro-arbitration canon comes into play only at the second step, when a court must determine whether the arbitration clause covers the parties' dispute.[114] State law still has its role because courts rely on "state-law principles of contract interpretation" to determine the scope of the agreement.[115] But if there is ambiguity as to the scope of the clause, courts today apply a handy rule, the pro-arbitration canon, positing that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[116] Sometimes, courts state the rule in even stronger terms: "an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."[117]

In this Part, I consider how the pro-arbitration canon came to be, and how it came to be so widely accepted. I begin with the canon's early adoption, showing that the "liberal policy favoring arbitration" is the canon's foundational substantive justification, and noting that many courts cited case law interpreting the Labor Management Relations Act (LMRA)[118]—not the FAA—for support of the canon. Next, I turn to the Supreme

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111 *See* Noohi v. Toll Bros., 708 F.3d 599, 611 n.6 (4th Cir. 2013) ("Even if there were an ambiguity, however, the presumption in favor of arbitration does not apply to questions of an arbitration provision's validity, rather than its scope."); *see also* Banc One Acceptance Corp. v. Hill, 367 F.3d 426, 429 (5th Cir. 2004) ("While there is a strong federal policy favoring arbitration, the policy does not apply to the initial determination whether there is a valid agreement to arbitrate."); Druco Rests., Inc. v. Steak N Shake Enters., Inc., 765 F.3d 776, 781 (7th Cir. 2014) ("Both federal and state courts acknowledge that the FAA's policy in favor of arbitration applies when determining the *scope* of an agreement to arbitrate, but not when deciding whether there is an agreement to arbitrate in the first instance.").

112 *See, e.g.*, Jaludi v. Citigroup, 933 F.3d 246, 254–55 (3d Cir. 2019).

113 First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995); Fleetwood Enters. Inc. v. Gaskamp, 280 F.3d 1069, 1073 (5th Cir. 2002).

114 *See, e.g.*, *Jaludi*, 933 F.3d at 254–55.

115 Mundi v. Union Sec. Life Ins. Co., 555 F.3d 1042, 1044 (9th Cir. 2009).

116 Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).

117 Waterford Inv. Servs., Inc. v. Bosco, 682 F.3d 348, 353 (4th Cir. 2012).

118 29 U.S.C. §§ 141–187.

Court's subsequent embrace of the canon in several decisions, though largely in dicta. I conclude with the present state of the canon, which confirms its inescapable connection with the "liberal policy favoring arbitration."

A. Early Adoption by the Circuits

The Second Circuit appears to be the first circuit to have adopted the pro-arbitration canon in the context of the FAA. That qualification—"in the context of the FAA"—is an important one. Just prior to the pro-arbitration canon's appearance in FAA cases before the courts of appeals, the Supreme Court adopted a similar rule under the LMRA. As discussed below, that case law bled into FAA cases without meaningful analysis of whether the statutory cross-pollination was warranted.

The Second Circuit first stated the FAA pro-arbitration canon in a relatively innocuous 1961 decision, *Metro Industrial Painting Corp. v. Terminal Construction Co.*[119] The case involved a commercial dispute between a general contractor and a subcontractor constructing a housing project at Homestead Air Force Base.[120] The parties' agreement included an arbitration provision, which the subcontractor invoked when it incurred expenses in excess of $200,000 due to the general contractor's delays and demands for extra work outside the scope of the original contract.[121] When the general contractor refused to arbitrate, the subcontractor brought suit in the Southern District of New York and moved to compel arbitration under the FAA.[122] The district court granted the motion and the general contractor appealed.[123]

On appeal, the Second Circuit faced several issues. After concluding that the parties were diverse, that the contract "evidenced a transaction involving commerce" within the meaning of the FAA, and that federal law controlled the question of arbitrability, the court then considered whether "disputes over delays and extras were arbitrable under the contract."[124] The extent of the court's reasoning is as follows, with the key sentence (for present purposes) being the last:

119 287 F.2d 382, 385 (2d Cir. 1961).
120 *Id.* at 383.
121 *Id.* at 383–84.
122 *Id.* at 384.
123 *Id.* at 383–84.
124 *Id.* at 384.

> The arbitration clause therein requires the parties to submit 'any question with respect to performance, non-performance, default, compliance or non-compliance, whether on behalf of the Contractor or Subcontractor' to arbitration. The grievance asserted by petitioners is that respondents failed to meet time schedules, insisted upon performance of duties not required of petitioners under the contract and failed to supply materials for petitioners. *In view of the federal policy to construe liberally arbitration clauses, to find that they cover disputes reasonably contemplated by this language, and to resolve doubts in favor of arbitration, it is clear that these disputes can reasonably be said to fall within the category of compliance or non-compliance.*[125]

For support of the "federal policy to construe liberally arbitration clauses," the court cited two cases—*Robert Lawrence Co. v. Devonshire Fabrics, Inc.* and *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*[126] Although both cases generally affirmed the "liberal policy of promoting arbitration"[127] or Congress' "approval of arbitration"[128] in the FAA, neither concerned the interpretation of ambiguous arbitration provisions.[129] In other words, the rule was the Second Circuit's own concoction.

From this humble beginning, the pro-arbitration canon spread. Naturally, the Second Circuit recited the rule most frequently at first, as it had done with the "liberal policy favoring arbitration" more broadly.[130] But within about twenty years, at least eight other circuits—the Third, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, and District of Columbia—had applied similar rules when considering the scope of arbitration agreements under the FAA.[131]

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125 *Id.* at 385 (emphasis added) (citation omitted).

126 *Id.* (first citing Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 410 (2d Cir. 1959); and then citing Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U.S. 449, 453 (1935)).

127 *Robert Lawrence Co.*, 271 F.2d at 410.

128 *Shanferoke Coal & Supply Corp.*, 293 U.S. at 453.

129 Indeed, in *Robert Lawrence Co.*, the Second Circuit invoked the "liberal policy favoring arbitration" to resolve ambiguities in the FAA itself—a fundamentally different issue from ambiguities in an arbitration clause. 271 F.2d at 410 ("Finally, an [*sic*] doubts as to the construction of the Act ought to be resolved in line with its liberal policy of promoting arbitration both to accord with the original intention of the parties and to help ease the current congestion of court calendars.").

130 *E.g.*, Fed. Com. & Navigation Co. v. Kanematsu-Gosho, Ltd., 457 F.2d 387, 389–90 (2d Cir. 1972); Coenen v. R.W. Pressprich & Co., 453 F.2d 1209, 1212 (2d Cir. 1972); Bos. & Me. Corp. v. Ill. Cent. R.R. Co., 396 F.2d 425, 426 (2d Cir. 1968).

131 Lundgren v. Freeman, 307 F.2d 104, 110 (9th Cir. 1962) ("The policy of the Arbitration Act is that the agreement be liberally construed in favor of arbitration."); Wick v. Atl. Marine, Inc., 605 F.2d 166, 168 (5th Cir. 1979) ("Furthermore, unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue, then a stay pending arbitration should

The early cases invoking the pro-arbitration canon teach three things. First, as shown by *Metro Industrial Painting*, the "policy favoring arbitration" was, from the very beginning, the canon's foundational substantive justification. Indeed, many of the cases invoking the canon expressly married those concepts. A good example is the Fifth Circuit's opinion in *Seaboard Coast Line Railroad Co. v. Trailer Train Co.*, where the court wrote, "We begin our analysis by noting the federal policy favoring arbitration over litigation. This federal policy requires that we construe arbitration clauses generously, resolving all doubts in favor of arbitration."[132] Similarly express couplings can be found in early cases from the Third,[133] Seventh,[134] and Eighth Circuits.[135]

Second, the pro-arbitration canon had real teeth from the outset. By its terms, the rule required the resolution of "any doubts in favor of arbitration"[136] or unless it could be said with "positive assurance" that the parties never agreed to arbitrate a particular dispute.[137] Thus, the rule compelled arbitration even

be granted."); Hanes Corp. v. Millard, 531 F.2d 585, 598 (D.C. Cir. 1976) ("As to the first inquiry, we begin with the accepted premise that, in construing arbitration agreements, every doubt is to be resolved in favor of arbitration."); Galt v. Libbey-Owens-Ford Glass Co., 376 F.2d 711, 714 (7th Cir. 1967) ("The policy of the Federal Arbitration Act is to promote arbitration to accord with the intention of the parties and to ease court congestion. All doubts are to be resolved in favor of arbitration." (first citing *Robert Lawrence Co.*, 271 F.2d at 410; and then citing *Metro Indus. Painting Corp.*, 287 F.3d at 385)); Hussey Metal Div. of Copper Range Co. v. Lectromelt Furnace Div., McGraw-Edison Co., 471 F.2d 556, 558 (3d Cir. 1972) ("[D]oubts as to whether an arbitration clause may be interpreted to cover the asserted dispute should be resolved in favor of arbitration unless a court can state with 'positive assurance' that this dispute was not meant to be arbitrated." (quoting United Steelworkers of Am. v. Warrior & Gulf Navigation. Co., 363 U.S. 574, 582 (1960))); Ga. Power Co. v. Cimarron Coal Corp., 526 F.2d 101, 106 (6th Cir. 1975) ("In the absence of language withdrawing this provision from the arbitration requirement it is the duty of the court to resolve any doubts in favor of arbitration." (citing Am. Radiator & Standard Sanitary Corp. v. Loc. 7, Int'l Bhd. of Operative Potters, 385 F.2d 455, 458 (6th Cir. 1966))); Seaboard Coast Line R.R. Co. v. Trailer Train Co., 690 F.2d 1343, 1348 (11th Cir. 1982) ("This federal policy requires that we construe arbitration clauses generously, resolving all doubts in favor of arbitration." (citations omitted)); Mellon Bank, N.A. v. Pritchard-Keang Nam Corp., 651 F.2d 1244, 1249 (8th Cir. 1981) ("Whenever possible, the courts will use the Federal Arbitration Act to enforce agreements to arbitrate." (quoting *Galt*, 376 F.2d at 714)).

132 690 F.2d at 1348 (citations omitted).

133 *Hussey Metal Div. of Copper Range Co.*, 471 F.2d at 558.

134 *Galt*, 376 F.2d at 714.

135 *Mellon Bank, N.A.*, 651 F.2d at 1249.

136 *Ga. Power Co.*, 526 F.2d at 106.

137 Wick v. Atl. Marine, Inc., 605 F.2d 166, 168 (5th Cir. 1979).

where other evidence or interpretive tools suggested that the parties never intended to arbitrate the dispute.[138]

Third, many of the early adopters of the FAA's pro-arbitration canon borrowed the concept from case law interpreting the LMRA. In this regard, the key case is *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, where the Supreme Court held:

> [T]o be consistent with congressional policy in favor of settlement of [labor] disputes by the parties through the machinery of arbitration, the judicial inquiry under [the LMRA] must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.[139]

Despite the Court's insistence in *United Steelworkers* that the LMRA's treatment of arbitration agreements differed materially from the FAA's,[140] the courts of appeals were quick to apply the pro-arbitration canon in FAA cases, doing so without apparent reservation or analysis of why the rule should be the same under the FAA.[141]

B. The Supreme Court and the Pro-Arbitration Canon

Although the FAA's pro-arbitration canon had gained traction through the 1960s and 1970s, it had not reached universal acceptance. This changed in the 1980s, when the Supreme Court itself began to cite the rule. In doing so, the Court—like the courts of appeals before it—justified the rule in terms of the

138 *See, e.g.*, Lundgren v. Freeman, 307 F.2d 104, 109–10 (9th Cir. 1962) (explaining that arbitrators properly addressed "points of law" despite evidence of the parties' intent to reserve such issues for the court); Hanes Corp. v. Millard, 531 F.2d 585, 598–99 (D.C. Cir. 1976) (noting that the statute of limitations was properly arbitrated under the "fundamental and powerful federal policy that favors arbitration of disputes" despite contrary arguments that were "not without force"); *see also* Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1220 (11th Cir. 2021) (Newsom, J., concurring) (describing the pro-arbitration canon as "especially potent and especially made up").

139 United Steelworkers of Am. v. Warrior & Gulf Navigation. Co. (*United Steelworkers*), 363 U.S. 574, 582–83 (1960).

140 *Id.* at 577–79.

141 *See, e.g.*, *Wick*, 605 F.2d at 168 (citing United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960)); Fed. Com. & Navigation Co. v. Kanematsu-Gosho, Ltd., 457 F.2d 387, 390 (2d Cir. 1972) (citing *United Steelworkers*, 363 U.S. at 582–83); *Ga. Power Co.*, 526 F.2d at 106 (citing Am. Radiator & Standard Sanitary Corp. v. Loc. 7 of Int'l Bhd. of Operative Potters, 358 F.2d 455, 458 (6th Cir. 1966)).

FAA's "liberal policy favoring arbitration." Rarely, however, did the Court apply the canon directly. Instead, the Court's references to the pro-arbitration canon came largely in dicta and were tempered by an insistence that a party can be compelled to arbitrate only those disputes that it agreed to arbitrate.

Reinforcing the connection between the "liberal policy favoring arbitration" and the pro-arbitration canon is the fact that the first Supreme Court decision to recognize the canon was *Moses H. Cone*.[142] (Recall that it was in *Moses H. Cone* that the Court first stated that the FAA embodies a "liberal federal policy favoring arbitration.")[143] In holding that federal law governed the substantive question of arbitrability in the underlying suit, the Court remarked that "the Courts of Appeals have . . . consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."[144] The Court took the opportunity to pronounce its agreement:

> The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.[145]

Though unequivocal, this pronouncement was dicta.[146] Again, all that was necessary to the Court's abstention analysis was the fact that federal law controlled the question of arbitrability—the precise nature of the applicable rules was immaterial.[147]

Nevertheless, *Moses H. Cone* cemented the status of the pro-arbitration canon, with the Supreme Court invoking it in a series of subsequent decisions. The first was *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, where the Court held that an international commercial agreement's arbitration clause cov-

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142 Frankel, *supra* note 51, at 545–46 (attributing the pro-arbitration canon to *Moses H. Cone*).

While that decision was certainly a key factor in the doctrine's wide adoption, this Article shows that the pro-arbitration canon arose decades before and spread through the lower courts prior to its articulation in *Moses H. Cone*.

143 Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

144 *Id.*

145 *Id.* at 24–25.

146 Margaret L. Moses, *Arbitration Law: Who's in Charge?*, 40 SETON HALL L. REV. 147, 174 (2010) ("The first Supreme Court statement that there was a federal policy favoring arbitration came from dicta in the 1983 case of *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*").

147 *Id.*; *see* Frankel, *supra* note 51, at 542.

ered statutory antitrust claims.[148] In so holding, the Court rejected the cross-petitioner's argument for a presumption *against* the arbitrability of statutory claims.[149] For support, the Court invoked "[t]he 'liberal federal policy favoring arbitration,'" and pointed to the pro-arbitration canon, citing *Moses H. Cone* without further interrogating the principles it espoused in dicta.[150] The Court summarized the applicable framework as follows: "Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability."[151] Again, however, the pro-arbitration canon was unnecessary to the Court's holding that the FAA "provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability."[152]

The Court next recited the pro-arbitration canon in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, a preemption decision.[153] The case involved a California procedural rule that "permit[ted] a court to stay arbitration pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by it, where 'there is a possibility of conflicting rulings on a common issue of law or fact.'"[154] Ultimately, the Court held that the FAA does not preempt the California rule, at least where the parties incorporated California law into their agreement.[155] In so holding, the Court rejected the appellant's argument that the parties had *not* incorporated the law into their agreement, which relied in part on *Moses H. Cone* and the pro-arbitration canon.[156] The Court reasoned that 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."[157] Thus, it held, "Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration . . . simply does not offend the rule of liber-

148 473 U.S. 614, 629 (1985).
149 *Id.* at 625.
150 *Id.* at 625 (quoting *Moses H. Cone*, 460 U.S. at 24).
151 *Id.* at 626.
152 *Id.* at 627.
153 489 U.S. 468, 470 (1989).
154 *Id.* at 471.
155 *Id.* at 478–79.
156 *Id.* at 475.
157 *Id.* at 476.

al construction set forth in *Moses H. Cone*, nor does it offend any other policy embodied in the FAA."[158]

The pro-arbitration canon next arose in two 1995 decisions. The first was *Mastrobuono v. Shearson Lehman Hutton, Inc.*[159] At issue was whether the parties' contractual choice of New York law in an agreement providing that "any controversy" between the parties "shall be settled by arbitration," precluded an arbitrator from awarding punitive damages, because under New York law, only judges could award punitive damages.[160] The arbitration panel in the underlying dispute concluded that it was authorized to award punitive damages and did so.[161] The Second Circuit disagreed and before the Supreme Court, the petitioner largely argued that the FAA preempted New York's rule; the respondent argued that, regardless, the parties' choice of New York law evidenced their agreement that punitive damages would be unavailable.[162] And the Supreme Court granted certiorari, framing the issue thusly: "The question presented is whether the arbitrators' award is consistent with the central purpose of the Federal Arbitration Act to ensure 'that private agreements to arbitrate are enforced according to their terms.'"[163]

The Court rejected the respondent's argument, employing several interpretive tools, including the pro-arbitration canon.[164] First, the Court applied the accepted rule that "[a] writing is interpreted as a whole."[165] Thus, it reasoned, while the choice of New York law might alone suggest the intent to preclude punitive damages, the choice to send "any controversy" to arbitration in combination with the incorporation of procedural rules allowing punitive damages, suggested otherwise.[166] The Court concluded that, at most, juxtaposing these two features of the agreement rendered the availability of punitive damages ambiguous.[167] To resolve the ambiguity, the Court invoked the pro-arbitration canon, the canon of *contra proferentem* ("the common-law rule of contract interpretation that a court should construe

158 *Id.*
159 514 U.S. 52, 53 (1995).
160 *Id.* at 54, 59.
161 *Id.* at 54.
162 *Id.*
163 *Id.* at 53–54 (quoting *Volt Info. Scis., Inc.*, 489 U.S. at 479).
164 *Id.*
165 *Id.* at 59.
166 *Id.* at 59–60.
167 *Id.* at 62.

ambiguous language against the interest of the party that drafted it"), and the rule that a contract must be read to "give effect to all its provisions and to render them consistent with each other."[168] The pro-arbitration canon counseled in favor of the arbitrability of punitive damages, as did the *contra proferentem* rule because the agreement at issue was the respondent's form agreement.[169] Likewise, the Court concluded that "the best way to harmonize the choice-of-law provision with the arbitration provision is to read 'the laws of the State of New York' to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators."[170] Thus, each interpretive tool relied on by the Court supported the conclusion that the parties agreed to arbitrate claims for punitive damages.[171]

The other 1995 decision to deal with the pro-arbitration canon was *First Options of Chicago, Inc. v. Kaplan*, which dealt with the question of whether the court or the arbitrator should decide arbitrability.[172] Holding that the answer to that question depended on the parties' intent, the Court concluded that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so."[173] Acknowledging that this approach was contrary to that used to determine whether a particular claim was within the scope of an arbitration agreement—where the pro-arbitration canon applies—the Court reasoned that the different treatment was warranted.[174] On the one hand, the Court explained, in resolving ambiguities regarding the scope of an arbitration agreement, "the parties likely gave at least some thought to the scope of arbitration" such that, "given the law's permissive policies in respect to arbitration . . . , one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter."[175] By contrast, the question of "who (primarily) should decide arbitrability" was "rather arcane," such that there was less reason to think that the parties considered the question at all, let alone agreed to submit it to the

168 *Id.* at 62–63.
169 *Id.*
170 *Id.* at 63–64.
171 *Id.*
172 514 U.S. 938, 942 (1995).
173 *Id.* at 944 (second and third alterations in original).
174 *Id.* at 944–45.
175 *Id.* at 945.

arbitrator.[176] Either way, the Court reiterated that "[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts."[177]

The Court briefly repeated the pro-arbitration canon in several decisions[178] before returning to it more comprehensively in the 2010 *Granite Rock* decision.[179] The issue was whether the parties agreed to arbitrate a dispute regarding the date of ratification for a collective bargaining agreement.[180] The district court held that they had not, and the Ninth Circuit reversed, reasoning in part that "the 'national policy favoring arbitration' required that any ambiguity about the scope of the parties' arbitration clause be resolved in favor of arbitrability."[181]

The Supreme Court, holding that the parties had not agreed to arbitrate the dispute, rejected the Ninth Circuit's invocation of the pro-arbitration canon as an "overread[ing]" of the Court's precedents.[182] The pro-arbitration canon, the Court explained, "cannot be divorced from the first principle that underscores all of our arbitration decisions: Arbitration is strictly 'a matter of consent,' and thus 'is a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration.'"[183] Noting that the pro-arbitration canon has its "foundation in 'the federal policy favoring arbitration,'"[184] the Court reiterated that "this 'policy' is merely an acknowledgment of the FAA's commitment to 'overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts.'"[185] Thus, the Court explained:

> [W]e have never held that this policy overrides the principle that a court may submit to arbitration "only those disputes . . . that the parties have agreed to submit." Nor have we held that courts may use

176 *Id.*

177 *Id.* at 944 (collecting cases).

178 *E.g.*, EEOC v. Waffle House, Inc., 534 U.S. 279, 294 (2002); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452 (2003) (plurality opinion).

179 Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 291 (2010).

180 *Id.* at 292.

181 *Id.* at 295–96.

182 *Id.* at 299.

183 *Id.* (first quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S 468, 479 (1989); and then quoting First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995)).

184 *Id.* at 302.

185 *Id.*

> policy considerations as a substitute for party agreement. We have applied the presumption favoring arbitration, in FAA and in labor cases, only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed and (absent a provision clearly and validly committing such issues to an arbitrator) is legally enforceable and best construed to encompass the dispute.[186]

Noting that the canon applies only to ambiguous arbitration agreements, the Court concluded that it was inapplicable because the ratification dispute was unambiguously outside of the scope of the arbitration agreement, which covered only those disputes "*arising under*" the collective bargaining agreement.[187]

Finally, the Court most recently discussed the pro-arbitration canon in *Lamps Plus, Inc. v. Varela*, where the issue was "whether the FAA . . . bars an order requiring class arbitration when an agreement is . . . 'ambiguous' about the availability of such arbitration."[188] The Ninth Circuit had applied the canon of *contra proferentem* to resolve that ambiguity in favor of class arbitration, which the drafter of the agreement had resisted.[189] Rejecting that reasoning, the Supreme Court held that the FAA preempted the rule of *contra proferentem* insofar as it would preclude the traditional bilateral arbitration that—according to the Court—Congress contemplated in passing the FAA.[190] The Court explained that its invocation of the rule to resolve ambiguity in *Mastrobuono* was inconsequential because it resolved the ambiguity at issue the same as did the pro-arbitration canon, and because its holding in that case was "primarily based on the FAA policy favoring arbitration."[191]

C. The Pro-Arbitration Canon Today

Today, courts routinely place the pro-arbitration canon and the "policy favoring arbitration" hand in hand. The Second Circuit, for example, posits that "[w]here the scope of an arbitration agreement is ambiguous, the Federal Arbitration Act's policy favoring arbitration requires that 'any doubts . . . be resolved in fa-

186 *Id.* at 302–03 (omission in original) (citations omitted).
187 *Id.* at 307.
188 587 U.S. 176, 179 (2019).
189 *Id.* at 180.
190 *Id.* at 183, 187–88.
191 *Id.* at 188 n.5.

vor of arbitration.'"[192] The Fifth Circuit similarly explains that "once a court determines that an agreement to arbitrate exists, the court must pay careful attention to the strong federal policy favoring arbitration and must resolve all ambiguities in favor of arbitration."[193] The Ninth Circuit agrees that in determining whether parties have agreed to arbitrate a dispute, we apply "general state-law principles of contract interpretation, while giving due regard to the federal policy in favor of arbitration by resolving ambiguities as to the scope of arbitration in favor of arbitration."[194] These are just a few examples—similar ones can be found in every circuit.[195]

With three recent exceptions, the pro-arbitration canon has garnered limited critical attention.[196] Professor Richard Frankel, in his 2014 article *The Arbitration Clause as Super Contract*, identified the pro-arbitration canon as one of three doctrines that he argued were inconsistent with the FAA's purpose of ensuring equal treatment between arbitration agreements and other contracts.[197] He argued that, consistent with that purpose, courts should apply instead the generally applicable principle of *contra proferentem*, interpreting the contract against the drafter who, presumably, preferred arbitration—an argument that the Supreme Court implicitly rejected in *Lamps Plus*.[198]

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192 Bell v. Cendant Corp., 293 F.3d 563, 566 (2d Cir. 2002) (omission in original) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983)).

193 Banc One Acceptance Corp. v. Hill, 367 F.3d 426, 429 (5th Cir. 2004).

194 Boardman v. Pac. Seafood Grp., 822 F.3d 1011, 1018 (9th Cir. 2016).

195 *See, e.g.*, Harrison v. Envision Mgmt. Holding, Inc. Bd. of Dirs., 59 F.4th 1090, 1097 (10th Cir. 2023); Lyons v. PNC Bank, Nat'l Ass'n, 26 F.4th 180, 185 (4th Cir. 2022); Reo v. Palmer Admin. Servs., 770 F. App'x 746, 747 (6th Cir. 2019); Morgan v. Smith Barney, Harris Upham & Co., 729 F.2d 1163, 1165 (8th Cir. 1984); CardioNet, Inc. v. Cigna Health Corp., 751 F.3d 165, 172 (3d Cir. 2014); Dialysis Access Ctr., LLC v. RMS Lifeline, Inc., 638 F.3d 367, 376 (1st Cir. 2011); Druco Rests., Inc. v. Steak N Shake Enters., Inc., 765 F.3d 776, 781 (7th Cir. 2014); Inetianbor v. CashCall, Inc., 768 F.3d 1346, 1353 (11th Cir. 2014); Promega Corp. v. Life Techs. Corp., 674 F.3d 1352, 1359 (Fed. Cir. 2012); Nat'l R.R. Passenger Corp. v. Consol. Rail Corp., 892 F.2d 1066, 1069 (D.C. Cir. 1990).

196 Although the pro-arbitration canon has rarely been the direct subject of analysis, it has been noted within broader criticisms of the "policy favoring arbitration." *See, e.g.*, Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. STATE U. L. REV. 99, 123–24 (2006); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. QUARTERLY 637, 704–05 (1996).

197 The other two doctrines were the waiver-privilege rule eventually discarded in *Morgan* and the rule for when non-signatories are bound by arbitration agreements. Frankel, *supra* note 51, at 534.

198 Lamps Plus, Inc. v. Varela, 587 U.S. 176, 178–79 (2019). While *Lamps Plus* strongly suggests that *contra proferentem* is no longer viable as an interpretive tool for

More recently, in 2021, Eleventh Circuit Judge Kevin Newsom criticized the canon in his concurrence in *Calderon v. Sixt Rent a Car, LLC*.[199] Arguing that the canon is unsupported as a textual matter, he concluded that "[s]o far as I can tell, the *Moses H. Cone* [pro-arbitration] canon is just made up."[200] In doing so, Judge Newsom noted that he was unaware of "a single straight-faced attempt to defend [the pro-arbitration canon,]" which "emerged decades after the Act became law and . . . as a result of the overextension of an unrelated labor statute and a bald appeal to policy considerations."[201]

Despite this, the pro-arbitration canon has its supporters. In 2022, Professor Tamar Meshel authored an article defending the pro-arbitration canon, *In Defense of Moses*.[202] Responding in part to Judge Newsom's concurrence and in part to broader criticisms of case law interpreting the FAA as establishing a "policy favoring arbitration[,]" Professor Meshel argued that textual support

arbitration agreements, at least insofar as it would always be applied to avoid arbitration, the Court's holding was not so broad. Instead, the Court held that *contra proferentem* could not be used to resolve ambiguity in favor of class arbitration rather than traditional bilateral arbitration. *Id.* at 188. Thus, the canon may still have a role to play in some cases, though it is unlikely the Court would prioritize the rule to the extent Professor Frankel argues for.

This Article makes several contributions beyond Professor Frankel's article, which proved exceptionally prescient with regard to the validity of the waiver rule at issue in *Morgan*. First, I provide a deeper look at the history of the pro-arbitration canon. While Professor Frankel attributes the canon to *Moses H. Cone*, I show how the canon arose decades before in lower court decisions. In doing so, I strengthen the argument that the pro-arbitration canon is inseparable from the "liberal policy favoring arbitration." *See supra* Part III. Second, I offer an alternative to *contra proferentem* for interpreting ambiguous arbitration agreements, accepting that *Lamps Plus* likely closed that avenue. Specifically, I argue *infra* that there are numerous interpretive principles that courts can employ to resolve ambiguities regarding arbitrability even setting aside *contra proferentem*. Third, I offer textual arguments for an FAA that is agnostic as to ambiguities in arbitration agreements. *See infra* Section IV.A. In this respect, I go beyond Professor Frankel's arguments, which turn primarily on an analysis of legislative history and policy. *See* Frankel, *supra* note 51, at 555–62. Fourth, I account for key precedential developments from the decade since Professor Frankel published. Most notable is *Morgan*, which provides a template for overruling the pro-arbitration canon. Fifth, and finally, I consider the extent to which courts may abandon the pro-arbitration canon prior to a future decision by the Supreme Court rejecting the doctrine, concluding that while they may not, courts may freely relegate the doctrine to a principle of last resort. *See infra* Section IV.C.

199 Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1215–21 (11th Cir. 2021) (Newsom, J., concurring).

200 *Id.* at 1215 (Newsom, J., concurring).

201 *Id.* at 1221 (Newsom, J., concurring); *see also* Harper v. Amazon.com Servs., Inc., 12 F.4th 287, 297–98 (3d Cir. 2021) (Matey, J., concurring) (agreeing with Judge Newsom's concurrence and calling for a reexamination of the pro-arbitration canon).

202 Tamar Meshel, *In Defense of* Moses, 96 ST. JOHN'S L. REV. 395, 399 (2022).

for the canon could be found (primarily) in section 2's savings clause.[203] I discuss these divergent conclusions further below.

IV. THE PRO-ARBITRATION CANON IS CONTRARY TO THE FAA

In this Part, I argue that the pro-arbitration canon is incompatible with the FAA and should be abandoned. First, I show that the text, legislative history, and purpose of the FAA require courts to resolve ambiguous arbitration agreements the same as they would any other contract, without applying an arbitrarily pro-arbitration canon. Second, I address the possible counterarguments. None are persuasive. Third, I offer a path forward considering the pro-arbitration canon's ubiquity in FAA case law, concluding that until the Supreme Court invalidates the canon, lower courts should apply it only in the most limited circumstances.

A. Courts Must Interpret Arbitration Agreements the Same as Other Contracts

At bottom, the validity of the pro-arbitration canon is a question of statutory interpretation: In passing the FAA, did Congress intend for courts to construe ambiguous arbitration agreements in favor of arbitration? The FAA's text, legislative history, and purpose play complementary roles in answering that question in the negative.[204] Those sources reject the pro-arbitration canon and show instead that Congress expected courts to apply generally applicable tools to resolve ambiguities in arbitration agreements. *Morgan* confirms that conclusion.

To start with the obvious, the FAA's text nowhere mentions rules of contract interpretation, let alone a pro-arbitration canon of construction. While the FAA, in several places, calls upon courts to interpret arbitration agreements, it never mentions the rules courts should apply in doing so.

First, in section 2, the statute provides that "written provision[s] . . . to settle by arbitration a controversy thereafter arising" and "agreement[s] in writing to submit to arbitration an existing controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[205] Questions of validity, revocability, and enforceability thus come into play only after a threshold inquiry

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203 *Id.* at 398–401.

204 *See, e.g.*, Gundy v. United States, 538 U.S. 128, 141 (2019); McCreary Cnty. v. Am. C.L. Union, 545 U.S. 844, 861 (2005).

205 9 U.S.C. § 2.

into whether there is a "written provision . . . to settle by arbitration" or "an agreement in writing to submit to arbitration" a particular controversy.[206] That inquiry necessarily covers not only questions regarding formation—offer, acceptance, and consideration—but also interpretive questions regarding the scope of the agreement, like whether the contract covers an existing controversy or one "thereafter arising."[207] Yet section 2 is silent as to how courts should conduct the interpretive inquiry.

Something similar happens in sections 3 and 4. Section 3 requires the court to stay a pending action "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under . . . an agreement."[208] Section 4 likewise requires courts to order "the parties to proceed to arbitration in accordance with the terms of the agreement" upon "being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue" or after a jury finding that the parties agreed to arbitrate.[209] Both section 3 and section 4 call for interpretive inquiries into, respectively, whether the issues are "referable to arbitration" or arbitration would be "in accordance with the terms of the agreement."[210] But, again, both sections 3 and 4—like section 2—are silent as to the applicable interpretive rules.

These silences were not an invitation for courts to concoct and apply a pro-arbitration canon. Quite the opposite. The Supreme Court has repeatedly held that "Congress is understood to legislate against a background of common-law adjudicatory principles. Thus, where a common-law principle is well established . . . courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'"[211] Applying this rule

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206 *Id.*; *see* Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 297 (2010).

207 *See* 9 U.S.C. § 2; *Granite Rock Co.*, 561 U.S. at 297.

208 9 U.S.C. § 3.

209 *Id.* § 4.

210 *Id.* §§ 3–4; *see, e.g.*, Oberstein v. Live Nation Ent. Inc., 60 F.4th 505, 510 (9th Cir. 2023).

211 Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991) (citations omitted); *see also* Atl. Sounding Co. v. Townsend, 557 U.S. 404, 422 (2009) (holding punitive damages available under a maritime statute because they "were an established part of the maritime law" at the time of the statute's enactment); Bowen v. Massachusetts, 487 U.S. 879, 896 (1988) (noting "the well-settled presumption that Congress understands the state of existing law when it legislates"); Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885, 889 (3d Cir. 1975) ("Since Congress has not enacted a federal law for interpreting antitrust releases nor has it indicated an intent to adopt state laws on the subject, this court must consider for itself whether the statutory policies embodied in the antitrust

demonstrates that Congress intended for courts to apply generally applicable rules of contract interpretation—not the pro-arbitration canon—to resolve ambiguities in arbitration agreements.[212]

And the available rules of construction are plenty. The intent of the parties is the north star for any question of contract interpretation.[213] Courts faced with an ambiguous agreement—one where the text reveals more than one reasonable reading—have a litany of longstanding common law tools to determine intent.[214] For instance, non-substantive canons can help identify the best

laws will be better promoted by the absorption of state laws regarding release or the formulation of a federal rule.").

212 *See* Atlas Pallet, Inc. v. Gallagher, 725 F.2d 131, 135 (1st Cir. 1984) ("[I]n enacting the NFIP, Congress did not intend to abrogate standard insurance law principles" including "basic contract rules govern[ing] the interpretation of a policy's terms" (first citing Drewett v. Aetna Casualty & Surety Co., 539 F.2d 496 (5th Cir. 1976); and then citing Eagle-Picher Indus. v. Liberty Mut. Ins. Co., 682 F.2d 12 (1st Cir. 1982)).

213 *See, e.g.*, McIntosh v. Groomes, 198 N.W. 954, 955 (Mich. 1924) ("The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties."); Uinta Tunnel, Min. & Transp. Co. v. Ajax Gold Min. Co., 141 F. 563, 566 (8th Cir. 1905) ("The purpose of a written contract is to express the concurring intention of the minds of the parties when it is made. Hence the object of its construction or interpretation is to ascertain the actual intent and meaning of the parties when they executed it."); Del., Lackawanna & W.R.R. Co. v. Bowns, 58 N.Y. 573, 581–82 (1874) ("This doctrine as to the interpretation of written agreements is elementary, and is born of the familiar principle of daily application in courts of justice, that all contracts must be so interpreted as to carry out the intent of the contracting parties."); Streeter v. Streeter, 43 Ill. 155, 161 (1867) ("And it is a well recognized rule, that contracts should receive a reasonable interpretation, according to the intention of the parties entering into them . . . ."); McMillin v. Titus, 72 A. 240, 241 (Pa. 1909) ("The words of a grant are to receive a reasonable construction, and one that will accord with the intention of the parties; and, in order to ascertain their intention, the court must look at the circumstances under which the grant was made."); Donohue v. Cuomo, 184 N.E.3d 860, 866 (N.Y. 2022) ("The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent . . . ." (quoting Greenfield v. Philles Recs., 780 N.E.2d 166, 170 (N.Y. 2002)); CITGO Asphalt Refin. Co. v. Frescati Shipping Co., 589 U.S. 348, 355 (2020) ("Maritime contracts 'must be construed like any other contracts: by their terms and consistent with the intent of the parties.'"); Lamps Plus, Inc. v. Varela, 587 U.S. 176, 184 (2019) ("Consent is essential under the FAA because arbitrators wield only the authority they are given. . . . Parties may generally shape such agreements to their liking by specifying with whom they will arbitrate, the issues subject to arbitration, the rules by which they will arbitrate, and the arbitrators who will resolve their disputes. Whatever they settle on, the task for courts and arbitrators at bottom remains the same: 'to give effect to the intent of the parties.'" (citations omitted)).

214 *See* Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987) ("A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot."). *See generally* RESTATEMENT (SECOND) OF CONTS. §§ 202–03 (A.L.I. 1981) (articulating general principles of contract interpretation and explaining interpretive tools courts apply to resolve ambiguity).

reading of a provision—even one subject to multiple reasonable interpretations.[215] The Supreme Court acknowledged as much in *Mastrobuono*, applying not only the pro-arbitration canon to determine whether the parties agreed to arbitrate claims for punitive damages but also a "cardinal principle of contract construction: that a document should be read to give effect to all its provisions and to render them consistent with each other."[216] Courts can also look to extrinsic evidence to resolve doubts regarding an arbitration agreement's scope.[217] Perhaps the parties' negotiations inform the meaning of an arbitration clause.[218] Or maybe past performance reveals an unspoken understanding.[219]

215 *See Perry*, 482 U.S. at 492 n.9; *see, e.g.*, O'Brien v. Miller, 168 U.S. 287, 297 (1897) (applying general canons of construction in an admiralty action); Shreffler v. Nadelhoffer, 25 N.E. 630, 633–34 (Ill. 1890) (concerning the interpretation of suretyship agreements); Tims v. LGE Cmty. Credit Union, 935 F.3d 1228, 1237 (11th Cir. 2019) (Georgia law); Boardman v. Pac. Seafood Grp., 822 F.3d 1011, 1018 (9th Cir. 2016) (Oregon law); Shelby Cnty. State Bank v. Van Diest Supply Co., 303 F.3d 832, 836 (7th Cir. 2002) (Iowa law).

216 Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62–64 (1995).

217 *See, e.g.*, Springsteen v. Samson, 32 N.Y. 703, 706 (1865) ("Where a literal performance is impossible or impracticable, or where the language is ambiguous or susceptible of more than one construction, or is vague, or general, or inappropriate to express the true intent, extraneous evidence is admissible to explain, and an antecedent parol agreement may be received to point to the intent of the parties."); Bank of N.Y. Tr. Co. v. Franklin Advisers, Inc., 726 F.3d 269, 275 (2d Cir. 2013); Skilstaf, Inc. v. CVS Caremark Corp., 669 F.3d 1005, 1015 (9th Cir. 2012); Pierce Cnty. Hotel Emps. & Rest. Emps. Health Tr. v. Elks Lodge, B.P.O.E. No. 1450, 827 F.2d 1324, 1327 (9th Cir. 1987).

218 *See, e.g.*, Miller v. Green, 112 S.E. 417, 417–18 (N.C. 1922) ("If the contract is ambiguous words cannot be supplied which import an intention not expressed when the contract is made, for then the intention of the parties is to be deduced from the language employed; but if there is a latent ambiguity—if the contract is not clear and unequivocal—preliminary negotiations and surrounding circumstances may be considered for the purpose of determining what the parties intended—*i. e.*, for the purpose of ascertaining in what sense they used the ambiguous language, but not for the purpose of contradicting the written contract or varying its terms."); McIntosh v. Groomes, 198 N.W. 954, 955–56 (Mich. 1924) ("If ambiguous terms are used, the preliminary negotiations may be considered, not to vary or contradict the plain terms of the instrument, but to aid the court in determining the intent with which such words were used."); Rhone-Poulenc Inc. v. Int'l Ins. Co., 71 F.3d 1299, 1305 (7th Cir. 1995); Cajun Elec. Power Coop., Inc. v. Fed. Energy Regul. Comm'n, 924 F.2d 1132, 1137 (D.C. Cir. 1991).

219 *See, e.g.*, McMillin v. Titus, 72 A. 240, 241 (Pa. 1909) ("'When a contract is capable of two different interpretations,' . . . 'that which the parties themselves have always put upon it, and acted upon, especially as here for a long series of years, a court will follow, because it is the true intent and meaning of the parties which are to be sought for in the language they use.'" (citation omitted)); Knotts v. Bartlett, 98 S.E. 590, 590 (W. Va. 1919) ("Conceding the language to be of doubtful import or ambiguous, though it seems clear enough as far as it goes to define the relation of the parties to each other, yet where the parties, by their acts and conduct concur in its construction and interpretation, courts regard and give effect to their exposition, when to do so does not violate the rules of law or infringe upon public policy."); Addicks Servs., Inc. v. GGP-Bridgeland, LP, 596 F.3d 286, 294 (5th Cir. 2010); Lanier Pro. Servs., Inc. v. Ricci, 192 F.3d 1, 4 (1st Cir. 1999).

Whatever the tool,[220] its object is the determination of the parties' intent in choosing a particular word or phrase.[221]

There is no indication in the FAA's purpose that Congress intended to displace these generally applicable rules in favor of the pro-arbitration canon. For decades, the "policy favoring arbitration" served as the purposive basis for the canon. Courts reasoned that by favoring arbitration over litigation, the FAA compelled them to resolve ambiguities in arbitration agreements in favor of arbitration.[222] But read faithfully, *Morgan* confirms that the FAA's "policy favoring arbitration" "is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts."[223] Thus, the FAA's purpose "is about treating arbitration contracts like all others, not about fostering arbitration."[224] This reading of the FAA stems from section 2's "substantive mandate" that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,"[225] and legislative history, which confirms that the original purpose of the FAA was that through the Act, an arbitration agreement is placed upon the same footing as other contracts.[226] Accordingly, the FAA's equal-treatment purpose reinforces why generally applicable rules of contract interpretation must prevail; only through the application of such principles is an arbitration agreement treated like other contracts.

A rule of construction that literally favors arbitration cannot be squared with the FAA. Indeed, the pro-arbitration canon is precisely the sort of "novel rule" favoring arbitration that the Court renounced in *Morgan*. Despite the availability of common

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220 As noted in *supra* note 198, it is possible that *contra proferentem* still has some role to play in the analysis despite *Lamps Plus*. To the extent that the doctrine even remains a viable tool for resolving ambiguities in arbitration agreements, it would arguably play a minor role, applicable only where "the meaning of a provision remains ambiguous after exhausting the ordinary methods of interpretation." Lamps Plus, Inc. v. Varela, 587 U.S. 176, 186 (2019). Regardless, given the Court's strong suggestion that the *contra proferentem* would be preempted insofar as it was applied in a manner hostile to arbitration, litigants seeking to avoid arbitration would be wise to give it limited weight.

221 *See* cases cited *supra* note 213.

222 *See* cases cited *supra* notes 131, 195.

223 Morgan v. Sundance, Inc., 596 U.S. 411, 411 (2022) (quoting Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 302 (2010)).

224 *Id.* at 412.

225 9 U.S.C. § 2.

226 *See Morgan*, 596 U.S. at 411.

law tools of interpretation, which resolve ambiguities in the manner most consistent with the parties' intentions, the pro-arbitration canon unabashedly "tip[s] the scale"[227] in favor of arbitration, against litigation, without regard to the parties' intent. Such a rule does not place arbitration "agreements upon the same footing as other contracts"[228]—it places arbitration agreements "on a pedestal."[229] And absent a policy truly favoring arbitration over litigation, the pro-arbitration canon lacks any principled basis in the FAA. Instead, as stated in *Morgan*, a court facing an ambiguous arbitration agreement "must hold a party to its arbitration contract just as the court would to any other kind."[230] In other words, courts must employ generally applicable rules of contract interpretation.[231]

In short, with *Morgan*'s correction of courts' misunderstanding of the "policy favoring arbitration," the pro-arbitration canon is a purposive rule without a purpose. The FAA supports instead a contrary rule requiring courts to avoid pro-arbitration favoritism and resolve ambiguous arbitration agreements the same way they would any other ambiguous contract. Not only would adopting that rule be workable—courts are well-versed in resolving ambiguous contracts—it would harmonize the analysis of ambiguous arbitration agreements with other questions regarding, for example, whether an agreement to arbitrate was formed or whether a generally applicable contract defense might apply.[232] In neither of those circumstances does the "policy favoring arbitration" tip the scales against litigation, and neither should it when interpreting arbitration agreements. More broadly, applying only generally applicable rules of contract interpretation to resolve ambiguities in arbitration agreements conforms to the Supreme Court's repeated insistence that "[a]rbitration is strictly 'a matter of consent,' and thus "is a way to resolve those dis-

227 Lloyd v. J.P. Morgan Chase & Co., 791 F.3d 265, 270 (2d Cir. 2015).

228 *Morgan*, 596 U.S. at 411.

229 Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1219 (11th Cir. 2021) (Newsom, J., concurring).

230 *Morgan*, 596 U.S. at 418.

231 Of course, for much the same reasons, courts may not apply generally applicable rules that necessarily favor litigation over arbitration. *See* Lamps Plus, Inc. v. Varela, 587 U.S. 176, 183 (2019).

232 *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944–45 (1995); Will-Drill Res., Inc. v. Samson Res. Co., 352 F.3d 211, 214 (5th Cir. 2003); Noohi v. Toll Bros., Inc., 708 F.3d 599, 611 (4th Cir. 2013); Bell v. Cendant Corp., 293 F.3d 563, 566 (2d Cir. 2002); MacDonald v. CashCall, Inc., 883 F.3d 220, 230 (3d Cir. 2018).

putes—*but only those disputes*—that the parties have agreed to submit to arbitration."[233]

The pro-arbitration canon, therefore, should be sent the way of the waiver-prejudice rule that the Court rejected in *Morgan*.[234] Both rules arose from Second Circuit decisions in the early 1960s, both rules are grounded in the "policy favoring arbitration," both rules gained widespread acceptance with minimal critical analysis, and both rules are contrary to the FAA. The Court rejected the waiver-prejudice rule; rejecting the pro-arbitration canon is the logical next step.

B. The Conceivable Counterarguments Are Unavailing

Proponents of the pro-arbitration canon might dispute my conclusion by pointing to Professor Meshel's textual defense of the pro-arbitration canon. They might also point out that *Morgan* dealt with a "procedural" rule and thus does not implicate the substantive pro-arbitration canon. Or they might point to the canon's roots in the LMRA as a basis for its continued application. Each of these arguments fails under scrutiny.

First, Professor Meshel's textual defense of the pro-arbitration canon is unpersuasive. She maintains that the savings clause of section 2 supports the pro-arbitration canon "by explicitly allowing courts to refuse . . . enforcement [of an arbitration agreement] only on the most narrow contract law defenses—those that would allow for the *revocation* of any contract."[235] From this premise, she reasons that the FAA favors the right to arbitration over other contractual rights and that the Act therefore sanctions a liberal reading of arbitration agreements in favor of arbitration.[236]

This reasoning is flawed. For one thing, case law rejects Professor Meshel's premise that only "the most narrow contract law defenses" apply to arbitration agreements. To the contrary, "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2."[237] Indeed, any other approach

233 Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 299 (2010).

234 *Morgan*, 596 U.S. at 418–19.

235 Meshel, *supra* note 202, at 415–16.

236 *See id.* at 416.

237 Dr.'s Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996); *see also* Epic Sys. Corp. v. Lewis, 584 U.S. 497, 507 (2018) (explaining that the FAA's savings clause permits arbitration agreements to be invalidated by generally applicable contract defenses); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (interpreting the FAA's savings clause to preserve generally applicable contract defenses).

would be inconsistent with *Morgan* (a case that Professor Meshel acknowledges only briefly in a footnote), which confirms that the purpose of the FAA is to assure the equal treatment of arbitration agreements and other contracts.[238]

But even accepting Professor Meshel's premise, it would not support the pro-arbitration canon. As a textual matter, Professor Meshel's conclusion improperly grounds the pro-arbitration canon in section 2's invocation of the language of revocability, validity, and enforceability.[239] These principles cannot support the pro-arbitration canon—a tool of contract interpretation—because they have little, if any, bearing on the interpretive question of an agreement's scope. Revocation, for example, does not implicate the interpretive question of an agreement's scope because it concerns a party's ability to unilaterally terminate an existing agreement, for example on account of another party's breach.[240] Validity, likewise, goes to circumstances that would render a contract void or voidable.[241] And a contract may be void or voidable because of public policy, a defect in a party's capacity, a mistake regarding the subject matter, or because it was the product of fraud or duress.[242] But these are not interpretive issues. The same goes for questions of enforceability, which embrace substantive doctrines like the statute of frauds and statute of limitations, or questions of public policy.[243] So while an otherwise valid

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238 *See* Meshel, *supra* note 202, at 402 n.30.

239 *See id.* at 415–16.

240 *See, e.g.*, Fenix Cattle Co. v. Silver (*In re* Select-A-Seat Corp.), 625 F.2d 290, 292 (9th Cir. 1980) (material breach would justify revocation); *cf.* Uniloc 2017 LLC v. Google LLC, 52 F.4th 1352, 1357 (Fed. Cir. 2022) (discussing irrevocable terms under New York law). Professor Meshel characterizes revocability as a doctrine tethered to the existence or formation of a contract, but even accepting that premise, those are issues distinct from interpreting the scope of an agreement. *See* Meshel, *supra* note 202, at 412; *see also id.* at 416–17 (distinguishing questions of scope from questions of existence and formation of a contract).

241 *See Contract*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining an invalid contract as "[a]n agreement that is either void or voidable."); RESTATEMENT (SECOND) OF CONTS. § 7 (A.L.I. 1981) (defining "voidable Contracts").

242 *See* RESTATEMENT (SECOND) OF CONTS. § 7 (A.L.I. 1981); *see, e.g.*, First Nat'l Bank of Springfield v. Malpractice Rsch., Inc., 688 N.E.2d 1179, 1182 (Ill. 1997) (contract may be void as against public policy); N.Y. Life Ins. Co. v. Mitchell, 528 P.3d 1269, 1272 (Wash. 2023) (contract may be voidable for lack of capacity); *In re* Allegheny Int'l, Inc., 954 F.2d 167, 176 (3d Cir. 1992) (finding a contract voidable if induced by fraud under Pennsylvania law); Thor Properties., LLC v. Chetrit Grp. LLC, 936 N.Y.S.2d 196, 198 (App. Div. 2012) (contract may be voidable for mutual mistake); U.S. *ex rel.* Trane Co. v. Bond, 586 A.2d 734, 740 (Md. 1991) (contract may be void if induced by duress).

243 *See Contract*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining an unenforceable contract as "[a]n otherwise valid contract that, because of some technical defect, cannot be fully enforced; a contract that has some legal consequences but that may not be enforced

and unrevoked agreement may nonetheless be unenforceable if the statute of limitations has run or the agreement falls within the statute of frauds but was not reduced to writing, the inquiry is distinct from that of interpreting the agreement's scope.[244]

Because revocability, validity, and enforceability cover substantive issues distinct from the antecedent interpretive question of an agreement's scope, they are scant support for the pro-arbitration canon. Far better textual evidence of Congress's intent is its omission of any reference to interpretive rules in the FAA despite raising interpretive questions in several sections of the Act. As explained above, under accepted rules of statutory interpretation, that omission evidences Congress's intent to have generally applicable rules of contract interpretation apply—not an atextual pro-arbitration canon.

Second, the purportedly procedural nature of the waiver rule at issue in *Morgan* does not detract from the case's applicability to the substantive pro-arbitration canon. To be sure, in *Morgan*, the Court was careful to couch its holding in terms of whether courts could craft "arbitration-preferring *procedural* rules."[245] Perhaps that tailoring was necessary to avoid splits from the unanimous opinion. But the principles the Court relied on and applied were almost exclusively substantive. Indeed, the bulk of the Court's analysis focused on the FAA's equal-treatment principle, which derives from the FAA's substantive provisions, primarily section 2, and applies to substantive issues—contract formation and available defenses—no less than procedural ones.

The only part of the Court's analysis that would be inapplicable to an analysis of the pro-arbitration canon would be the Court's brief reliance on section 6. That section provides that "[a]ny application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions."[246] To be sure, section 6 supports the extension of the

in an action for damages or specific performance in the face of certain defenses, such as the statute of frauds"); RESTATEMENT (SECOND) OF CONTS. § 8 (A.L.I. 1981) (defining "unenforceable contracts").

244 *See* Halcon Int'l, Inc. v. Monsanto Austl. Ltd., 446 F.2d 156, 159 (7th Cir. 1971) ("Thus the Restatement of Contracts distinguishes between voidable contracts (such as those induced by fraud, mistake or duress) and unenforceable contracts (such as those where enforcement is barred because of a statute of limitations, discharge in bankruptcy or statute of frauds)." (citing RESTATEMENT (SECOND) OF CONTS. §§ 13–14 (A.L.I. 1981))).

245 Morgan v. Sundance, Inc., 596 U.S. 411, 418 (2022) (emphasis added).

246 9 U.S.C. § 6.

equal treatment principle to procedural questions like waiver of the right to compel arbitration under section 4. But the presence of section 6 is only necessary because section 2—from which the equal treatment rule derives—is a substantive mandate. And section 2 prohibits novel substantive rules favoring arbitration just as much as section 6 prohibits procedural ones.

Third, LMRA case law does not support the pro-arbitration canon's continued application post-*Morgan*. As explained above, beyond the "liberal policy favoring arbitration," some courts cited case law from the LMRA as support for the canon.[247] But in *United Steelworkers*, where the Court held that ambiguities in a collective bargaining agreement's arbitration clause must be resolved in favor of arbitration, it was careful to explain that "arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement."[248] The LMRA "promote[s] industrial stabilization through the collective bargaining agreement" and "[a] major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances."[249] So while "[i]n the commercial case, arbitration is the substitute for litigation," in the context of labor disputes, "arbitration is the substitute for industrial strife."[250] These policy aims, set forth in the LMRA itself,[251] have no application outside the context of a collective bargaining agreement.[252] And the FAA has no comparable statement of purpose. To the contrary, its fundamental purpose is the equal treatment of arbitration agreements and other contracts. And *that* policy cannot support the pro-arbitration canon.

247 *United Steelworkers*, 363 U.S. 574, 578 (1960).

248 *Id.*

249 *Id.*

250 *Id.*; *see also* AT&T Technologies, Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 650 (1986) ("This presumption of arbitrability for labor disputes recognizes the greater institutional competence of arbitrators in interpreting collective-bargaining agreements, 'furthers the national labor policy of peaceful resolution of labor disputes and thus best accords with the parties' presumed objectives in pursuing collective bargaining.'").

251 29 U.S.C. § 141.

252 *See* Moses, *supra* note 196, at 124 ("So the policy [favoring arbitration] with regard to the FAA was instead a policy pertaining to the labor law field. In that field, there are strong national policy justifications for favoring arbitration of collective bargaining agreements—to prevent strikes and worker violence, to preserve labor peace, and to promote industrial stabilization. These policy reasons do not pertain to the FAA, which simply provides that arbitration of commercial and maritime disputes can be a workable alternative to litigation." (footnotes omitted)).

C. A Path Forward Post-*Morgan*

If you are convinced that the pro-arbitration canon is incompatible with the FAA, the question follows: What next? After all, the canon is accepted in every circuit,[253] supported by decades of case law,[254] and has been repeatedly cited by the Supreme Court.[255] So even if a court were—in the abstract—inclined to abandon the rule, doing so implicates some practical constraints.

Theoretically, there are three paths forward. First, lower courts could immediately renounce the pro-arbitration canon and cease applying it, citing *Morgan* as an intervening change in the law warranting a departure from otherwise binding precedent. Second, courts could continue to apply the pro-arbitration canon without adjustment, waiting (hoping?) for the Supreme Court to correct course. Finally, lower courts could follow the Supreme Court's lead in *Morgan* and *Granite Rock*, and reorient the pro-arbitration canon as merely a restatement of the rule that arbitration is a matter of consent and it is the parties' intent that controls, making the canon a last resort where ambiguity is otherwise impossible to resolve. Whereas the first and second options are likely too aggressive and too meek, respectively, the last is "just right," because it best ensures that arbitration agreements are appropriately interpreted until the Supreme Court formally renounces the rule.

The most aggressive approach—immediately discarding the pro-arbitration canon—is untenable considering the Supreme Court's past invocations of the pro-arbitration canon. Although the courts of appeals may reconsider their own precedent when the reasoning is called into doubt by intervening Supreme Court decisions,[256] only the Supreme Court can overrule its own precedent.[257] That rule applies "regardless of whether subsequent cas-

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253 *See* cases cited *supra* notes 188–91.

254 *See* cases cited *supra* notes 127, 188–91.

255 *See supra* Section III.B.

256 *See, e.g.*, Nghiem v. NEC Elec., Inc., 25 F.3d 1437, 1441 (9th Cir. 1994) ("'We are bound by decisions of prior panels' unless an en banc decision, Supreme Court decision or subsequent legislation undermines those decisions." (quoting United States v. Washington, 872 F.2d 874, 880 (9th Cir. 1989))).

257 *See* State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) ("The Court of Appeals was correct in applying that principle despite disagreement with *Albrecht*, for it is this Court's prerogative alone to overrule one of its precedents."); Evans v. Sec'y, Fla. Dep't of Corr., 699 F.3d 1249, 1252, 1263–64 (11th Cir. 2012) ("On the subject of lower courts predicting that the Supreme Court is going to overrule one of its own decisions, however, Judge Hand cautioned against 'embrac[ing] tthe [sic] exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant.'" (first alteration in

es have raised doubts about [earlier Supreme Court precedent's] continuing vitality."[258]

Here, the pro-arbitration canon is a part of Supreme Court precedent such that lower courts must continue to apply it until the Court says otherwise—which it should, with haste. To be sure, most of the Court's invocations of the canon have come in dicta lacking precedential force. *Moses H. Cone*'s pronouncement of the FAA's pro-arbitration canon, for example, is already recognized as dicta.[259] The same can be said of the Court's discussion of the canon in *Mitsubishi Motors*, *Volt*, *First Options*, and *Granite Rock*.[260] So none of these cases stand in the way of lower courts—bound as they are to follow the Supreme Court's holdings—abandoning the pro-arbitration canon on their own. But at least in *Mastrobuono*, the pro-arbitration canon was a part of the Court's holding. There, the Court actually applied the pro-arbitration canon to resolve ambiguities in an arbitration agreement.[261] True, the canon was but one of a number of interpretive tools the Court invoked—including the canon of *contra proferentem* and the rule that a contract should be read to give effect to all its provisions—such that the pro-arbitration canon was not strictly necessary to the Court's ruling.[262] But the Court's more recent readings of *Mastrobuono* limit lower courts' ability to

original) (quoting Spector Motor Serv. Inc., v. Walsh, 139 F.2d 809, 823 (2d Cir. 1943) (Hand, J., dissenting))).

258 Hohn v. United States, 524 U.S. 236, 252–53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

259 Moses, *supra* note 146, at 174 ("The first Supreme Court statement that there was a federal policy favoring arbitration came from dicta in the 1983 case of *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*").

260 In none of these cases was the pro-arbitration canon necessary to the Court's ruling. In *Granite Rock*, the Court concluded that the agreement at issue was unambiguous, such that it had no cause to apply the canon. *See* Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 307 (2010). And in *Mitsubishi Motors* and *First Options*, the Court invoked the pro-arbitration canon merely as a point of contrast to reject arguments for similar rules when considering other threshold questions regarding arbitrability. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625–26 (1985); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995). Similarly, in *Volt*, the pro-arbitration canon was invoked only to say that it would not favor arbitration "under a certain set of procedural rules." Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 470, 476 (1989).

261 *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995).

262 *See id.* at 62–64.

treat the case's application of the pro-arbitration canon as dicta. For example, in *Lamps Plus*, where the Court found California's *contra proferentem* rule preempted by the FAA, the majority noted that *Mastrobuono* "was primarily based on the FAA policy favoring arbitration," making it difficult to explain away the significance the pro-arbitration canon had on the outcome of the case.[263] Similarly, in *EEOC v. Waffle House, Inc.*, the Court explained that "[i]n *Mastrobuono,* we reiterated that clear contractual language governs our interpretation of arbitration agreements, but because the choice-of-law provision in that case was ambiguous, we read the agreement to favor arbitration under the FAA rules."[264] Thus, a faithful reading of *Mastrobuono*, *Lamps Plus*, and *Waffle House*, suggests that the pro-arbitration canon is a part of binding Supreme Court case law that lower courts must continue to apply it until the Court says otherwise.

But it does not follow that courts must sit back and wait for the Supreme Court to announce the canon's demise in some future decision.[265] The key lies in the Court's approach in *Morgan* and, earlier, *Granite Rock.* In those cases, the Court reoriented—without expressly overruling—the "policy favoring arbitration" and the pro-arbitration canon respectively. Despite seemingly contrary authority, the Court in *Morgan* explained that the "policy favoring arbitration" does not mean literally favoring arbitration over litigation, it means treating arbitration agreements the same as other contracts.[266] Similarly, in *Granite Rock* the Court recast the canon as applying only where the arbitration agreement is "legally enforceable and *best construed to encompass the dispute*."[267]

263 Lamps Plus, Inc. v. Varela, 587 U.S. 176, 189 n.5 (2019).

264 534 U.S. 279, 294 n.9 (2002).

265 Though not strictly within the scope of this Article, I do not think that abandoning the pro-arbitration canon would raise significant stare decisis concerns. For one thing, all but one of the Court's mentions of the doctrine have come in dicta, and its conception of the rule has fluctuated over time. *See* Franchise Tax Bd. of Cal. v. Hyatt, 587 U.S. 230, 232 (2019) (explaining that stare decisis factors include "the quality of the decision's reasoning, its consistency with related decisions, [and] legal developments since the decision"); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 917 (2018) ("An important factor in determining whether a precedent should be overruled is the quality of its reasoning . . . ."). For another, doing so would likely not implicate private parties' reliance interests because rejecting the canon would mean that courts would be focused on giving effect to parties' actual intent in drafting an arbitration agreement. *See Hyatt*, 587 U.S. at 248–49 (reliance interests a factor in whether to overrule past precedent). In light of these considerations, the flaws in the canon's substantive basis would warrant a departure from past precedent. *See id.*

266 Morgan v. Sundance, Inc., 596 U.S. 411, 418 (2022).

267 Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 303 (2010) (emphasis added).

Together, these cases reveal a principled path forward until the Court overrules its pro-arbitration canon precedent: the pro-arbitration canon should be relegated to the status of a canon-of-last-resort, applied only after exhausting all other tools for resolving ambiguous agreements. In terms of *Morgan*, this rule makes sense. To treat arbitration agreements and other contracts equally, they should—as much as possible—be interpreted using the same tools. Prioritizing generally applicable state-law interpretive tools over the pro-arbitration canon ensures that occurs. And if those tools favor one of several reasonable readings of the agreement, then that reading must control. Otherwise, the court would be violating the broader principle that arbitration agreements must be treated the same as other agreements. And if—in what would likely be a very rare scenario—state-law interpretive tools cannot resolve an ambiguity, then perhaps the canon could apply, on the weak reasoning that if the parties agreed to arbitrate some disputes, they must have agreed to arbitrate others.[268] The canon-of-last-resort approach likewise comports with *Granite Rock*. Only if generally applicable interpretive tools suggest that an arbitration agreement covers a given dispute can it be said that the agreement is "best construed to encompass the dispute" such that the pro-arbitration canon would apply to resolve any ambiguity in favor of arbitration.[269]

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268 *See id.* at 289 ("The [pro-arbitration canon] should be applied only where it reflects, and derives its legitimacy from, a judicial conclusion (absent a provision validly committing the issue to an arbitrator) that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed, is legally enforceable, and is best construed to encompass the dispute."); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 945 (1995) ("The latter question [of an arbitration clause's scope] arises when the parties have a contract that provides for arbitration of some issues. In such circumstances, the parties likely gave at least some thought to the scope of arbitration. And, given the law's permissive policies in respect to arbitration, one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter." (citation omitted)).

Unburdened by the pro-arbitration canon, a court in this scenario could resolve the issue by holding that the moving party failed to carry its burden to establish a right to arbitrate the dispute at issue. *See, e.g.*, Air-Con, Inc. v. Daikin Applied Latin Am., LLC, 21 F.4th 168, 176 (1st Cir. 2021) ("[T]he substantive law on the enforceability of arbitration agreements puts the burden on the party moving to compel arbitration to show that it is entitled to that outcome."); Austin v. Experian Info. Sols., Inc., 148 F.4th 194, 201 (4th Cir. 2025).

269 This canon-of-last-resort approach finds an analogue in the application of *contra proferentem*, which today is generally applied only "when the meaning of a provision remains ambiguous after exhausting the ordinary methods of interpretation." Lamps Plus, Inc. v. Varela, 587 U.S. 176, 186 (2019); *see also* Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1220 (11th Cir. 2021) (Newsom, J., concurring) (noting other instances where substantive canons are applied only where meaning cannot otherwise be determined).

Not only does this canon-of-last-resort approach flow naturally from *Morgan* and *Granite Rock*, it is also compatible with *Mastrobuono* and the Court's other pro-arbitration canon cases because the Court has never had the occasion to state precisely where in the hierarchy of interpretive tools the canon lies. Notably, some intermediate courts have already begun to read *Granite Rock* in this fashion.[270] *Morgan*'s rejection of a pro-arbitration rule crafted from the "policy favoring arbitration" should push more courts to do the same, until the Supreme Court ends the discussion for good.[271]

V. CONCLUSION

Over eighty years ago, Circuit Judge Frank offered an observation that resonates here: "Give a bad dogma a good name and its bite may become as bad as its bark."[272] His point was that rhetorical flourish can distract from a doctrine's questionable roots. Thus, he mused, the "hypnotic power of the phrase 'oust the jurisdiction'" could explain the widespread acceptance of the ouster doctrine as a justification for the common law's maltreatment of executory arbitration agreements, despite the doctrine's substantive flaws.[273]

The same can be said of the phrase "liberal national policy favoring arbitration" (and variations thereon).[274] Fundamentally, it represents a bad dogma, or at least a confusing one, because it suggests that the FAA favors arbitration over litigation when the

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270 *See, e.g.*, Loc. Union 97, Int'l Bhd. of Elec. Workers v. Niagara Mohawk Power Corp., 67 F.4th 107, 113 (2d Cir. 2023) ("At bottom, *Granite Rock* stands for the proposition that courts may invoke a presumption of arbitrability only where the parties' dispute concerns a valid and enforceable agreement to arbitrate that is ambiguous as to its scope. In so holding, the Supreme Court abrogated some elements of this Court's previous arbitrability jurisprudence."); Lloyd v. J.P. Morgan Chase & Co., 791 F.3d 265, 270 (2d Cir. 2015) ("So if an arbitration clause is best construed to express the parties' intent *not* to arbitrate certain disputes, that intent controls and cannot be overridden by the presumption of arbitrability.").

271 *See, e.g.*, Largan Precision Co. v. Fisch Sigler LLP, 610 F. Supp. 3d 209, 215–16 (D.D.C. 2022) ("There are two reasons not to apply the presumption in favor of arbitrability here. For starters, [Respondent] overemphasizes the force of the presumption. The Supreme Court recently highlighted the presumption's limited reach when it clarified that the 'policy favoring arbitration . . . is about *treating arbitration contracts like all others, not about fostering arbitration*.'" (quoting Morgan v. Sundance, Inc., 596 U.S. 411, 418 (2022) (emphasis added))).

272 Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 984 (2d Cir. 1942).

273 *Id.* at 983–84.

274 *See Morgan*, 596 U.S. at 418 (quoting Carolina Throwing Co. v. S & E Novelty Corp., 442 F.2d 329, 331 (4th Cir. 1971) (per curiam)).

statute's purpose is merely to ensure that arbitration agreements and other contracts are treated the same. Yet as courts began reciting the mantra of a "policy favoring arbitration," that bad dogma began to bite. Soon enough, a law addressing the judicial hostility to arbitration led to an overcorrection, serving as the substantive basis for questionable doctrines, such as the arbitration-specific waiver rule at issue in *Morgan*, and the pro-arbitration canon discussed here.[275]

Those bites have left real marks. The Tenth Circuit has applied the pro-arbitration canon to interpret employees' arbitration agreements in favor of arbitrating discrimination and wage claims, even where those claims were outside the scope of the parties' substantive agreement.[276] Several circuits have similarly applied the canon to favor the arbitrability of claims of fraudulent inducement and other torts beyond simple breaches of contract.[277] The Second Circuit has resolved ambiguity in favor of arbitrating questions regarding timeliness, and the Third Circuit has even used the canon to compel arbitration where the arbitral forum chosen by the parties was unavailable.[278] These are but a few recent examples; scholars have argued persuasively that the pro-arbitration canon and the "policy favoring arbitration" are responsible in large part for the Supreme Court's decisions holding statutory rights arbitrable.[279]

In this Article, I have argued that the pro-arbitration canon must be abandoned. *Morgan* is the hook. For one thing, it confirms that there is no "liberal [federal] policy favoring arbitration" *over litigation*.[280] Instead, as the Court had hinted at in earlier decisions, the "policy favoring arbitration" means only that

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275 *See* Frankel, *supra* note 51, at 553–54 ("Ironically, these special rules often have been crafted by courts that are seeking to rein in what they perceive as continued judicial hostility to arbitration, when, in reality, that purported hostility simply represents decisions placing arbitration clauses on equal footing with other contracts, as the FAA requires.").

276 *See, e.g.*, Sanchez v. Nitro-Lift Technologies, L.L.C., 762 F.3d 1139, 1148 (10th Cir. 2014); Armijo v. Prudential Ins. Co. of Am., 72 F.3d 793, 798 (10th Cir. 1995).

277 *See* Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc., 350 F.3d 568, 576–77 (6th Cir. 2003); Gregory v. Electro-Mech. Corp., 83 F.3d 382, 385–86 (11th Cir. 1996); Battaglia v. McKendry, 233 F.3d 720, 727 (3d Cir. 2000).

278 *See Khan v. Dell Inc.*, 669 F.3d 350, 356 (3d Cir. 2012); Bechtel do Brasil Construções Ltda. v. UEG Araucária Ltda., 638 F.3d 150, 158 (2d Cir. 2011).

279 *See* Moses, *supra* note 146, at 176 (arguing that the "policy favoring arbitration" "was the Court's linchpin for determining that the FAA permitted antitrust claims to be arbitrated"); Moses, *supra* note 196, at 145 (arguing that the Supreme Court "relied heavily" on pro-arbitration canon to hold statutory claims arbitrable); Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 307–08 (2015).

280 Morgan v. Sundance, Inc., 596 U.S. 411, 418 (2022).

courts must treat arbitration agreements the same as other contracts.[281] So the FAA favors arbitration only relative to its disfavored status under the law before the statute's enactment.[282] More important than that general clarification, though, the Court wielded that principle in a way that it had not before, rejecting a court-made rule that grafted an arbitration-favoring prejudice requirement onto the generally applicable standard for waiver.[283] In doing so, the Court was clear: "[A] court may not devise novel rules to favor arbitration over litigation."[284]

The pro-arbitration canon is such a novel rule. The text of the FAA lends it no support. To the contrary, the statute's text compels courts to resolve ambiguities in arbitration agreements the same as they would any other contract—using the myriad tools courts have developed for the task. Nor does the FAA's legislative history—which is relatively sparse, but confirms that the statute was intended to place arbitration agreements on the "same footing" as other contracts—support the canon's continued application. Indeed, the pro-arbitration canon was never said to arise from these typical substantive bases.[285] Instead, it is an explicit application of the "policy favoring arbitration." With *Morgan*'s clarification of that phrase's proper understanding, the canon now lacks any basis whatsoever. The Supreme Court, accordingly, should abandon it. And until it does, lower courts should relegate it to the status of a canon-of-last-resort.

281 *See id.*
282 *See id.*
283 *See id.* at 418–19.
284 *Id.* at 418.
285 *See* Frankel, *supra* note 51, at 539, 546.

Escaping the Labyrinth: Cutting Through the Maze of Federal Sector Employment Laws to Streamline Appeals, Allow Faster and More Consistent Decisions, and Level the Playing Field Between Agencies and Employees

Christopher Ligatti

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Escaping the Labyrinth: Cutting Through the Maze of Federal Sector Employment Laws to Streamline Appeals, Allow Faster and More Consistent Decisions, and Level the Playing Field Between Agencies and Employees

*Christopher Ligatti**

Federal employees and their job protections have gained increased media attention due to the current presidential administration. Criticism has long been aimed primarily at the property interest and accompanying due process protections that federal employees have in their employment. However, this Article argues that while the federal sector employment law system is badly in need of reform, the issue is not the constitutionally required due process protections afforded to employees, but rather the additional statutory and regulatory protections Congress has granted employees. Currently, federal employees have multiple overlapping forums in which they can bring employment actions, may cross-appeal negative decisions in one forum to another, and, in discrimination matters, have the right to a full and complete "do-over" before a federal court jury if unsuccessful in the administrative process. These procedures go well beyond the requirements of procedural due process. They create a lengthy and confusing process that takes years to navigate, confuses even experienced practitioners, contributes to government inefficiencies, and results in splits of law between executive agencies, such as the EEOC, and the federal courts.

This Article sets forth the intricacies of these procedures and the flaws in the system, before reviewing a series of proposed reforms, including the constitutional and practical issues that could arise from these reforms. As part of this analysis, the Article considers whether elimination of the right to a de novo hearing and the option for a jury trial in federal court in discrimination matters would violate the Seventh Amendment under current Supreme Court jurisprudence. Ultimately, the Article concludes that the best reforms would be to make an employee's choice of forum more final, eliminate cross-appeals between forums, equalize the existing

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appellate options so that agencies and employees are on equal footing, and use appeals to the Federal Circuit to ensure consistency in law. The Article also suggests eliminating the right to a hearing in federal court in discrimination matters as most case law indicates that this is not required under the Seventh Amendment. The Article concludes that these reforms can make the system of federal sector employment law fairer and easier to navigate for both employees and management, while also creating a more efficient process that can provide the parties resolution in a reasonable timeframe.

I. INTRODUCTION

When judges characterize a process as "unnecessarily elaborate and confusing" and even experienced practitioners cannot figure out what forum to proceed in, it is time to abandon the process. But until such time, the following is offered in an effort to alleviate some of the confusion, but at risk of adding to it.[1]

Federal agencies and their employees, once considered an invisible branch of government, are now clearly in the public eye. From allegations that federal public servants constitute a deep state,[2] to employees repeating their pledges on social media,[3] being advised not to use the word "resist" at work,[4] and the flurry of executive orders at the beginning of President Trump's second term,[5] public officials have unprecedented attention on them. President Trump has run two successful campaigns based, in part, on his vow to "drain the swamp,"[6] and has taken action to attempt to convert thousands of career public servants, whose jobs currently have certain statutory and constitutional protections, to political appointees who can be fired at will.[7]

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1 NATANIA M. DAVIS & ERNEST C. HADLEY, A GUIDE TO FEDERAL SECTOR EQUAL EMPLOYMENT LAW AND PRACTICE 1575 (34th ed. 2021).

2 *See* Ellen M. Gilmer & Parker Purifoy, *Trump's Targeting of 'Deep State' Employees Set for Comeback*, BLOOMBERG GOV'T (Nov. 6, 2024, at 12:36 PT), https://news.bgov.com/bloomberg-government-news/trumps-targeting-of-deep-state-employees-set-for-comeback [https://perma.cc/CDN2-KL5K].

3 *See* Joe Davidson, *Feds' Charitable Giving Reflects Worry; Reciting Oath on Video Reflects Pride and Trump Counterpoint*, WASH. POST (Sep. 11, 2017), https://www.washingtonpost.com/news/powerpost/wp/2017/09/11/feds-charitable-giving-reflects-worry-reciting-oath-on-video-reflects-pride/ [https://perma.cc/CF8J-Z5UU].

4 Peter Overby, *Ethics Agency Warns Employees Not to Discuss Impeachment or 'Resistance,'* NPR (Nov. 30, 2018, at 05:00 ET), https://www.npr.org/2018/11/30/671954539/ethics-agency-warns-federal-workers-not-to-discuss-impeachment-or-resistance [https://perma.cc/3U9R-7ZXQ] (embedding the Office of Special Counsel's guidance from November 28, 2018).

5 *See Presidential Actions*, THE WHITE HOUSE, https://www.whitehouse.gov/presidential-actions/ [https://perma.cc/3GFK-MLTE] (last visited Oct. 5, 2025).

6 Trevor Hughes, *Trump Calls to 'Drain the Swamp' of Washington*, USA TODAY (Oct. 18, 2016, at 17:25 ET), https://www.usatoday.com/story/news/politics/elections/2016/2016/10/18/donald-trump-rally-colorado-springs-ethics-lobbying-limitations/92377656/ [https://perma.cc/PT2W-XR9C]; *Ahead of Debate, Trump Pledges to 'Drain the Swamp' in Wisconsin Speech*, WISN (Sep. 7, 2024, at 18:48 CT), https://www.wisn.com/article/wisconsin-ahead-of-debate-trump-pledges-to-drain-the-swamp/62095554 [https://perma.cc/YG2N-P56V].

7 *See Restoring Accountability to Policy-Influencing Positions Within the Federal Workforce*, THE WHITE HOUSE (Jan. 20, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/restoring-accountability-to-policy-influencing-positions-within-the-federal-workforce/ [https://perma.cc/EM7S-PZE3]; *Executive Order on Creating Schedule F in the Excepted Service*, THE WHITE HOUSE (Oct. 21, 2020) [hereinafter *Exec. Order on Schedule F*],

However, while these issues get the most attention and implicate important ideas of public service and the history of the spoils system,[8] they ignore much more immediate and practical issues with agencies' abilities to conduct regular management actions, including the assignment of duties, the review of work product, and the discipline and removal of subpar or misbehaving employees. While the difficulty of firing federal employees has been a long-standing complaint of critics of the federal bureaucracy,[9] many of these simplistic analyses, such as the Trump administration's effort to convert career employees into political appointees,[10] blame the very concept of a property interest in federal employment and the accompanying due process protections.[11] However, there are clear dangers in returning to a politicized civil service that can be fired without procedural safeguards

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https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-creating-schedule-f-excepted-service/ [https://perma.cc/8JPB-UEQM] (the original executive order seeking to implement schedule F); Improving Performance, Accountability and Responsiveness in the Civil Service, 90 Fed. Reg. 17182, 17182 (Apr. 23, 2025); Gabe Lezra & Diamond Brown, *FAQ: The Conservative Attack on the Merit-Based Civil Service*, CITIZENS FOR RESP. AND ETHICS IN WASH. (Jan. 25, 2024), https://www.citizensforethics.org/news/analysis/faq-the-conservative-attack-on-the-merit-based-civil-service/ [https://perma.cc/ELA5-3BFZ]; Barry M. Mitnick, *Trump Revived Andrew Jackson's Spoils System, Which Would Undo America's 138-Year-Old Professional Civil Service*, THE CONVERSATION (Jan. 21, 2021, at 08:14 ET), https://theconversation.com/trump-revived-andrew-jacksons-spoils-system-which-would-undo-americas-138-year-old-professional-civil-service-150039 [https://perma.cc/9CUS-2HQK] (quoting 1880s editorial cartoons in *Harper*'s that describe the spoils system as a "vast public evil").

8 *See, e.g.*, Peter W. Schroth, *Corruption and Accountability of the Civil Service in the United States*, 54 AM. J. COMPAR. L. 553, 553–68 (2006) (providing a concise history of the spoils system, the laws creating it, and the laws designed to counter it); Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568, 1613–17 (2008) (providing a less common perspective that stresses some of the benefits of the spoils system).

9 *See, e.g.*, Stephen Moore, *Firing Bad Federal Workers Is the Answer for a Better Government*, THE HERITAGE FOUND. (July 30, 2018), https://www.heritage.org/conservatism/commentary/firing-bad-federal-workers-the-answer-better-government [https://perma.cc/F52Z-XSEF].

10 *See Exec. Order on Schedule F*, *supra* note 7.

11 *See* Eric Katz, *Firing Line*, GOV'T EXEC. (Jan. 21, 2015), https://www.govexec.com/feature/firing-line/ [https://perma.cc/859N-TBC2] ("It is nearly impossible to remove an entrenched, poorly performing or even malfeasant federal employee. The red tape is too thick to penetrate. The bureaucracy protects itself."). While this is not an accurate description—as the article admits "more than two dozen federal workers are fired every day"—it does illustrate the common idea that the problem is due process protections and the accompanying red tape. *Id.*; *see also* Jeffrey Joseph Lorek, *Budget-Related Furloughs in Today's Federal Government: Making the Case for Reforming the Civil Service Reform Act of 1978*, 24 FED. CIR. BAR J. 537, 557–58 (2015) (explaining that the property interest of federal employees in their job is a statutory right and the Constitution does not require that property interests include public employment).

and at the whim of presidential administrations.[12] Proposals to remove due process rights miss that the issue is not due process for federal employees but the specific processes, especially the equal employment opportunity process, by which employees challenge managerial actions *after* the procedure required under due process. In other words, the problem is not the safeguards that apply to federal employment, but rather the statutory and administrative systems that have been established for employees to challenge management actions, even after receiving the procedures required by due process.

Under the current system, employee claims against the federal government typically begin at either the Equal Employment Opportunity Commission (EEOC), the Merit Systems Protection Board (MSPB), in a federal sector grievance arbitration, or with the Office of Special Counsel (OSC). These various forums, all with different jurisdictional requirements and procedures, combine to create a maze of various laws involving multiple separate forums, cross referencing regulations, duplicative processes, cross-appeals, false paths, and dead ends (for the federal agency at least). The complexity of, the confusion created by, and the time required to navigate these procedures make this a common cause of complaint.[13] Discrimination complaints can languish for years as they proceed through up to five levels of review, including a full trial at the administrative level before an administrative judge, and a "do-over" at federal court if the employee initially loses.[14] Removals can be overturned with years of back pay

12 *See* Ben L. Erdreich, *The Merit Systems Protection Board: Past, Present, and Future*, 6 FED. CIR. BAR J. 1, 2 (1996) (stating that President Lincoln "predicted that the long term consequences of the chaos in government created by the spoils system could be a greater danger to the republic than the Civil War"); Michael Wolraich, *How Donald Trump's Plans Could Bring Back the Spoils System*, TIME (May 14, 2024, at 11:49 ET), https://time.com/6968746/spoils-system-donald-trump/ [https://perma.cc/VH27-QXQN]; Max Stier, *The Patronage System Was Corrupt. It's Threatening a Comeback.*, POLITICO (Aug. 2, 2022, at 04:30 ET), https://www.politico.com/news/magazine/2022/08/02/trump-civil-service-public-safety-00048796 [https://perma.cc/QJ6S-7SYF] ("Such a policy would have a real chilling effect — discouraging federal employees from speaking out while simultaneously eroding public trust in our government. It also would tarnish the historic requirement of a merit-based system where well-qualified federal employees are given charge over our most sensitive capabilities, data and choices, and would undermine the role of civil servants as stewards of the public good.").

13 *See* discussion *infra* Section III.B.1.

14 *See* discussion *infra* Section III.B.4; Charles B. Hernicz, *The Civil Rights Act of 1991: From Conciliation to Litigation—How Congress Delegates Lawmaking to the Courts*, 141 MIL. L. REV. 1, 13 ("Discrimination suits commonly languish in federal courts for years or even decades.").

owed to the employee.[15] Most significantly, the system is tilted toward employees, giving them several chances to argue their cases and numerous avenues of appeal, without providing these same appellate options to federal agencies.[16] In essence, employees are given multiple bites at the apple, needing only to receive one favorable decision, while the agency needs to run the table, winning again and again in different forums over a number of years to reach a favorable resolution.[17]

This Article will first set forth the various avenues federal employees have for challenging management actions and explain the process and appellate options within each forum.[18] Then it will discuss the pre-deprivation due process protections for federal career, as opposed to political, appointees.[19] The Article will explain how these procedures satisfy the procedural due process requirements of the Constitution.[20] Then the Article will explain how the system is fundamentally unfair, promotes a split in law between the EEOC and federal courts, causes long delays in the resolution of cases, negatively impacts judicial economy, and leads to exaggerated damages, all while also deterring agencies from taking disciplinary or other action in the first place.[21] After explaining these issues with the current system, this Article will discuss potential solutions, suggesting multiple reforms including making an employee's choice of forum more final, streamlining the various appeal processes, and allowing the agency more appellate options to mirror those of the employee.[22]

While this Article will discuss each of the forums available to employees, the most complicated aspect of federal sector employment law is the process at the EEOC. Federal sector cases brought to the EEOC go through a lengthy process, developed over decades, but with some of the most significant issues arising from the Civil Rights Act of 1991 (CRA), which specifies that compensatory damages are available and that employees unsuccessful at the EEOC have the right to request a jury trial in fed-

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15 *See* discussion *infra* Section III.B.4.
16 *See* discussion *infra* Section III.B.2.
17 *See* discussion *infra* Section III.B.2.
18 *See infra* Sections I.A–E.
19 *See infra* Section III.A.
20 *See infra* Section III.A.
21 *See infra* Section III.B.1–5.
22 *See infra* Section III.C.

eral court.[23] Commentary at the time the CRA was enacted was split between those acclaiming the additional rights granted to employees and those concerned that the pendulum had swung too far, although most criticism was focused not on changes to the EEOC process but rather on fears of its provisions being applied retroactively and that the Act's provisions would encourage "quotas" to effectuate an affirmative action regime.[24] In one article, a commentator stated that the CRA's focus on litigation and the availability of compensatory damages meant that "litigation rules and disatisfaction [sic] reigns."[25] In the years since the CRA, efficiency has not been a byword for the EEOC, with cases taking years to adjudicate before an administrative judge,[26] with do-overs in federal court for unsuccessful employees,[27] a backlog of hearing requests based on decades of underfunding,[28] a separate system of law diverging from that applied in federal court,[29] and where the bare allegations can lead to a decade-long process of adjudication.[30] Due to these issues, much of this Article will fo-

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23 Katz, *supra* note 11; Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (amending 42 U.S.C. § 1981 to add 42 U.S.C. § 1981a).

24 *See* Daniel Patrick Tokaji, *The Persistence of Prejudice: Process-Based Theory and the Retroactivity of the Civil Rights Act of 1991*, 103 YALE L.J. 567, 567–69 (1993); Scott M. Pearson, Note, *Canons, Presumptions and Manifest Injustice: Retroactivity of the Civil Rights Act of 1991*, 3 S. CAL. INTERDISC. L.J. 461, 463 (1993).

25 Hernicz, *supra* note 14, at 82.

26 Juliet Linderman, *At the EEOC, Harassment Cases Can Languish for Years*, FED. TIMES (Apr. 9, 2018), https://www.federaltimes.com/federal-oversight/watchdogs/2018/04/09/at-the-eeoc-harassment-cases-can-languish-for-years/ [https://perma.cc/SEP4-85K7].

27 *See* discussion *infra* Section II.A.

28 *See* Drew Friedman, *EEOC's 20% Backlog of Discrimination Charges 'Alarming' to GOP House Lawmakers*, FED. NEWS NETWORK (May 18, 2023, at 10:00 PT), https://federalnewsnetwork.com/congress/2023/05/eeocs-20-backlog-of-discrimination-charges-alarming-to-gop-house-lawmakers/ [https://perma.cc/BZH2-25KA] (describing a backlog of 51,399 complaints in 2022); Drew Friedman, *While Under Hiring Freeze, EEOC Facing 'Very Big Task,' Burrows Says*, FED. NEWS NETWORK (June 28, 2024, at 16:48 PT), https://federalnewsnetwork.com/workforce/2024/06/while-under-hiring-freeze-eeoc-facing-very-big-task-burrows-says/ [https://perma.cc/5MNV-PNCE] (explaining that despite an increasing caseload, the EEOC has roughly 1,000 positions less than in the 1980s); *EEOC Budget and Staffing History 1980 to Present*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc-budget-and-staffing-history-1980-present [https://perma.cc/9E5S-QC3D] (last visited Oct. 27, 2025). The 2023 EEOC Annual Report stated that the Agency received 8,669 federal sector hearing requests, 3,730 federal sector appeals, and conducted 471 federal sector mediations during the year. *2023 Annual Performance Report*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Feb. 23, 2024), https://www.eeoc.gov/2023-annual-performance-report [https://perma.cc/2NPZ-S5ZE].

29 *See* discussion *infra* Section II.B.

30 *See* Hernicz, *supra* note 14, at 13 ("Discrimination suits commonly languish in federal courts for years or even decades."); Pettway v. Am. Cast Iron Pipe Co., 576 F.2d 1157, 1168 (5th Cir. 1978) ("The length of litigation in complex Title VII [cases] often rivals that of even the most notorious antitrust cases.").

cus on the problems of the EEOC process and needed reforms in this process, while also proposing necessary related reforms in the other forums.

II. BACKGROUND: SUMMARY OF THE FORUMS IN FEDERAL SECTOR EMPLOYMENT LAW

The system for federal employee challenges to management decisions can confuse even experienced practitioners.[31] There are generally five forums in which employees can challenge agency action depending on the type of action at issue: the EEOC, the MSPB, federal sector arbitration, the OSC, and federal court. Each of these forums then has different avenues of appeal, some of which involve complete re-hearings of the claim in another forum.[32]

As an initial matter, employees face a choice of where to file their complaint based on where the type of complaint they wish to file would be jurisdictional. An employee cannot typically take their workplace issues straight to federal court as exclusive jurisdiction for federal employee claims lies within the aforementioned administrative agencies.[33] For instance, claims of discrimination based on a protected class can be filed with the EEOC,[34] as a grievance that goes to arbitration if covered by a collective bargaining agreement,[35] a complaint to the OSC,[36] or if the case involves a significant disciplinary action, the MSPB.[37] Disciplinary actions of a suspension over fourteen days, removal or reduction in grade may be appealed to the MSPB[38] or be filed as a grievance leading to arbitration,[39] and lesser disciplinary actions can be grieved and arbitrated.[40]

31 *See* discussion *infra* Section III.B.1.

32 *See* discussion *infra* Sections II.A–E.

33 *See* 29 C.F.R. § 1614.407 (2025); *Overview of Federal Sector EEO Complaint Process*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/federal-sector/overview-federal-sector-eeo-complaint-process [https://perma.cc/ND77-9P45] (last visited Aug. 6, 2025). An exception to the exhaustion requirement is claims under the Age Discrimination in Employment Act, which may be brought straight to federal court after giving the EEOC at least thirty-day notice of their intent to file in district court. 29 C.F.R. § 1614.201(a).

34 29 C.F.R. § 1614.103(a).

35 *See id.* § 1614.301(a); U.S. FED. LAB. RELS. AUTH., GUIDE TO ARBITRATION UNDER THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE 6–7 (2016) [hereinafter GUIDE TO ARBITRATION], https://www.flra.gov/system/files/webfm/Authority/AR%20Forms%2C%20Guide%2C%20Other/Arbitration%20Guide%209.30.16.pdf [https://perma.cc/UHY4-ESN5].

36 *See* 5 C.F.R. §§ 1800.2(a)(1), 1201.3(c)(1)(i) (2025).

37 *See* GUIDE TO ARBITRATION, *supra* note 35, at 5.

38 *See* 5 C.F.R. § 1201.3(a)(1).

39 *Id.* § 1201.3(c)(1)(i), (c)(1)(ii)(B).

40 U.S. MERIT SYS. PROT. BD., *Different Types of Adverse Actions Use Different Rules*, *in* ADVERSE ACTIONS: A COMPILATION OF ARTICLES 15, 16 (2016) (explaining that while

Regardless of where a claim is filed, the choice of forum does not necessarily involve a choice of law. For instance, if a claim of discrimination is brought to the MSPB or before an arbitrator, these adjudicators will look to EEOC caselaw.[41] Arbitrators will also look to MSPB caselaw in the event a disciplinary action is the subject of a grievance and subsequent arbitration.[42]

As explained below in this Article's description of these forums, if an employee is unsuccessful in the initial forum, at least one, and often two, additional forums are available on appeal, depending both on the type of claim and where the initial claim was filed.

A. Equal Employment Opportunity Commission

The EEOC "is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy, childbirth, or related conditions, transgender status, and sexual orientation), national origin, age (40 or older), disability or genetic information."[43] While the EEOC governs both public and private sector employers with at least fifteen employees,[44] it also handles equal employment matters involving federal agencies.[45] The EEOC "provides leadership and guidance to federal agencies," "assures federal agency . . . compliance with EEOC regulations, provides technical assistance to federal agencies . . . monitors and evaluates federal agencies' affirmative employment programs," develops educational materials and provides training, has administrative judges "who conduct hearings on EEO complaints, and adjudicates appeals from administrative decisions made by federal agencies on EEO complaints."[46]

The EEOC system is complex. EEOC regulations establish that every federal agency is to set up its own Equal Employment

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federal law and regulation do not address the standard of proof for challenges of suspensions under fourteen days, collective bargaining agreements or agency policies may do so).

41 *See* Southerland, 2014 M.S.P.B. 88 ¶ 12 (2014) ("[T]he Board generally defers to the EEOC on issues of substantive discrimination law unless the EEOC's decision rests on civil service law for its support or is so unreasonable that it amounts to a violation of civil service law.").

42 *See* GUIDE TO ARBITRATION, *supra* note 35, at 5.

43 *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/overview [https://perma.cc/YP8H-AKC3] (last visited Aug. 6, 2025).

44 *See id.*; 42 U.S.C. § 2000e(b).

45 *See* 29 C.F.R. § 1614.101(a) (2025).

46 *Overview*, *supra* note 43 (regarding the EEOC's non-adjudicatory roles); *see also* 29 C.F.R. § 1614.109 (regarding the EEOC's hearing role).

Opportunity office (EEO) that supports equal employment opportunity at the agency through trainings, evaluations of data, and communications with the public and within the agency.[47] Part of this office's remit within each agency is to administer a program by which employees may make complaints about employment discrimination, receive counseling from the EEO office, and have formal complaints investigated.[48]

Under the system set up by the EEOC, informal complaints (also known as consulting with an EEO counselor) are first made to an EEO office within each agency.[49] That agency then has the responsibility to counsel employees about their rights and the process, and engage in alternative dispute resolution (ADR) if selected by the employee.[50] Once this process is over, the employee is notified that they can file a formal complaint.[51] The complaint is then accepted if it is jurisdictional and a notice of accepted claims is sent to the employee.[52] The agency is then responsible for appointing a neutral EEO investigator who compiles a Report of Investigation (ROI) that includes documentary evidence as well as affidavits from the listed responsible management officials, the employee, and any witnesses listed by the parties.[53] The ROI is supposed to be completed within 180 days,[54] although many investigations take longer.[55] Once the ROI has been received by the employee, the employee has the option to either request a final decision by the agency, or proceed to the hearing process before an EEOC administrative judge.[56]

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47 *See* 29 C.F.R. § 1614.102.

48 *See id.* §§ 1614.102–.108.

49 *Id.* § 1614.105(a)(1).

50 *Id.* § 1614.105(b)(1)–(2); *see* MARTIN J. DICKMAN & PATRICIA A. MARSHALL, EXAMINING THE INEFFICIENCIES OF THE FEDERAL WORKPLACE 4 (2002), https://www.rrb.gov/sites/default/files/2017-05/secondineff.pdf [https://perma.cc/4W4G-BKQQ].

51 *See* 29 C.F.R. § 1614.105(d).

52 *See id.* § 1614.106(e).

53 *See id.* §§ 1614.106(e)(2), 1614.108(a)–(c); U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEO-MD-110, EQUAL EMPLOYMENT OPPORTUNITY MANAGEMENT DIRECTIVE FOR 29 C.F.R. PART 1614 ch. 6, at 6-1 to -28 (2015) [hereinafter EEOC MD 110] (explaining an appropriate investigation consists of training requirements for investigators and types of evidence provided).

54 *See* 29 C.F.R. § 1614.108(e).

55 *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-105874, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: IMPROVED OVERSIGHT PROCESSES NEEDED TO HELP AGENCIES ADDRESS PROGRAM DEFICIENCIES 9, 21 (2024) (finding eight of twenty-four federal agencies deficient, with, as one example, the Department of Transportation taking an average of 298 days to complete an investigation).

56 29 C.F.R. § 1614.108(f).

If the employee chooses to receive a decision from the agency, the agency is required to issue this within sixty days.[57] If the employee disagrees with the agency's resolution, it can appeal to the EEOC Office of Federal Operations (OFO) or opt to refile the claim as a lawsuit de novo in federal court.[58] If the employee takes the OFO route and is still unsuccessful at the OFO or if the OFO is unable to make a decision within 180 days, the employee may then still file for a de novo process in federal court.[59]

However, if the employee chooses to proceed with the EEOC hearing process, an administrative judge assigned by the EEOC takes the case through discovery, potential settlement conferences, dispositive motions, and through a hearing, after which the administrative judge is supposed to issue a decision.[60] The entire process from the administrative judge's receipt of the case to the administrative judge's decision is supposed to occur within 180 days, but may be extended by the administrative judge for good cause.[61] Either the agency or the complainant may appeal the administrative judge's decision to the OFO and the complainant, but not the agency, also has the option to instead file a claim de novo in federal court.[62]

If under either of these procedures, the employee files a claim in federal court, the case goes through the full panoply of federal court litigation, including further, duplicative discovery, dispositive motions and hearings, and after resolution in the district court, the regular set of appeals in the federal system, up to the Supreme Court, are available.[63]

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57 *See id.* § 1614.110(b).

58 *See id.* §§ 1614.110(b), 1614.407(a).

59 *See id.* § 1614.407(c)–(d), (f). Further, if a complainant simply wishes to abandon their appeal, they may do so and instead file their claim in federal court. *See id.* § 1614.407(e).

60 *Id.* § 1614.109.

61 *Id.* § 1614.109(i).

62 *See id.* §§ 1614.110(a), 1614.407(c)–(d), (f); Michele E. Williams, *Getting the Fox Out of the Chicken Coop: The Movement Towards Final EEOC Administrative Judge Decisions*, ARMY LAW., July 1999, at 13, 22 ("Unlike complainants, federal agencies are not permitted to challenge an adverse EEOC decision in federal district court."); Nancy M. Modesitt, *The Hundred-Years War: The Ongoing Battle Between Courts and Agencies over the Right to Interpret Federal Law*, 74 MO. L. REV. 949, 975 (2009) ("The final OFO decision is mandatory and binding on the agency; the agency cannot appeal the final OFO decision.").

63 *See* 3 EMP. DISCRIMINATION COORDINATOR ANALYSIS OF FED. L. § 105:46, Westlaw (database updated Oct. 2025) (citing Nabors v. U.S., 568 F.2d 657 (9th Cir. 1978)) (explaining that a federal court errs when it bases its decision solely on the administrative record before the EEOC without allowing further development of the evidence); DICKMAN & MARSHALL, *supra* note 50, at 6.

To summarize, the EEOC mandates the establishment of EEO offices within each agency that engages in multiple levels of counseling and ADR before engaging in a long and costly fact-finding investigation before the claim goes to an administrative judge, where discovery, motion practice and a hearing occurs, and whose decision can then be appealed to the OFO. The length and complexity of the process is impressive, but curious considering that after these multiple determinations on the merits of the case, the employee (and only the employee) may then start from the beginning on *the exact same claim* in federal district court.

As explained above, once the employee is unsuccessful at the EEOC (or on appeal to the MSPB in a mixed case discussed below), the employee can go to federal court de novo—this means that the entire case would begin again, with a complaint filed in district court, discovery, dispositive motions, and an eventual trial in federal court, with all the potential appeals available in the federal court system after judgment. In a discrimination claim, for instance, by this time, the employee would have lost at least twice already (before an EEOC administrative judge and the OFO) before having a complete rehearing at district court with all of the appellate options within the federal courts still available if the employee is unsuccessful in district court. As one commentator put it: "the EEOC's determination is final, unless a complainant is dissatisfied with the decision and seeks a trial de novo in federal court."[64]

B. Merit Systems Protection Board

The MSPB is an administrative agency authorized by statute to hear appeals of certain disciplinary and other actions against federal employees.[65] Unlike the arbitration forum discussed below, appeals of agency actions to the MSPB[66] are not limited to bargaining unit members, but can be filed by most employees, in-

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64 Steven M. Ranieri, *"If at First You Don't Succeed . . .": An Argument Giving Federal Agencies the Ability to Challenge Adverse Equal Employment Opportunity Commission Decisions in Federal Court*, ARMY LAW., Sep. 2008, at 23, 23.

65 *See* 5 U.S.C. § 1204(a)(1); *About MSPB*, U.S. MERIT SYS. PROT. BD., https://www.mspb.gov/about/about.htm [https://perma.cc/C7W8-RPS9] (last visited Oct. 29, 2025).

66 In a confusing instance of terminology, all cases brought to the MSPB are called "appeals" of the agency action. For clarity, this Article will typically use the term "appeals" to refer to appeals of adjudications, not agency actions, nor cases within the MSPB's original jurisdictions.

cluding managers, as long as they are not political appointees.[67] However, for the most part, only removals, reductions in grades, or suspensions of over fourteen days, are within the jurisdiction of the MSPB.[68]

Cases filed at the MSPB typically are heard by an MSPB administrative law judge.[69] Unlike litigation in the EEOC or federal forum, while discovery can take place, no motions for summary judgment are entertained by the MSPB.[70] Therefore, any appeal that is jurisdictional must go to a hearing. If either the agency or the employee are dissatisfied with the administrative judge's decision, they may petition for review by the MSPB Board.[71] If an employee does elect to go to the MSPB and is unsuccessful there, they may then appeal to the United States Court of Appeals for the Federal Circuit (Federal Circuit).[72] Unlike the EEOC, this is not a de novo re-hearing, but rather a typical appeal to a higher authority.[73] The agency has no such option if they disagree with the MSPB's determination, unless they convince the Director of the Office of Personnel Management (OPM) to appeal to the Federal Circuit based on an OPM determination "that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive."[74] This is rare,[75] and even

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67 *See* 5 C.F.R. § 1201.3 (2025); *Appellant Questions and Answers*, U.S. MERIT SYS. PROT. BD., https://www.mspb.gov/appeals/appellantqanda.htm [https://perma.cc/QXB3-9ZDP] (last visited Oct. 29, 2025).

68 *See* 5 C.F.R. § 1201.3(a)(1).

69 *See id.* § 1201.4(a).

70 *See generally id.* §§ 1201.71–.75 (regarding discovery). *See* Bommer v. Dep't of the Navy, 1987 M.S.P.B. 453 ¶¶ 11–16 (1987) (holding that the statute requires a hearing on appeal and that the MSPB cannot consider motions for summary judgment); U.S. MERIT SYS. PROT. BD., OPTIONS FOR REVISING THE BOARD'S REGULATIONS GOVERNING THE ESTABLISHMENT OF MSPB JURISDICTION OVER AN APPEAL 13–16 (2013) (providing working group recommendations, one of which would allow summary judgment motions).

71 *See* 5 C.F.R. § 1204.114(a), (c).

72 *See* 5 U.S.C. § 7703; 5 C.F.R. § 1201.120.

73 *See* 5 U.S.C. § 7703(c).

74 *Id.* § 7703(d)(1).

75 In the author's experience, this involves the concurrence not just of the agency and the OPM, but also the Department of Justice, which would be responsible for arguing the case in the Federal Circuit. In a review of available caselaw, only three instances of this were found: (1) where a decision had an impact on the eligibility requirements for a sensitive position within the Department of Defense, (2) a jurisdictional decision that would remove the right of appeal to the MSPB from a wide range of employees, and (3) where caselaw subsequent to the MSPB decision regarding whistleblowers necessitated review. *See* James v. Von Zemenszky, 284 F.3d 1310, 1314 (Fed. Cir. 2002); Kaplan v. Conyers,

where OPM makes the petition for review, the Federal Circuit has the discretion to grant or deny the hearing of the appeal from OPM.[76] In typical disciplinary cases before the MSPB, the agency simply has no realistic option to seek review of the MSPB decision.[77]

C. Federal Sector Arbitration

The relationship between federal employees and management is governed by the Federal Service Labor-Management Relations Statute.[78] Under this law, collective bargaining agreements between agencies and unions must include negotiated grievance procedures that provide for binding arbitration for many workplace disputes.[79] In most cases, this involves the relevant union receiving complaints from members and then the union filing a grievance, that if not resolved informally, can be referred by the union to binding arbitration.[80] While the exact content of each collective bargaining agreement may differ, most allow grievances based on management disciplinary decisions,[81] prohibited personnel practices (including discrimination) set out by statute,[82] and have certain statutory, as well as negotiated, exclusions.[83]

Any party that is unsuccessful at arbitration may file an exception with the Federal Labor Relations Authority (FLRA) contending the arbitrator's decision was in error on narrow grounds, the most common of which are that the arbitrator's award was contrary to law; was incomplete, ambiguous, or contradictory; failed to take its essence from the collective bargaining agreement; was based on a non-fact; exceeded the arbitrator's authori-

733 F.3d 1148, 1153 (Fed. Cir. 2013); James v. Santella, No. 689, 2002 WL 237761, at *1 (Fed. Cir. Feb. 1, 2002).

76 5 U.S.C. § 7703(d)(1).

77 *See* U.S. MERIT SYS. PROT. BD., *Implementing or Challenging Initial Decisions*, *in* ADVERSE ACTIONS: A COMPILATION OF ARTICLES 59, 60 (2016) ("In contrast, the agency cannot appeal directly to the Federal Circuit at any stage.").

78 5 U.S.C. § 7101(b).

79 *Id.* § 7121(a)(1), (b)(1)(C)(iii).

80 *See* Stephen L. Wood, *Federal Employees, Federal Unions, and Federal Courts: The Duty of Fair Representation in the Federal Sector*, 64 CHI.-KENT L. REV. 271, 291 (1988).

81 *See* 5 U.S.C. § 7121(e); GUIDE TO ARBITRATION, *supra* note 35, at 5–6.

82 *See* 5 U.S.C. § 7121(b)(2)(a), (d) (referring to the prohibited personnel action provided in 5 U.S.C. § 2302(b)); GUIDE TO ARBITRATION, *supra* note 35, at 7–8.

83 *See* 5 U.S.C. § 7121(c) (excluding grievances concerning prohibited political activity; retirement, life, or health insurance claims; claims involving suspensions or removals for national security reasons; claims involving examinations, certifications, or appointments; or the classification of a position that does not result in the reduction of grade or pay of an employee); GUIDE TO ARBITRATION, *supra* note 35, at 28–31.

ty; or demonstrated arbitrator bias or the lack of a fair hearing.[84] Such FLRA decisions are not subject to judicial review, unless they involved an unfair labor practice claim.[85] In many cases, review by the FLRA is the end of the line.

D. Office of Special Counsel

In addition to other responsibilities,[86] the OSC has the power to investigate and remedy prohibited personnel practices.[87] Specifically, the OSC can pursue disciplinary action against supervisors who have been found to have engaged in discriminatory personnel practices or in Hatch Act violations.[88] The OSC can also accept whistleblower complaints.[89] If the OSC finds a prohibited personnel practice to have taken place, it will seek corrective action and potential discipline with the federal agency and, if the agency resists, will take the issue to the MSPB.[90] Also, if the OSC closes the complaint or fails to file with the MSPB, the employee

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84 *See* 5 U.S.C. § 7122(a); GUIDE TO ARBITRATION, *supra* note 35, at 26–29, 49–55 ("Although Congress specifically provided for Authority review of arbitration awards, Congress also made clear that the scope of that review is very limited.").

85 *See* 5 U.S.C. § 7123(a)(1); PETER BROIDA, A GUIDE TO FEDERAL LABOR RELATIONS AUTHORITY LAW AND PRACTICE ch. 9, *Review of Arbitration Awards* (38th ed. 2025) ("FLRA members review a lot of arbitration awards, in comparison with the number of cases percolating through exceptions to ALJ awards involving ULPs, negotiability, and representation disputes."); National Treasury Employees Union, 72 F.L.R.A. 308, 314 (2021) (Chairman DuBester, dissenting) (explaining that unfair labor practices can either be filed with a Regional Office of the FLRA and brought before an administrative judge or be challenged through grievance arbitration).

Unfair labor practice is "conduct by agencies or unions that violates rights that the Statute protects or the rule that it establishes." *Unfair Labor Practice*, U.S. FED. LAB. RELS. AUTH., https://www.flra.gov/cases/unfair-labor-practice [https://perma.cc/Z62R-64JK] (last visited Oct. 30, 2025).

86 *OSC Services*, U.S. OFF. OF SPECIAL COUNS., https://osc.gov/Services/Pages/default.aspx [https://perma.cc/N9BF-KUTT] (last visited Aug. 6, 2025) (describing outreach, training, alternative dispute resolution, and certification duties, as well as complaints under USERRA).

87 5 C.F.R. § 1800.2 (2025).

88 Robert G. Vaughn, *The Civil Service Reform Act of 1978 and Legal Regulation of Public Bureaucracies*, 31 HOW. L.J. 187, 194 (1988); *Your Rights as a Federal Employee*, U.S. OFF. OF SPECIAL COUNS., https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/fedrights.pdf [https://perma.cc/3XMG-67JE] (last visited Aug. 6, 2025); 5 C.F.R. § 1800.2 (describing additional inappropriate personnel practices the OSC investigates, such as political coercion, nepotism, and whistleblower retaliation).

89 5 C.F.R. § 1800.2(a)(8). For a description of whistleblower cases and the confusion over the process, see Devin Redding, Note, *A Road to Resolution for Federal Whistleblowers' Mixed Case Claims*, 125 W. VA. L. REV. 751, 761 (2022).

90 5 U.S.C. § 1214(b)(2)(B)–(C); *Fact Sheet: How Complaints Are Investigated and Prosecuted*, U.S. OFF. OF SPECIAL COUNS. (Sep. 2018), https://osc.gov/Documents/PPP/Processing%20Complaints%20of%20PPPs/How%20Complaints%20are%20Investigated%20and%20Prosecuted.pdf [https://perma.cc/8XWY-7NH4].

has an individual right of appeal to the MSPB.[91] An employee disciplined by the MSPB based on an OSC charge of a prohibited personnel practice has a right of appeal to the Federal Circuit, while if the charge is regarding a Hatch Act violation, any appeal goes to the relevant district court.[92] The OSC has no right of appeal if the MSPB finds no discipline is warranted.[93]

E. Mixed Cases with the EEOC, MSPB, or in Federal Sector Arbitration[94]

The most labyrinthian part of federal sector employment law involves "mixed cases" and "mixed appeals." The MSPB has jurisdiction over "mixed appeals"—challenges to agency actions that fall within their usual jurisdiction but where the employee is alleging that the reason for the action was discriminatory.[95] If the employee loses before an MSPB administrative judge in a mixed appeal and then is unsuccessful in an appeal to the MSPB Board, the employee may either appeal to the EEOC[96] or file the claim in the relevant federal district court to restart the litigation process de novo.[97] If the employee decides to appeal to the EEOC, and is unsuccessful there (after already being unsuccessful before an MSPB judge and the full MSPB), the employee can still file for a de novo hearing in the relevant federal district court.[98] In these circumstances, the federal district court would treat the case as any other civil litigation and allow the full civil procedure that entails—including discovery, motions, and an eventual trial in federal court—before the relevant possible federal appeals.[99] In the case where the MSPB decision is appealed to the EEOC and the EEOC disagrees with the MSPB, the MSPB must either concur in the EEOC decision or reaffirm its own decision.[100] If the MSPB disagrees with the EEOC and reaffirms its own decision,

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91 5 U.S.C. § 1214(a)(3).

92 *Id.* § 1215(a)(4); 5 C.F.R. § 1201.127.

93 *See* 5 C.F.R. § 1201.127.

94 John P. Stimson, *Unscrambling Federal Merit Protection*, 150 MIL. L. REV. 165, 204–12 (1995) (explaining the history behind the creation of the current system, including the congressional concerns that led to the mixed appeal process).

95 5 U.S.C. § 7702(a); Perry v. Merit Sys. Prot. Bd., 582 U.S. 420, 431–32 (2017).

96 29 C.F.R. § 1614.303 (2025) (EEOC regulation on MSPB appeals to the EEOC); 5 C.F.R. § 1201.161 (MSPB regulation on MSPB appeals to the EEOC).

97 5 C.F.R. § 1201.157; 29 C.F.R. § 1614.310(b).

98 29 C.F.R. § 1614.310(c)–(e).

99 *See* 3 EMP. DISCRIMINATION COORDINATOR ANALYSIS OF FED. L. § 105:46, Westlaw (database updated Oct. 2025) (citing Nabors v. U.S., 568 F.2d 657 (9th Cir. 1978)); DICKMAN & MARSHALL, *supra* note 50, at 6.

100 5 C.F.R. § 1201.162(a).

the case is referred to a Special Panel made up of MSPB and EEOC representatives as well as a chairman appointed by the president.[101] If the complainant disagrees with the Special Panel's decision, once again, the complainant can elect to restart the process de novo in federal district court.[102]

The EEOC may also take "mixed cases"—complaints where discrimination is alleged but which involve actions that the employee could have taken to the MSPB (explained above, but usually involving removal, downgrade, or a suspension of more than fourteen days).[103] While the decision to take the case to the EEOC, as opposed to the MSPB, is binding,[104] in these cases, the employee may appeal the EEOC decision to the MSPB.[105] Once again, the employee can petition the EEOC to review the decision of the MSPB, and the procedure described above, including the use of the Special Panel, is applicable.[106] After the MSPB decision, the complainant, again, but not the agency, has another option to still go to federal district court and file the case de novo if they are dissatisfied with the MSPB decision, the MSPB's adoption of the EEOC decision, or the decision of the Special Panel.[107] The complaint, discovery, motion practice, and the hearing would all be redone at the federal level, with the full panoply of federal court appeals available, up to and including potential review by the Supreme Court.[108] The agency has no such right.[109]

Mixed cases can also exist in the federal sector arbitration process.[110] However, instead of going to the FLRA, grievants

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101 29 C.F.R. § 1614.306; 5 C.F.R. § 1201.171; 5 U.S.C. § 7702(d)(6).

102 5 C.F.R. § 1201.175; 29 C.F.R. § 1614.310(f); Stimson, *supra* note 94, at 199 (explaining that even with cases that have gone to the special panel, discrimination claims can be brought de novo in federal court).

103 29 C.F.R. § 1614.302(a); Kloeckner v. Solis, 568 U.S. 41, 44 (2012).

104 29 C.F.R. § 1614.302(b).

105 *Id.* § 1614.302(d)(3).

106 *Id.* § 1614.303(a) ("Individuals who have received a final decision from the MSPB on a mixed case appeal *or on the appeal of a final decision on a mixed case complaint* under 5 CFR part 1201, subpart E and 5 U.S.C. 7702 may petition EEOC to consider that decision." (emphasis added)).

This is the first chance for the case to come before any part of the EEOC, as mixed cases before the EEOC cannot be assigned to an administrative judge but rather receive a final agency decision, which can then be appealed as described above. EEOC MD 110, *supra* note 53, app. D, at D-4.

107 29 C.F.R. § 1614.310.

108 *See* 3 EMP. DISCRIMINATION COORDINATOR ANALYSIS OF FED. L. § 105:46, Westlaw (database updated Oct. 2025) (citing Nabors v. U.S., 568 F.2d 657 (9th Cir. 1978)); DICKMAN & MARSHALL, *supra* note 50, at 6.

109 *See* Williams, *supra* note 62.

110 GUIDE TO ARBITRATION, *supra* note 35, at 7.

must appeal an arbitration decision to the EEOC or MSPB if that body would have had jurisdiction from the beginning.[111] And from there, the complainant can obtain further review as usually available in those forums.[112] For example, if the employee's claim involved a disciplinary action that would have given the MSPB jurisdiction, the employee can appeal to the MSPB,[113] or directly to the Federal Circuit.[114] If the employee chooses to seek review at the MSPB, they then may still appeal to the Federal Circuit after the MSPB decision.[115] If discrimination was alleged as part of the initial grievance about an action that would fall under the MSPB's jurisdiction, the arbitrator's decision could be appealed by the employee to the EEOC, then appealed to the MSPB (with possible review by the Special Panel) before then being appealed either to a Federal Circuit Court of Appeal or for a de novo proceeding in the relevant federal district court.

III. ANALYSIS

The current system as described above has countless flaws and complications and is patently unfair to the agencies that are responsible for advancing the public interest through the judicious use of taxpayer dollars. While employee rights are essential to the proper functioning of government and avoiding a system based on political allegiance and other improper considerations, the myriad of rights that exist even beyond the constitutionally

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111 *Id.* at 5–7 (first citing U.S. Dep't of the Interior, Bureau of Indian Affs., Wapato Irrigation Project, 65 F.L.R.A. 5, 6–7 (2010); and then citing U.S. Dep't of Com., Pat. & Trademark Off., Arlington, Va., 61 F.L.R.A. 476, 477–78 (2006)).

112 In performance or disciplinary actions, the statute provides that "judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures." 5 U.S.C. § 7121(f). Similarly, discrimination matters can be appealed to the EEOC. *Id.* § 7121(d); GUIDE TO ARBITRATION, *supra* note 35, at 6.

113 5 U.S.C. § 7121(d).

> Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

Id.; GUIDE TO ARBITRATION, *supra* note 35, at 6.

114 GUIDE TO ARBITRATION, *supra* note 35, at 6.

115 5 U.S.C. § 7121(f). An agency may also appeal to the Federal Circuit Court of Appeals in certain cases, but only if, as explained above in terms of the MSPB, the OPM determines that the arbitration decision will "have a substantial impact on a civil service law, rule, regulation, or policy directive." *Id.* § 7703(d).

required due process create uncertainty for both agencies and employees and require the expenditure of taxpayer dollars on the navigation of a long, confusing system that employees and agencies have difficulty navigating.

A. The Existing Processes Are Not Required by Constitutional Due Process

In considering the flaws in the present system and potential ways to reform the federal sector employment law system, it is important to understand that the processes described above are not required by the Due Process Clause of the Constitution. While it is true that federal agencies must comply with the constitutional requirement of due process before the deprivation of property in cases involving an adverse action such as those appealable to the MSPB,[116] the present system has grown well beyond the procedural due process requirements in the Constitution.

To deprive a person of a property interest, the government must fulfill certain procedural due process requirements.[117] Due process in the employment area is composed of both pre-deprivation due process (the process the government must go through prior to an employee's termination) and post-deprivation due process (the processes by which the employee can challenge the action after the termination).[118] The focus of this Article is the post-deprivation systems established by Congress, but it is worth understanding these pre-deprivation processes to understand the system in which these post-deprivation processes exist.

While no constitutional provision has been interpreted to give federal government employees a property interest in their continued employment,[119] Congress has provided that federal employment comes with such an interest,[120] and the courts have ruled on what type of processes are required to meet the constitu-

116 Stephanie West, Comment, *Re-Balancing the Pendulum: A Recommendation for Civil Service Reform*, 68 ADMIN. L. REV. 359, 369 (2016).

117 *See* U.S. Const. amend. XIV, § 1.

118 *See* J. Michael McGuinness, *Procedural Due Process Rights of Public Employees: Basic Rules and a Rationale for a Return to Rule-Oriented Process*, 33 NEW ENG. L. REV. 931, 939, 956 (1999).

119 McMurtray v. Holladay, 11 F.3d 499, 502 (5th Cir. 1993) ("The United States Constitution is not the source of property interests. Rather, it merely provides procedural protections against the invasion of an acquired property interest."); Stone v. FDIC, 179 F.3d 1368, 1374–75 (Fed. Cir. 1999).

120 *Stone*, 179 F.3d at 1375; U.S. MERIT SYS. PROT. BD., WHAT IS DUE PROCESS IN FEDERAL CIVIL SERVICE EMPLOYMENT? 3 (2015).

tional requirement of procedural due process.[121] In the landmark case of *Cleveland Board of Education v. Loudermill*, the Supreme Court ruled on the due process required for an employee whom the legislature made fireable for cause (as opposed to at will).[122] The Court held that if a cause requirement exists, then a property interest is created and due process protections apply.[123] The Court concluded that once the legislature specified that termination from government employment must be "for cause," pre-deprivation notice and a chance to respond is required by due process.[124] However, the Court also held that the adequacy of due process protections is based on viewing the pre- and post-deprivation protections together and that notice and a chance to respond without a neutral third party was sufficient pre-termination in this case because a full adversarial hearing was available post-termination.[125] While *Loudermill* involved state government property interests, subsequent decisions have held that the same principles apply to federal employment and to the legislatively created property interest in federal employment.[126] Further cases, most notably *Farhat v. Jopke*, reiterated the *Loudermill* holding and the connection between pre- and post-deprivation procedures, explaining that when post-deprivation procedures include a subsequent full hearing and appellant review, a less formal pre-deprivation procedure can be used.[127]

The post-deprivation due process procedures afforded in the EEOC, MSPB, OSC, and in federal sector arbitration, as ex-

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121 *See* U.S. MERIT SYS. PROT. BD., *supra* note 120, at 15–16.

122 470 U.S. 532, 535 (1985).

123 *Id.* at 538–39 (holding that since the employees were "entitled to retain their positions 'during good behavior and efficient service,' [and] could not be dismissed 'except . . . for . . . misfeasance, malfeasance, or nonfeasance in office,'" the legislature had created a property interest (omissions in original) (citation omitted)).

124 *Id.* at 535, 545–46.

125 *Id.* at 546–47.

126 U.S. MERIT SYS. PROT. BD., *supra* note 120, at 18 (citing Lachance v. Erickson, 522 U.S. 262, 266 (1998) (citing *Loudermill*, 470 U.S. at 542, to explain the due process rights of a federal civil servant in their employment)); *see* Stone v. FDIC, 179 F.3d 1368, 1374–75 (Fed. Cir. 1999) (holding in the context of federal employment that the "process due a public employee prior to removal from office has been explained in *Loudermill*").

127 370 F.3d 580, 597 (6th Cir. 2004); *see also* Licari v. Ferruzzi, 22 F.3d 344, 348 (1st Cir. 1994) (supporting that sufficient opportunity to be heard, adequate pre-deprivation procedures, and adequate post-deprivation judicial review satisfies due process); Mathews v. Eldridge, 424 U.S. 319, 348–49 (1976) (demonstrating that when pre-deprivation procedures are sufficiently objective and professional, a further evidentiary hearing is not necessary to comport with due process); West, *supra* note 116, at 369 (explaining that pre-termination and post-termination procedures are "coupled" such that the quality of each will affect the sufficiency of the other).

plained above, are robust to say the least.[128] There is little chance that a pruning of the multiple appellate options from these forums would create any due process issues, especially considering the extensive pre-deprivation rights already granted to employees in adverse actions.[129]

Federal employees being disciplined for conduct issues have significant pre-deprivation rights. Like the state employees in *Loudermill*, federal employees who are suspended for over fourteen days, removed, or demoted first receive a proposed disciplinary action with thirty days' notice, then have at least seven days to respond both in writing and orally if they choose.[130] Then, they receive a decision document from a different, higher management official than the proposing official; that document must be based only on the materials in the proposal and the response.[131] If the deciding official receives new and material information or documentation about the conduct at issue or proposed penalty at any point, the employee gets another chance to provide a response to the new information.[132]

Federal employees faced with removal or demotion based on performance issues have even more significant pre-deprivation rights. The employee must receive notice that they are performing at an unsuccessful level, and then are provided a performance improvement plan that includes a precise description of the standards they must meet to be considered minimally successful and a time period to complete specific metrics to achieve this performance.[133] If they fail to meet the specified standards,

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128 *See supra* Sections II.A–E.

129 U.S. MERIT SYS. PROT. BD., ADDRESSING POOR PERFORMERS AND THE LAW 5 (2009) ("[The Due Process] requirement drives many of the procedures that exist in both Chapter 43 [Disciplinary Actions] and Chapter 75 [Performance-Based Actions].").

130 5 U.S.C. §§ 7512–13.

131 *See Stone*, 179 F.3d at 1376–77; Ward v. USPS, 634 F.3d 1274, 1279–82 (Fed. Cir. 2011); Young v. Dep't of Hous. & Urb. Dev., 706 F.3d 1372, 1376 (Fed. Cir. 2013); U.S. MERIT SYS. PROT. BD., *supra* note 120, at 19–22.

132 *Adverse Actions Process — A Flowchart*, U.S. MERIT SYS. PROT. BD., https://www.mspb.gov/studies/adverse_action_report/3_AdverseActionProcess_flowchart.htm [https://perma.cc/L68L-6MHC] (last visited Aug. 6, 2025) ("If the deciding official obtains new information, [the] official will inform the employee of the new information being considered and provide an opportunity to respond.").

133 *See* 5 U.S.C. § 4303; U.S. MERIT SYS. PROT. BD., *supra* note 129, at 7–8; West, *supra* note 116, at 372–73. Poor performers can also be removed under the disciplinary procedures above without a performance improvement plan and opportunity to improve. U.S. MERIT SYS. PROT. BD., *supra* note 129, at 6–10. However, this is often not used because disciplinary penalties can be mitigated by the MSPB and the burden of sustaining the action is the higher standard of preponderance of the evidence as opposed to substantial evidence in performance actions. *Id.*

then they receive a proposal to remove with a chance to respond, as described above in disciplinary cases, and then a final decision.[134]

With such robust pre-deprivation procedures, the post-deprivation processes described above are well in excess of constitutional requirements. No constitutional provision requires a trial in federal court or even appeals to federal court. Neither *Loudermill* nor any other case has required post-termination proceedings beyond a full hearing before a neutral third party and possibly some avenue of appeal.[135] Therefore, as long as potential reforms still allow for an administrative hearing post-deprivation before an administrative agency, the elimination of other further appellate opportunities would not raise a due process issue.

B. Flaws in the Current System of Federal Sector Employment Law

The current state of federal sector employment law has a myriad of flaws that have important practical consequences for both agencies and employees. In addition to the confusion created by the different forums and cross-appeals, the interminable delay in reaching a final resolution, and the consequences for good government and public trust, the system is also patently unfair.

1. The Current Landscape of Federal Sector Employment Law Is Confusing to Even Experienced Practitioners

The multiple forums available and the multiple avenues of appeals spelled out in multiple sets of regulations have created a system that even the premier secondary source on the EEOC process, *Hadley's Guide to Federal Sector Equal Opportunity Employment Law and Practice*, calls "confusing."[136] The Guide goes on to state that "the Board, the Commission, and even the

134 5 U.S.C. § 4303; U.S. MERIT SYS. PROT. BD., *supra* note 129, at 12.

135 *See, e.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982) (demonstrating that merely "*some* form" of hearing procedure is required for post-deprivation due process); Wojcik v. Mass. State Lottery Comm'n, 300 F.3d 92, 102 (1st Cir. 2002); Huimin Song v. Cnty. of Santa Clara, 705 F. App'x 492, 494 (9th Cir. 2017) (finding binding arbitration is sufficient post-deprivation due process); Hudson v. City of Highland Park, 943 F.3d 792, 801 (6th Cir. 2019); Purisch v. Tenn. Tech. Univ., 76 F.3d 1414, 1424 (6th Cir. 1996) (finding formal hearing before a committee sufficient); Damiano v. Scranton Sch. Dist., 135 F. Supp. 3d 255, 274 (M.D. Pa. 2015) (finding post-deprivation administrative hearing met constitutional due process); Clements v. Airport Auth. of Washoe Cnty., 69 F.3d 321, 332–33 (9th Cir. 1995) (holding that if post-termination proceedings are overseen by individuals who harbor malice for the employee's whistleblowing activities, the process will fail to meet the due process requirements).

136 DAVIS & HADLEY, *supra* note 1, at 1574.

courts occasionally misunderstand" this process.[137] As Hadley puts it in calling for reform, "[f]or years it has been clear that the process does not work and often leads to unreasonable delays while a case bounces back and forth between the Commission and the Board."[138] In fact, Hadley cites a federal district court case that cites an early version of the Hadley book, where the judge states that "courts and commentators appear to be unanimous in their denunciation of this unnecessarily elaborate and confusing system of intertwined administrative jurisdiction and judicial review."[139] Many commentators, including members of Congress, have acknowledged that the flaws inherent in such byzantine procedures (especially those within the EEOC) can affect employees' ability to navigate the system and achieve relief.[140]

2. The Federal Sector Employment System Is Patently Unfair to Agencies

The most obvious flaw with the current system is simple unfairness. While employees should have an opportunity to have their claims heard, it is unclear why they should have so many repeated attempts to succeed in different forums. Complainants in a discrimination claim have three opportunities to develop a factual record to support their claims: in the EEO investigation, before the EEOC administrative judge, and in federal court.[141] Other claims outside the federal sector—including not only em-

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137 *Id.*

138 *Id.* at 1575.

139 *Id.* (quoting McAdams v. Reno, 858 F. Supp. 945, 949 n.5 (D. Minn. 1994)).

140 Courtney Bublé, *Watchdog Considers Review of Equal Employment Opportunity Complaint Process for Feds*, GOV'T EXEC. (Sep. 27, 2021), https://www.govexec.com/oversight/2021/09/watchdog-considers-review-equal-employment-opportunity-complaint-process-feds/185648/ [https://perma.cc/M9MU-PULP] (explaining how two members of Congress described the federal employee complaint process as "convoluted, slow, costly and unjust"); Ranieri, *supra* note 64, at 24, 41 (describing it as an "elaborate" and "cumbersome administrative process [that] deters aggrieved persons from pursuing their claims"); Christina M. Royer, West v. Gibson*: Federal Employees Win the Battle, but Ultimately Lose the War for Compensatory Damages Under Title VII*, 33 AKRON L. REV. 417, 436 (2000) ("The EEOC process is a very complicated one for an average discrimination complainant, since these complainants often negotiate the system without counsel."); *The Partnership for Public Service's Vision for a Better Government*, P'SHIP FOR PUB. SERV. (Aug. 15, 2024), https://ourpublicservice.org/publications/vision-for-a-better-government/ [https://perma.cc/KDR6-L3L3] (describing the process as "complicated"); Redding, *supra* note 89, at 760 (referring to the processes of the MSPB, EEOC, and OSC as "byzantine administrative processes").

141 *See supra* Section II.A; DICKMAN & MARSHALL, *supra* note 50, at 17 ("Currently, parties to Federal employee EEOC proceedings are allowed to present their case to an investigator who makes findings, before an EEOC administrative judge and again in Federal Circuit court. There is no reason to allow Federal parties three different opportunities to develop a factual record.").

ployment claims, but also fair housing, voting rights, and other civil rights matters—provide complainants only one opportunity to make their case.[142] And if the claims involve a full administrative hearing process, the complainants have only rights of appeal to federal court after completing that process.[143] No other type of federal claim involves an adjudicatory process where only one party has the right to a re-do. There is no reason a federal employee with an employment discrimination claim should have two opportunities to prove their case at hearing while a voting rights group focused on racial gerrymandering would only have one. While employees in the public sector are, of course, entitled to adequate due process, the current system already provides ample due process protections before even getting to the EEOC or MSPB.[144] There is no reason such an employee's claims should be judged in any more favorable environment than a simple contract dispute or tort action, especially considering the pre-deprivation protections that exist for major personnel actions.[145]

Further, while vindicating employee civil rights is important, so are multiple interests of the federal agency. The efficiency of the federal service, the ability of managers and employees to focus on their assigned duties, the cost to taxpayers, and the ability of managers to take appropriate action and exercise appropriate management functions are essential to the effective functioning of government and to maintaining public trust in government.[146]

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142 Civil rights are typically enforced by suits in state or federal court brought by governmental entities, public interest groups, or individual plaintiffs. *See* 42 U.S.C. §§ 3612–3614 (regarding fair housing act claims); Aviva D. Kohn, Note, *At the Crossroads: Private Litigation and the Fate of Sections 2 and 208 of the Voting Rights Act*, 94 FORDHAM L. REV. 1555, 1563 (2026) (regarding voting rights claims); *see also* 42 U.S.C. § 1983 (providing for private parties to bring civil rights claims).

In these areas, there are no administrative processes similar to those available to federal sector employees. *See* 42 U.S.C. § 3612 (a–b) (demonstrating that bringing claims under the Fair Housing Act involves a choice of a hearing before an administrative judge or an election to federal court, but does not provide for both).

143 And even when an administrative process exists, it is not an entire litigation process that mirrors the process in federal court. For instance, parties have the option to have a complaint filed in federal court under the Fair Housing Act, instead of an administrative hearing with the agency. *Id.* If parties elect to remain in the administrative process, there is an option of an appeal to federal court, but not a de novo hearing. *Id.* § 3612(i).

144 *See supra* Section II.A.

145 *See supra* Section II.A.

146 Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 585 U.S. 878, 939 (2018) (acknowledging government interest in efficiency by explaining that "[t]he government . . . needs to run 'as effectively and efficiently as possible'"); United States v. Anderson, 579 F.2d 455, 458–59 (8th Cir. 1978) (acknowledging government interest in avoiding waste).

Public trust in government is near historic lows. *Public Trust in Government: 1958-2024*, PEW RSCH. CTR. (June 24, 2024), https://www.pewresearch.org/politics/2024/06/24/public-trust-in-

However, the current intertwined systems of the MSPB, EEOC, labor law, and federal procedure stymie these interests. And while it is true that employees also suffer from the confusion caused by such a highly technical and intertwined system,[147] it is notable that at virtually every step of this cumbersome procedure, employees are favored (for example, with further and more extensive appeal rights, investigations provided by the agency at no cost to the employee in EEOC cases, and the lack of dispositive motions in MSPB cases).

3. Current Federal Sector Employment Laws Create Splits in Law Between Federal Courts and Both the EEOC and Federal Sector Arbitrators

The current EEOC system allows—and in some ways encourages—a split in the law between the EEOC and federal courts. As explained above, an agency cannot appeal an EEOC administrative judge decision that is affirmed by the OFO.[148] Accordingly, if the EEOC sets a different standard or even contradicts federal precedent, the agency has no option to seek relief in federal court. However, if an employee receives an EEOC decision that contradicts federal precedent, the employee can go to federal court for a de novo hearing to ensure that federal law is followed.[149] Therefore, the EEOC can set a standard more generous to employees than that used in federal court without any fear of being overruled.

This has led to numerous small-sounding differences in the law with significant consequences. For example, while federal courts are split on whether an agency needs to make reasonable accommodations to assist an employee with their commute, the EEOC consistently holds that such accommodations are required.[150] Further, the EEOC considers every day a reasonable accommodation is not provided as a continuing violation,[151] while

government-1958-2024/ [https://perma.cc/X4WE-3KBG]; Katz, *supra* note 11 (describing a "near-universal recognition that agencies have a problem getting rid of subpar employees").

147 *See supra* Section III.B.1.

148 *See supra* text accompanying note 62.

149 *See supra* text accompanying note 62.

150 Dania S., EEOC Doc. 0120142114, 2016 WL 5349227, at *9 (E.E.O.C. Sep. 15, 2016); Regan v. Faurecia Auto. Seating, Inc., 679 F.3d 475, 480 (6th Cir. 2012); *see EEOC Informal Discussion Letter*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Apr. 27, 2007), https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-47 [https://perma.cc/6NYP-HM63].

151 Rolf K., EEOC Doc. 0120152946, 2017 WL 5107180, at *2 (E.E.O.C. Oct. 24, 2017); Palomo, EEOC Doc. 0120103596, 2011 WL 121264, at *2 (E.E.O.C. Jan. 5, 2011); *see also* Smith, EEOC Doc. 01A00309, 2000 WL 380147, at *1 (E.E.O.C. Apr. 5, 2000) (recognizing

federal courts typically treat the denial of a reasonable accommodation as a discrete discriminatory act not suitable for continuing violation analysis.[152] In fact, the EEOC's Administrative Judge Handbook states that "When there is a conflict between the Commission's position and that of the Circuit Court in the jurisdiction where the Administrative Judge sits, an Administrative Judge must follow Commission policy, but may acknowledge that the Circuit Court has reached a different conclusion."[153] The EEOC has stated that it need not follow federal court precedent.[154] EEOC decisions are likewise not binding in federal court.[155] As seen in the examples above, EEOC decisions tend to be more favorable to employees and are noticeably less detailed and analytical[156] than federal court decisions. This creates a situation where there is "a two-tiered system of law, with public sector employees receiving more favorable interpretations of employment discrimination laws than private sector employees – an outcome at odds with the statutory language establishing the same anti-discrimination protections for both groups."[157] There-

an "on-going failure" to provide accommodation as supporting a continuing violation theory); Arena, EEOC Doc. 01A02651, 2000 WL 1090411, at *1 (E.E.O.C. July 12, 2000) (finding a continuing violation claim where an agency continued to deny requested reasonable accommodations).

152 Tobin v. Liberty Mut. Ins. Co., 553 F.3d 121, 130 (1st Cir. 2009); Mercer v. SEPTA, 608 F. App'x 60, 63 (3d Cir. 2015); Hill v. Hampstead Lester Morton Ct. Partners LP, 581 F. App'x 178, 181 (4th Cir. 2014); Teague v. Nw. Mem'l Hosp., 492 F. App'x 680, 684 (7th Cir. 2012); Elmenayer v. ABF Freight Sys., Inc., 318 F.3d 130, 134–35 (2d Cir. 2003); Cherosky v. Henderson, 330 F.3d 1243, 1248 (9th Cir. 2003); Abram v. Fulton Cnty. Gov't, 598 F. App'x 672, 676 (11th Cir. 2015).

153 U.S. EQUAL EMP. OPPORTUNITY COMM'N, HANDBOOK FOR ADMINISTRATIVE JUDGES 5 (2002), https://deweypub.com/store/media/EEOC_Administrative_Judges_Handbook.pdf [https://perma.cc/KBH3-9VDG].

154 *See generally* Modesitt, *supra* note 62 ("Specifically, the EEOC has stated that, in deciding federal sector cases, the EEOC's policy and precedent controls over federal court precedent, except Supreme Court decisions. The EEOC's policy is most clearly articulated in its Administrative Judges' Handbook . . . .").

155 *See* Alex Reed, *Abandoning ENDA*, 51 HARV. J. ON LEGIS. 277, 293–94 (2014); Camille Patti, Hively v. Ivy Tech Community College*: Losing the Battle but Winning the War for Title VII Sexual Orientation Discrimination Protection*, 26 TUL. J.L. & SEXUALITY 133, 138 (2017).

156 *See* Modesitt, *supra* note 62, at 982–84, 992 (finding that nearly 30% of EEOC decisions lack citations or analysis).

157 *Id.* at 992–93; *see also* Daniel Watson, *Standard of Causation for Retaliation in Federal Sector Title VII Cases After* Nassar, 65 FED. LAW. 30, 35 (2018) ("Because federal agencies are unable to appeal adverse rulings from the EEOC, the EEOC is free to construct the secondary regulatory scheme . . . .").

Even where no actual conflict exists, the federal sector system can create the perception of inconsistent decisions. Anthony W. Cummings, *The Mixed-Case Dilemma in Federal Sector Employment Appeals*, ARMY LAW., Apr. 2008, at 17, 22 ("The perception of

fore, an employee with a claim that would be rejected in federal court can go to the EEOC and have no fear that the agency will appeal an EEOC decision to federal court.[158] In essence, "[the EEOC] is able to maintain its own body of law, and there is no mechanism through which its decisions can be directly criticized."[159]

Similarly, while employees in federal sector arbitrations are able to appeal serious adverse actions to federal court,[160] the agency must meet a higher standard to appeal to federal court, involving multiple concurrences between federal agencies.[161] Because arbitration decisions are often unpublished,[162] it is difficult to understand the scope of this problem of arbitrators ignoring federal precedent, but it is another way in which employees have favorable treatment and a unique right to federal court that agencies do not.

4. The Current Federal Sector System Causes Significant Delays to the Resolution of Cases

The multiple appellate avenues, and especially the de novo review available in discrimination cases, create a scenario where both employees and agencies wait years, and sometimes over a decade, for the resolution of their cases.[163] This contributes to what even OPM acknowledges is a "pervasive sense that firing a fed is difficult" and involves "a lengthy process."[164] As one report put it:

> The agencies processing claims are bound by few statutory or regulatory time frames in which to complete their work. Generally, the ad-

inconsistent judgments is created between different forums when those forums reach different conclusions after having been presented with essentially the same set of facts.").

158 *See* Modesitt, *supra* note 62, at 992 ("This situation establishes the EEOC as the sole and final arbiter of what Title VII means as to federal employees unless the employee sues in federal court."); Watson, *supra* note 157, at 35 ("[S]ince federal agencies cannot appeal adverse EEOC decisions, EEOC interpretive rules practically have the weight of law for federal agencies.").

159 Modesitt, *supra* note 62, at 995.

160 *See* 5 U.S.C. §§ 7703(c), 7703(d)(1).

161 *See* discussion *supra* note 75.

162 Meredith Goldich, *Throwing Out the Threshold: Analyzing the Severability Conundrum Under* Rent-A-Center, West, Inc. v. Jackson, 60 AM. U. L. REV. 1673, 1681 (2011) ("Arbitration opinions are typically unpublished and are not made available to the public."); Lara M. Pair & Paul Frankenstein, *The New ICC Rule on Consolidation: Progress or Change?*, 25 EMORY INT'L L. REV. 1061, 1070 (2011); *see* James H. Carter, *The International Commercial Arbitration Explosion: More Rules, More Laws, More Books, So What?*, 15 MICH. J. INT'L L. 785, 786 (1994) (describing books or articles for arbitration practitioners as combining published materials, unpublished decisions, and general arbitration "lore").

163 *See supra* Section III.B.1–5.

164 Katz, *supra* note 11.

> ministrative process is lengthy and duplicative. It may take several years for the complaint to be adjudicated if either the employee or Agency elects to appeal the claim through all available routes and waits until the deadline to file each appeal.[165]

A review of the time to discipline or take performance actions against an employee shows that this is not just a perception but a reality—a reality that begins with extensive pre-deprivation processes that take weeks to months and then post-deprivation options for the employee that take months, years, or in extreme EEOC cases, over a decade for final resolution.[166]

As described above, the process for significant discipline or removals requires that the employee have an opportunity to review a proposed action from a supervisor, respond to it in writing and/or in person, and then receive a final decision from another management official.[167] If any new information comes to the deciding official or the deciding official considers any information (either evidentiary or aggravating or mitigating the penalty) that was not provided in the proposal, another delay must take place as due process requires the employee be made aware of this information and be given a chance to respond.[168] And this formal process only occurs after an already lengthy process in which a supervisor determines that discipline should occur, the proposal is drafted, evidence is assembled, and legal reviews are complete.[169] For conduct, as opposed to performance issues, two thirds of removal actions take at least six weeks to process from learning of the misconduct through the proposal and decision process.[170] A quarter of such actions take more than twenty-

165 DICKMAN & MARSHALL, *supra* note 50, at 11.

166 *See supra* Section III.A (explaining the pre-deprivation process); Lacey v. Carson, No. 17-10834, 2019 WL 1170348, at *1 (E.D. Mich. Mar. 13, 2019) (illustrating that plaintiff suffered alleged adverse actions committed from 2009 to 2011 and denying the final appeal in federal court in 2021), *appeal denied*, No. 20-1209, (6th Cir. filed Apr. 13, 2021); McFarland-Lawson v. Todman, No. 23-2633, 2024 WL 3534695, at *3 (7th Cir. July 25, 2024) (illustrating that plaintiff filed an EEOC complaint in 2012 and that the final court of appeals decision was issued in 2024).

167 *See supra* Section III.A.

168 *See supra* note 132 and accompanying text.

169 *See* Mary E. Jones, *Think Before You Fire: Dispelling the Myths and Re-Evaluating a Supervisor's Need to Terminate Civilian Employment*, ARMY LAW., July–Aug. 2018, at 40, 42 (finding that rather than the legally required timeframes, "how much time passes before an agency removes an employee depends more on the decisions made by agency officials").

170 OFF. OF POL'Y & EVALUATION, U.S. MERIT SYS. PROT. BD., ADVERSE ACTIONS: THE RULES AND THE REALITY 4 (2015), https://www.mspb.gov/studies/researchbriefs/Adverse_Actions_The_Rules_and_the_Reality_1205509.pdf [https://perma.cc/539A-PTQ9].

seven weeks.[171] This is before the employee begins any process with the administrative agencies or courts.

For performance issues leading to removal, the process of getting through appropriate pre-deprivation due process safeguards is 170 to 370 days.[172] This includes approximately 80 to 200 days to observe performance issues, conduct counseling sessions, and monitor and provide regular performance feedback; 50 to 110 days to create and implement a Performance Improvement Plan; and 40 to 60 days to prepare a proposed notice of removal, notify the employee, review the employee's response to the proposed removal, and provide the deciding official's decision to the employee.[173] This is all before the performance action is ever challenged by the employee.

If the employee challenges the action before the MSPB, an initial decision is expected within 120 days, and the entire MSPB process, including an appeal of the initial decision to the Board, takes at least a few more months.[174] Consequently, the entire removal process, including an initial appeal to the MSPB, can take 410 to 610 days.[175] Further, continuances for parties to discuss settlement or obtain counsel are not uncommon and may lengthen the time for an administrative judge decision.[176] The EEOC can take even longer. The agency EEO investigation must be completed within 180 days but often takes longer.[177] Then if a hearing is requested, the case is assigned to an administrative

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171 *Id.*

172 West, *supra* note 116, at 377.

173 *Id.*

174 *See* U.S. MERIT SYS. PROT. BD., JUDGES' HANDBOOK 1 (2019), https://www.mspb.gov/appeals/files/ALJHandbook.pdf [https://perma.cc/4QMS-RWGG] (describing the 120 day policy of the MSPB); U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-191, FEDERAL WORKFORCE: IMPROVED SUPERVISION AND BETTER USE OF PROBATIONARY PERIODS ARE NEEDED TO ADDRESS SUBSTANDARD EMPLOYEE PERFORMANCE 25 (2015) (showing that the average time for an MSPB claim from initiation through the initial appeal of affirmed dismissals was 243 days in 2013).

More recent data on MSPB processing times was not available despite the provision of a plethora of other types of data in MSPB's 2022 Annual Report. *See generally* U.S. MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2023 (2024), https://www.mspb.gov/About/annual_reports/MSPB_FY_2023_Annual_Report.pdf [https://perma.cc/2RBA-CM5X] (providing no recent information on MSPB processing times).

175 West, *supra* note 116, at 377.

176 *See* U.S. MERIT SYS. PROT. BD., *supra* note 174, at 1. In the author's experience, MSPB administrative judges attempt to provide expeditious decisions, and such continuances are for thirty to sixty days.

177 *See* 29 C.F.R. § 1614.108(e) (2025); U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-105874, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: IMPROVED OVERSIGHT PROCESSES NEEDED TO HELP AGENCIES ADDRESS PROGRAM DEFICIENCIES 9, 21 (2024).

judge and a decision is supposed to be issued within 180 days, but often does not.[178] Further, the EEOC process is swamped by a deluge of cases overseen by overworked and underpaid administrative judges.[179] With the option of a de novo hearing at federal court, these claims can take more than a decade for a final resolution.[180]

These delays serve neither employees nor agencies, whose responsibilities for planning, staffing, and budgeting may be complicated by such pending cases. In addition, such delays can lead to extremely high damages. In removal claims brought in any of the relevant forums, employees can receive back pay if the removal is determined not to be for good cause or if it violated some principle of due process fairness.[181] Any uncertainties or speculation regarding the proper amount of back pay is resolved, at least according to the EEOC, in favor of the employee.[182] A removal action before the EEOC that takes years to resolve, if resolved in favor of the employee, may lead to years of back pay for

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178 In the author's experience, while 29 § C.F.R. 1614.109(i) requires a decision be made within 180 days unless there is good cause for an extension, the actual process often takes longer. It will usually take a month or so for a judge to be assigned after the completion of the investigation and request for a hearing. Discovery is usually completed within two or three months, at which point the briefing schedule for summary judgment motions opens. It usually takes around one month for briefing to be done. Then in the author's experience, summary judgment decisions can take usually between three and twelve months. If summary judgment is not granted, then the case goes to hearing, with all the attendant pre-hearing conferences and disclosures, as well as post hearing briefing. Therefore, from the filing of a formal complaint to a final decision from an administrative judge will be between one and three years. This is supported by the experience of other practitioners. *See Appearing Before an Administrative Judge at the EEOC*, DC BAR, https://www.dcbar.org/for-lawyers/communities/join-a-community/labor-and-employment-law/appearing-before-an-administrative-judge-at-the-ee [https://perma.cc/BY7R-LWTD] (last visited Aug. 6, 2025) ("[T]he Equal Employment Opportunity Commission's federal-sector process frustrates parties because it often lasts too long.").

179 *See* ELIZABETH JOUN, DAVID LYONS & DELVIN TURNER, REDUCING DELAY TO PROMOTE CIVIL RIGHTS: HOW ADMINISTRATIVE JUDGES AT THE EEOC CAN RESOLVE EMPLOYMENT DISCRIMINATION COMPLAINTS IN A FAIR YET EFFICIENT MANNER 18 fig. 3, 18–20 (2018), https://luskin.ucla.edu/wp-content/uploads/2018/06/5EEOCJusticeMP.FINAL_.pdf [https://perma.cc/34MV-BGJM] (regarding workload); *id.* at 36, 45–47 (describing the lack of funding to hire clerk or paralegal staff and the understaffing of administrative judges themselves); Shawn Zeller, *Justice Delayed*, GOV'T EXEC. (June 15, 2004), https://www.govexec.com/magazine/features/2004/06/justice-delayed/16983/ [https://perma.cc/6K9A-7VEF] (explaining that EEOC administrative judges are paid less than their counterparts at other agencies and are suffering from a lack of paralegals and clerical staff).

180 *See supra* text accompanying note 166; DICKMAN & MARSHALL, *supra* note 50, at 12.

181 5 U.S.C. § 5596(b)(1)(A) (applying the Back Pay Act to the discussed forums); EEOC MD 110, *supra* note 53, at 11-2 ("The purpose of a back pay award is to restore to the complainant the income he would have otherwise earned but for the discrimination.").

182 EEOC MD 110, *supra* note 53, at 11-3 ("The Commission has held that uncertainties involved in a back pay determination should be resolved against the agency that has already been found to have committed acts of discrimination." (citing Hanns v. USPS, EEOC Petition No. 04960030 (Sep. 18, 1997))).

time the employee did not actually work. Such back pay damages and interest on back pay,[183] are not limited by the $300,000 compensatory damages cap at the EEOC,[184] and therefore, such compensatory damages can come on top of back pay awards. These high damages can lead to increased litigation by employees (as well as increased damages expectations), be a burden on agencies' budgets, and lead agencies to be hesitant to take necessary removal actions.

5. The Current System Deters Federal Managers from Taking Necessary Actions

The plethora of options employees have for challenging management actions and the time it takes to reach a final resolution in these cases is perhaps meant to make management think twice before taking improper actions, but it also creates a demonstrable disincentive for federal agency managers to do their jobs and manage employees.[185] Management can be paralyzed and unwilling to take appropriate disciplinary or performance actions due to confusion over the process,[186] fear of being named as a responsible management official in even a frivolous EEOC case,[187] or inability to devote the time to the lengthy process of even getting to the point of issuing a disciplinary or performance ac-

183 *Id.* at 11-2 ("Interest on back pay shall be included in the back pay computation.").

184 42 U.S.C. § 1981a(b)(2) (excluding back pay from compensatory damages in these cases); EEOC MD 110, *supra* note 53, at 11-2, 11-20 (detailing the $300,000 cap on compensatory damages in a separate section from back pay).

185 *See* Katz, *supra* note 11 ("Undoubtedly, there are major hurdles to removing an employee from federal service; federal workers are guaranteed levels of due process not typically provided to employees in the private sector."); P'SHIP FOR PUB. SERV., *supra* note 140 ("More than 40% of respondents to the 2023 Federal Employee Viewpoint Survey, the annual nationwide survey of federal employees, reported that poor performers usually remain in their work unit and continue to underperform."); Ann Boehm, *The Federal EEO Process is Broken: Can We Help Fix It?*, FED. EMP. L. TRAINING GRP. (Oct. 20, 2021), https://feltg.com/the-federal-eeo-process-is-broken-can-we-help-fix-it/ [https://perma.cc/7MLJ-SRU6] (highlighting that "employers who assign work to their employees are getting claims of hostile work environment filed against them").

186 *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-48, FEDERAL EMPLOYEE MISCONDUCT: ACTIONS NEEDED TO ENSURE AGENCIES HAVE TOOLS TO EFFECTIVELY ADDRESS MISCONDUCT 23 (2018) (explaining that a 2016 MSPB survey found that 64% of managers and supervisors surveyed stated that they did not fully understand the process to remove an employee for misconduct); West, *supra* note 116, at 375 (noting that many managers complain that the system is too complex); U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-191, FEDERAL WORKFORCE: IMPROVED SUPERVISION AND BETTER USE OF PROBATIONARY PERIODS ARE NEEDED TO ADDRESS SUBSTANDARD EMPLOYEE PERFORMANCE 20 (2015); Jones, *supra* note 169, at 42 (stating that supervisors may not fully understand the processes involved).

187 *See* West, *supra* note 116, at 376.

tion.[188] Management may avoid even more typical and necessary duties (such as providing critical feedback and assigning work) for fear of retaliation claims that need not be based on an actual adverse action,[189] or hostile workplace claims, which will be accepted, investigated and assigned to an EEOC judge based on little more than allegations about a manager's tone or editing of work product.[190]

Federal managers are already tasked with navigating the federal bureaucracy and their higher management while trying to achieve agency goals amidst high workloads and budgets that

188 *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-191, FEDERAL WORKFORCE: IMPROVED SUPERVISION AND BETTER USE OF PROBATIONARY PERIODS ARE NEEDED TO ADDRESS SUBSTANDARD EMPLOYEE PERFORMANCE 20 (2015).

189 Retaliation claims, as opposed to other discriminatory acts, do not need to be materially adverse actions but use the rather nebulous concept of whether the employer's action would deter a reasonable person from asserting their rights. *See Enforcement Guidance on Retaliation and Related Issues*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Aug. 25, 2016), https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues [https://perma.cc/F89Z-S7Y5] ("An action need not be materially adverse standing alone, as long as the employer's retaliatory conduct, considered as a whole, would deter protected activity."); PETER M. PANKEN, RETALIATION: THE NEW TSUNAMI IN EMPLOYMENT LITIGATION, ALI-CLE COURSE MATERIALS 1, 9 (2015), Westlaw SY002 ALI-CLE 2137 (stating that retaliation has become the most frequently alleged type of federal sector violation raised with EEOC).

Management fear of retaliation complaints from the employees they supervise is real and extensively documented. *See* U.S. Gov't Accountability Off., GAO-18-48, Federal Employee Misconduct: Actions Needed to Ensure Agencies Have Tools to Effectively Address Misconduct 23 (2018); West, *supra* note 116, at 376; *The Boss as a Target: Recognizing and Stopping Upward Bullying*, Pub. Sector HR Ass'n (May 1, 2021), https://pshra.org/the-boss-as-a-target-recognizing-and-stopping-upward-bullying/ [https://perma.cc/3N3D-D7WG] ("Even if accusations are eventually dismissed, the investigative process damages the target's reputation and inflicts harm. The target is subjected to questioning and inevitable gossip. Effectively, the bully's rights are protected while the targeted manager is left with little if any recourse. As a result, even legitimate attempts to manage performance can give rise to allegations of retaliation."); Boehm, *supra* note 185 ("One attendee recently told me a complainant blatantly revealed she was filing a complaint to ensure she could claim retaliation for anything the agency might do to her in the future. According to the EEOC's 2019 Annual Report, employees claimed retaliation in 7,176 cases. There's either a lot of retaliation going on, or it's just easy to claim.").

190 *See* Hill v. Nicholson, 383 F. App'x 503, 513 (6th Cir. 2010) (admitting there is a relatively low bar for harassment claims to survive dispositive motions in a case about a "nitpicking" supervisor).

Cases based solely on a supervisor's tone or body-language may not survive summary judgment at the EEOC or federal court. *See, e.g.*, Warren, EEOC Doc. 01A42507, 2004 WL 1810504, at *1–2 (E.E.O.C. Aug. 3, 2004). However, it is apparent from the number of these cases at the EEOC that these cases are still accepted by agency EEO offices, are fully investigated with affidavits and documents sought from management staff, and may still progress through the same interminable process of multiple appeals and a de novo hearing in federal court as a matter of right. *See id.*

can vary greatly based on administration.[191] Adverse employment actions or even just innocent management actions weaponized by disgruntled employees can add hundreds of hours of required work over a period of multiple years. Managers must prepare for EEO interviews, search for documentary evidence, review notes and documents to refresh their recollection, and prepare for depositions and hearings.[192] This can distract managers both from focusing on their agency's mission and from providing support or supervision to other subordinates.[193]

C. Potential Solutions to Increase Efficiency and Fairness in Federal Sector Employment Law by Equalizing Appeal Options

The most common-sense reform would be to equalize appellate options and take steps to make an employee's choice of forum more final. As the employee is already making the initial choice of forum when they file,[194] they should not have the further benefit of multiple appeals or re-hearings until they get their desired result, especially not appeal options that are unavailable to the agency.

Some of the simplest reforms that could alleviate the problems described above would be to make the initial choice of forum more permanent and allow agency appeals to the same extent as employee appeals. A right of appeal for both parties from an arbitration, MSPB, or EEOC decision to the Federal Circuit Court of Appeals is more than sufficient to ensure a robust hearing for employee rights, without the wasted time and expense of a duplicative de novo procedure. Under such a system, the parties could still appeal the initial decision to the MSPB or EEOC, but with-

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191 *See generally* COUNCIL OF THE INSPECTORS GEN. ON INTEGRITY & EFFICIENCY, TOP MANAGEMENT AND PERFORMANCE CHALLENGES FACING MULTIPLE FEDERAL AGENCIES (2023), https://www.ignet.gov/sites/default/files/files/993-087CIGIE-TMPCReport9-12.pdf [https://perma.cc/AX8R-2V2C] (identifying widespread management and performance challenges across federal agencies); U.S. MERIT SYS. PROT. BD., A CALL TO ACTION: IMPROVING FIRST-LEVEL SUPERVISION OF FEDERAL EMPLOYEES (2010), https://www.mspb.gov/studies/studies/A_Call_To_Action_Improving_First_Level_Supervision_of_Federal_Employees_516534.pdf [https://perma.cc/6PU9-3WJ9] (finding deficiencies in first-level supervision and urging improved managerial training); OFF. OF MERIT SYS. OVERSIGHT & EFFECTIVENESS, U.S. OFF. OF PERS. MGMT., SUPERVISORS IN THE FEDERAL GOVERNMENT: A WAKE-UP CALL (2001), https://ourpublicservice.org/wp-content/uploads/2001/01/a37809c9945f5a8acb5471266c316241-1414081579.pdf [https://perma.cc/3ZAU-C3MX] (describing a variety of management challenges in the federal sector).

192 *See* DICKMAN & MARSHALL, *supra* note 50, at 11–12.

193 *See* Katz, *supra* note 11 (quoting a former OPM deputy director as stating that when "it takes an inordinate amount of time for the manager to focus his or her attention on one employee," it is at the expense of other employees).

194 *See supra* Part II.

out the cross-appeals between the agencies and the EEOC right to a de novo hearing. The Federal Circuit then would be responsible for ensuring a consistent body of law and correcting errors in the EEOC and MSPB's primary fields as well as in mixed cases. Allowing both parties to appeal to the Federal Circuit (instead of only allowing appeals by unsuccessful employees), would help prevent splits in law by having the court ensure consistency,[195] all while providing a more appropriate balance between employee rights and agency interests.[196] While this would potentially increase the appeals docket in the Federal Circuit, it would reduce the more time-intensive and costly de novo cases available in an unsuccessful EEOC claim.

Another, less desirable, option would be to retain the current system of cross-appeals but to equalize the appeal opportunities between the agency and employee. The agency should have the same right as an employee to appeal a decision by a federal sector arbitrator to the MSPB. Similarly, the agency should have an equal right to appeal an MSPB claim involving discrimination to the EEOC or an EEOC claim involving MSPB issues to the MSPB. Such agencies should be the final authority within the administrative law system on the matters within their own purview.[197] Further, a reformed system would require that such reviews are not opportunities to relitigate facts or the weighing of evidence, but rather will only be overturned by the other forum when the legal holdings clearly contradict established precedent of that body within that body's established expertise. Each forum's review would also be strictly and expressly confined to those issues on which it is the expert. For instance, an appeal of an arbitrator's decision regarding removal to the MSPB could not rule on contract interpretation as that is the arbitrator and FLRA's responsibility (not the MSPB's). Similarly, the appeal of an MSPB judgment in a case also alleging discrimination could only have the rulings on discrimination issues appealed to the EEOC, as opposed to issues such as the sufficiency of the removal

195 *See* Modesitt, *supra* note 62, at 996. For an interesting, if complicated, stroll through of one case involving these inconsistencies, see Cummings, *supra* note 157, at 17, 22.

196 *See* Watson, *supra* note 157, at 35 ("[A]gencies should be allowed to challenge EEOC determinations to an uninterested, neutral forum where the correct balance between protecting federal employees and the efficiency of the civil service can be achieved.").

197 *See* Richard J. Ericson, *Reasonable Accommodation of the Handicapped Federal Employee: Extending the Legal Duty of the Employer:* Ignacio v. United States Postal Service, 10 GEO. MASON U. L. REV. 267, 273 (1987) (explaining that the Special Panel has acknowledged the MSPB and EEOC's expertise in their respective areas).

process. This way there would be no need for the Special Panel created by law to harmonize such decisions.[198]

While either of these changes would need regulatory and statutory changes, they are both common-sense solutions that would not completely reinvent the federal sector process but rather promote uniformity and accountability for agency adjudicatory decisions.[199] However, any proposals to reform the federal sector employment system must deal with the right of employees to a de novo federal court process in any claims involving discrimination. As detailed below, when seeking to equalize appeal options or streamline the process in the EEOC system, additional complications, both statutory and constitutional, come into play.

1. Eliminating the De Novo Trial in Federal Court

As stated above, the proposed equalization of the appeal rights would involve the elimination of complainant's right to a de novo trial in federal court for any employee dissatisfied with the EEOC's resolution of their claim as this is the most frustrating, time consuming, and inefficient aspect of federal sector employment law.[200] Although statutory changes could remove the right to file a complaint in federal court, this is complicated by the CRA's requirement that any employee seeking compensatory damages have a right to a jury trial. If the right to a jury trial were removed statutorily, the inclusion of compensatory damages raises further constitutional issues discussed below. While perhaps the simplest and most straightforward reform would be to remove the compensatory damages provision from the CRA and avoid these issues, this is highly unlikely considering the importance of compensatory damages in remedying civil rights violations and the availability of compensatory damages for other civil rights violations.[201]

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198 *See* Stimson, *supra* note 94, at 242 (explaining that with the elimination of cross-agency appeal, there will be no reason for the Special Panel to exist).

199 *See* Modesitt, *supra* note 62, at 995–96.

200 *See supra* text accompanying notes 166, 180; Modesitt, *supra* note 62, at 995 ("The first and best solution would be to amend Title VII to remove the right to a trial de novo in the federal courts.").

201 *See* Ivan E. Bodensteiner, *Limiting Federal Restrictions on State and Local Government*, 33 VALPARAISO U. L. REV. 33, 40 (1998) (explaining how civil rights claims can result in compensatory damages, although awards are often small); Caprice L. Roberts, *Ratios, (Ir)rationality & Civil Rights Punitive Awards*, 39 AKRON L. REV. 1019, 1038–39 (2006); Ranieri, *supra* note 64, at 30 ("The issue of Title VII remedies, however, dominated the debate that culminated in the passage of the 1991 CRA."); *see generally* Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict Between the*

Instead, this Article will look at the possibility of removing the real problem—the jury trial provision in the CRA which presupposes and requires an employee's ability to file in federal court as jury trials are not available in the administrative forums.[202] If there is a right to a jury trial of federal sector discrimination claims, regardless of the removal of any other statutory provision regarding the ability to file in federal court after losing before the EEOC, then the employee will still have the opportunity for a de novo hearing in federal court.[203] The removal of the right to a jury trial implicates constitutional questions involving the Seventh Amendment and sovereign immunity, but based on established precedent, Congress would likely be found to have the power to do so as analyzed below.

a. Congress's Waiver of Sovereign Immunity to Allow Suit in Federal Court Creates a Statutory Right that Can be Withdrawn

Relevant to the processes at issue in this Article, a jury trial must be made available when constitutionally required by the Seventh Amendment[204] or when Congress has expressly waived sovereign immunity to allow such trials.[205] The doctrine of sovereign immunity prevents governments from being sued without their consent.[206] However, Congress can waive sovereign immunity to allow claims against the government to proceed.[207] Waivers of sovereign immunity can be broad or narrow and may only authorize certain types of proceedings against the government or authorize certain types of damages.[208]

Rhetoric and the Content of the Civil Rights Act of 1991, 46 RUTGERS L. REV. 1 (1993) (explaining the history of the CRA, the debates over compensatory damages, and the administration's "abhorrence" of compensatory and punitive damages and resulting cap on such damages).

202 *See* Ranieri, *supra* note 64, at 38 ("The court then recognized that a 'trial by jury' cannot occur in an administrative proceeding." (citing Gibson v. Brown, 137 F.3d 992, 996 (7th Cir. 1998))).

203 *Id.*

204 U.S. CONST. amend. VII.

205 *See* Dombrowski v. United States, 524 F. Supp. 3d 723, 728 (E.D. Mich. 2021).

206 *See* Rothe Dev., Inc. v. U.S. Dep't of Def., 666 F.3d 336, 338 (5th Cir. 2011); *Immunity*, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining "sovereign immunity").

207 United States v. Miller, 604 U.S. 518, 527 (2025) ("Waivers of sovereign immunity are jurisdictional provisions that empower courts to hear claims against the Government.").

208 *See* Ugo Colella & Adam Bain, *The Burden of Proving Jurisdiction Under the Federal Tort Claims Act: A Uniform Approach to Allocation*, 67 FORDHAM L. REV. 2859, 2863–64 (1999) (providing examples of the limited waiver and process authorized by the Federal Tort Claims Act); *see generally* 14 WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 3654 (4th ed. 2025) (discussing the difficulties of bringing suits against the United States).

The CRA specified that compensatory and punitive damages would be available (although both were capped), and that "[i]f a complaining party seeks compensatory or punitive damages . . . any party may demand a trial by jury."[209] Therefore, the CRA, by its very text, waived sovereign immunity as to both the right to a jury trial in claims against federal agencies and the availability of compensatory damages. These two waivers do not need to be connected. Legislation, like the Federal Tort Claims Act, may waive sovereign immunity to provide compensatory damages to litigants without waiving sovereign immunity as to the availability of a jury trial.[210] In other words, the waiver of sovereign immunity as to compensatory damages does not necessarily also create a right to a jury trial. Legislation could simply remove the right to a jury trial from the statute. However, if compensatory damages are made available by statute without the corresponding statutory right to a jury trial, the question becomes whether a jury trial (and therefore, a complaint in federal court) must be an option for claimants under the Seventh Amendment. The removal of the statutory right to a de novo hearing and to a jury trial as a statutory right under the CRA would be a dead letter if there is a constitutional right to request a trial by jury in these cases.

b. If the Statutory Right to a Jury Trial is Removed, the Seventh Amendment Does Not Require a Jury Trial

The Seventh Amendment guarantees the right to a jury trial in "[s]uits at common law, where the value in controversy shall exceed twenty dollars."[211] This constitutional provision was based, like the concept of sovereign immunity,[212] on long-standing principles of British common law making a distinction between claims "at law" or "in equity."[213] The Supreme Court has held that legal matters or matters "at law," are covered by the

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209 42 U.S.C. § 1981a(c)(1); *but see* Hernicz, *supra* note 14, at 71 (explaining punitive damages are not available against the federal government).

210 *See* Colella & Bain, *supra* note 208, at 2873 (explaining that there is no jury trial under the Federal Tort Claims Act); Cyrus B. Richardson, III, *Understanding the Limited Effect of* Molzof v. United States *on Wrongful Death Damages Under the Federal Tort Claims Act*, 20 N. ILL. U. L. REV. 69, 70 (2000) (stating that actual and compensatory damages are available under the Federal Tort Claims Act).

211 U.S. CONST. amend. VII.

212 Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 785 (2008).

213 *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 41–42 (1989).

Seventh Amendment's right to a jury trial while matters "in equity" are not.[214] In determining whether a certain claim is one of equity or law, the Supreme Court has held that the most important factor is the type of remedy sought.[215] Equitable remedies, such as injunctive relief or back pay, would not require a jury, whereas compensatory damages, punitive damages, or damages going beyond restoring the status quo would.[216]

Traditionally, claims under Title VII were not considered "at law" as the remedies were entirely equitable. Title VII, as originally crafted in the Civil Rights Act of 1964, did not allow for compensatory damages but only back pay, front pay, reinstatement, injunctive relief, and other equitable relief.[217] The text made no provision for compensatory or punitive damages[218] and most courts analyzing the question therefore found no right to a jury trial under Title VII.[219] While claims could be brought to federal court after exhausting administrative remedies, no jury trials were available, and judges were limited to equitable remedies in the relief they could order.[220]

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214 *See generally* Samuel L. Bray, *Equity, Law, and the Seventh Amendment*, 100 TEX. L. REV. 467 (2022) (distinguishing equity from law and proposing reform).

215 *See id.* at 468, 477–78; Anthony DiSarro, *When a Jury Can't Say No: Presumed Damages for Constitutional Torts*, 64 RUTGERS L. REV. 333, 343 (2012).

216 *See* Sec. & Exch. Comm'n v. Jarkesy, 603 U.S. 109, 123–25 (2024) (holding that damages meant to compensate, remedies designed to punish, or remedies that go beyond "restor[ing] the status quo" are legal remedies, not equitable in nature, and require a jury trial); Michael A. Labriola & Lisa C. Scolieri, *Title VII and the "Right" of Trial by Jury*, 30 DUQ. L. REV. 961, 963 (1992) ("Thus, those cases that recognized equitable rights and where equitable remedies were administered were not entitled to trial by jury.").

Courts have held that "'back pay' is an equitable remedy with the purpose of restoring victims to the status they would have enjoyed but for the discrimination." *Id.* at 962.

217 Ranieri, *supra* note 64, at 33; Hernicz, *supra* note 14, at 68; Manuel Martínez-Herrera, *Punitive Damages in the Employment Discrimination Context: "A General Overview and Analysis of Whether They Effectively Deter from Discriminating in the Workplace,"* RACO (2006), https://raco.cat/index.php/IUSLabor/article/view/57964/68032 [https://perma.cc/3EHG-VB84] ("Title VII of the Civil Rights Act of 1964 provided only for the award of equitable relief: injunctions, back pay, and the award of attorney's fees." (footnote omitted)).

218 *See* Hernicz, *supra* note 14, at 63–64, 72.

219 Michael D. Moberly, *Title VII Trials – and Tribulations: Examining the Divergent Roles of Judge and Jury Under the Act's Enhanced Remedial Scheme*, 39 HOFSTRA LAB. & EMP. L.J. 331, 339 n.43 (2022); Kerry R. Lewis, *A Reexamination of the Constitutional Right to a Jury Trial Under Title VII of the Civil Rights Act of 1964*, 26 TULSA L.J. 571, 571 (1991).

220 The CRA did not create the option to file a claim in federal court but added the damages and jury trial provisions. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072–74 (codified as amended at 42 U.S.C. §§ 1981–1981a); Moberly, *supra* note 219, at 378 ("Prior to the Civil Rights Act of 1991, only equitable relief, including back pay, was available to prevailing plaintiffs under Title VII." (quoting Bledsoe v. Emery Worldwide Airlines, Inc., 635 F.3d 836, 844 n.9 (6th Cir. 2011))). *See generally* Brown v. Gen. Servs. Admin., 425 U.S. 820 (1976) (finding that a plaintiff could

This inclusion of a jury trial provision in the CRA squares with the traditional understanding of the Seventh Amendment as requiring the option of a jury trial where a plaintiff seeks compensatory damages.[221] Congress likely assumed that, under the Seventh Amendment, a jury trial was required.[222]

However, the Seventh Amendment right to a jury trial is not absolute. First, the Seventh Amendment right to a jury trial does not apply when claims are against the United States.[223] As the Supreme Court put it in a 1943 case, such cases are equitable, not legal, in nature, as "[i]t hardly can be maintained that under the common law in 1791 jury trial was a matter of right for persons asserting claims against the sovereign."[224] Therefore, while Congress can waive sovereign immunity and create a right to a jury trial, it is a statutory right, not a constitutional one.[225]

Second, the Supreme Court has held that cases involving "public rights" are not subject to the Seventh Amendment's right to a jury trial.[226] Here there is a strong argument that the treatment of federal employee employment discrimination claims is a matter of "public" rights. Where a claim involves a "public" right, "Congress may assign the matter for decision to an agency without a jury, consistent with the Seventh Amendment."[227] "Essentially, Congress can employ this legislative technique for statutory rights that are 'closely intertwined with a federal regulatory

file in federal court within the relevant statute of limitations contained in the pre-1991 CRA).

221 *See* Margaret Raymond, *The Unconstitutionality of the Victim and Witness Protection Act Under the Seventh Amendment*, 84 COLUM. L. REV. 1590, 1615 (1984) (awarding compensatory damages without a jury trial may violate the Seventh Amendment).

222 *See* Govan, *supra* note 201, at 95 (explaining that proposals to increase equitable damages without compensatory damages was a way to avoid the Seventh Amendment right to a jury trial).

223 Lehman v. Nakshian, 453 U.S. 156, 168 (1981).

224 *See* Galloway v. United States, 319 U.S. 372, 388 (1943). For a description of various courts' interpretation of the Seventh Amendment in cases involving the government and naming the concept the "historically immune defendants" test, see Jason Weeden, *Historically Immune Defendants and the Seventh Amendment*, 74 TEX. L. REV. 655 (1996).

225 Dombrowski v. United States, 524 F. Supp. 3d 723, 728 (E.D. Mich. 2021) (citing *Galloway*, 319 U.S. at 388); *see* Brott v. United States, 858 F.3d 425, 436 (6th Cir. 2017).

226 Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53 (1989) ("Unless a legal cause of action involves 'public rights,' Congress may not deprive parties litigating over such a right of the Seventh Amendment's guarantee to a jury trial.").

227 Sec. & Exch. Comm'n v. Jarkesy, 603 U.S. 109, 127 (2024); Atlas Roofing v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 443 (1977) ("[W]hen Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law.'").

program' or where the 'right . . . belongs to [or] exists against' the federal government."[228]

The Supreme Court has stated that in determining whether a right is public or private, one factor is whether the government is necessarily a party, but that the main focus is on whether a private cause of action for the right existed in English common law.[229] As the Court has repeatedly put it, the question is whether the claim "is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789.'"[230] While an exhaustive review of English common law is beyond the scope of this Article, issues such as the granting of public benefits, immigration, customs, and the use of public land have been held to involve public rights.[231] Significantly, Occupational Safety and Health Administration enforcement actions against private parties have been found to involve public rights, and therefore, it was constitutional for Congress to commit the matter to resolution within an administrative agency.[232] However, some actions, such as where the Securities and Exchange Commission seeks civil money penalties for securities fraud, have been found to involve a private right, as it was analogous to common law fraud.[233]

The private-public right distinction is not precise,[234] and it is not entirely certain how the Supreme Court would rule on the application of this to Title VII matters, but it seems apparent that no action for employment discrimination, especially against the sovereign, existed in Westminster in 1789. This, along with the fact that an employment discrimination claim is not neatly analogizable to common law employment law claims[235] (such as wrongful discharge),[236] would likely mean that Congress has the

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228 DiSarro, *supra* note 215, at 349 (citing *Granfinanciera*, 492 U.S. at 51–52, 54).

229 *See Granfinanciera*, 492 U.S. at 41–42.

230 *Jarkesy*, 603 U.S. at 127.

231 *Id.* at 152–53 (Gorsuch, J., concurring).

232 *See Atlas Roofing*, 430 U.S. at 442.

233 *Jarkesy*, 603 U.S. at 124–25. *Jarkesy* distinguished A*tlas Roofing* as it involved an analogous private cause of action (fraud) and involved civil penalties. *See id.* at 136 (citing *Atlas Roofing*, 430 U.S. at 442).

234 Much like the federal sector employment system, the private-public right is an "area of 'frequently arcane distinctions and confusing precedents.'" Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 583 (1985) (quoting N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 90 (1982)).

235 Discrimination suits do not fit well within a common law framework. Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1, 3 (2013).

236 *See* Paul Rose, *Developing a Market for Employment Discrimination Claims in the Securities Industry*, 48 UCLA L. REV. 399, 414 (2000) (describing common law employ-

authority to eliminate the trial by jury provision of the CRA while retaining the right to compensatory damages and refer federal sector employment discrimination claims solely to the administrative process with appeals only to the Federal Circuit.

2. Providing Both Parties with a Right to a De Novo Trial in Federal Court

Another option would be to preserve the jury trial provision but apply it to both parties. Based on the compensatory damages provision of the CRA, the Supreme Court in *West v. Gibson* held that an employee could seek compensatory damages before the EEOC, and that, if unsuccessful, the employee, and only the employee could opt for a de novo hearing in federal court.[237] Major Steven M. Ranieri's summary of the arguments in this case is worth quoting in whole:

> Gibson argued what appeared obvious: parties cannot receive a jury trial before the EEOC and may only receive one in court. To Gibson this meant the EEOC could not award compensatory damages, because the EEOC could not meet a required condition of the damages provision, i.e., provide the government with a jury trial if it demanded one.
>
> The government conceded that the EEOC was without the power to grant jury trials. However, it interpreted the jury trial provision differently. Namely, it asserted that if a federal-sector employee was dissatisfied with either the administrative agency's or the EEOC's award and subsequently sought a trial ne [sic] novo in district court, either party could *then* request a jury trial. In other words, the jury trial provision only became operative if the aggrieved person utilized the other provisions of Title VII enabling her to file a civil action.[238]

The government's view was adopted by the court and the lack of an appeal mechanism for agencies was justified by the fact that while the CRA said "any party may demand a trial by

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ment claims as including wrongful termination, defamation, negligent supervision, invasion of privacy, tortious interference with economic opportunity, and intentional infliction of emotional distress).

While there are discrimination claims that seem to be at common law, these involve the concept that businesses offering services to the public at large cannot arbitrarily refuse service, not employment relationships. *See* Adam J. MacLeod, *The Jury Trial Right in Discrimination Cases*, LAW & LIBERTY (Nov. 4, 2024), https://lawliberty.org/the-jury-trial-right-in-discrimination-cases/ [https://perma.cc/7UAJ-PEB2].

237 *See* 527 U.S. 212, 221 (1999).

238 Ranieri, *supra* note 64, at 42 (footnotes omitted).

jury" the operative part of Title VII only gave the employee (the complaining party) the ability to go to federal court at all.[239]

However, it could be argued, as Ranieri does, that "demanding a jury trial" should be "read to be synonymous with initiating a civil action" with a jury, and that the provision should have been interpreted to apply to both sides so that either the employee or employer could challenge the EEOC determination de novo in federal court.[240] Such an interpretation, or a statutory change to more clearly state this, would increase the fairness of the system and would also prevent any splits in the law between EEOC and the federal courts. In addition, Ranieri makes the case that doing so would provide an incentive for complainants to mediate or settle their complaints as the current system provides an incentive to complainants to pursue their complaints through the entire administrative system without settling their complaints because they can always get a "second bite at the apple in federal court (in the form of a trial de novo) if they lose in the administrative process."[241]

While this solution would be helpful, it would not assist with matters of judicial efficiency, and would, in fact, likely double the number of EEOC decisions being reheard completely in federal court. It would also likely dissuade many employees from taking legitimate discrimination claims through the EEOC process as they realize that even after a full trial at the EEOC they will then likely go through the same process in federal court, a process that would likely take years. It also seems unlikely that the Court would reconsider an argument that was rejected in *Gibson* both in the Supreme Court and at the Seventh Circuit.[242]

While solving some problems, like the fundamental unfairness of the process and the divergent caselaw between federal courts and the EEOC, this proposal would serve to lengthen and further complicate the EEOC process. Therefore, while better than the current system, this proposal would still involve a long, complicated process that would still take years for both employees and agencies to navigate.

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239 *See id.* at 39–40. Ranieri aptly described the government's argument adopted by the court: "In other words, the jury trial provision only became operative if the aggrieved person utilized the other provisions of Title VII enabling her to file a civil action." *Id.* at 42.

240 *Id.* at 43.

241 *Id.* at 44.

242 *See West*, 527 U.S. at 221; Gibson v. Brown, 137 F.3d 992, 997–98 (7th Cir. 1998).

3. Creating Parallel and Separate Tracks in the EEOC and Federal Court

One option that has not yet been proposed would be to require a choice between federal court and the EEOC process at the beginning of the Agency EEO process. As explained above, under the CRA, employees may seek compensatory damages under Title VII, and under both the CRA and, possibly, the Constitution, this requires that they be offered a jury trial.[243] However, the Supreme Court has also held that the EEOC administrative process can award compensatory damages.[244] By eliminating the administrative exhaustion requirement for employees, claimants seeking compensatory damages could decide at the outset whether to go to federal court or the EEOC. Under this proposal, if employees go directly to federal court, they will be taking these cases out of the administrative forum, leaving EEOC with a reduced caseload and the ability to make good on its purpose of effectively and quickly resolving such disputes. This would in turn create a strong incentive for employees to go to the EEOC with their claims as resolution could be quicker and more efficient. Employees deciding on the EEOC path would have already had an opportunity to have their claim heard by a jury and would have rejected this in favor of remaining at the EEOC, thereby satisfying any potential constitutional requirement for an opportunity for a jury trial. Under this proposal, either party at the EEOC could then appeal to the Federal Circuit, as opposed to the option for a de novo hearing, to still maintain a consistent body of employment discrimination law. Further, claims not seeking compensatory damages, but rather just seeking remedies such as back pay, attorney fees, reinstatement, or promotion would only be eligible to go through the more efficient EEOC process, as without compensatory damages and only equitable remedies, there is no arguable right to a jury trial.[245]

IV. Recommendations for Restoring the Balance Between Federal Agencies and Employees in Federal Sector Employment Cases

All the recommendations above would require legislation. However, there is a strong argument to be made to Congress to

243 *See supra* Section III.C.1.

244 *West*, 527 U.S. at 222–23.

245 *See* Nancy L. Pirkey, *The Availability of Jury Trials in ERISA Section 510 Actions: Expanding the Scope of the Seventh Amendment*, 27 VALPARAISO U. L. REV. 139, 146 (1992).

streamline the process to equalize rights between government employees and their agencies. While the perception that federal workers cannot be fired is incorrect, it is clear that the process of federal sector employment actions and the various appeals available to employees dissuades managers from taking action and creates a process that is confusing to employees, unfairly disadvantages agencies, and has other ill effects such as splits in law and the delayed resolution of cases.[246]

As an initial matter, the best option would be the first given in Section III.C.1 above, namely, streamlining EEOC, MSPB, and FLRA processes to continue with appeals solely in their own forum, and with employees with mixed cases making a meaningful choice of forums, while also eliminating any de novo trial as suggested in Section III.C.1.i. This would still acknowledge the expertise of each forum (discrimination matters, merit systems principles, and bargaining and contract interpretation)[247] while still ensuring consistency through appeals to the Federal Circuit. While the EEOC may still formally retain its obdurate policy of ignoring federal precedent, the availability of an appeal to the Federal Circuit by any party would incentivize EEOC administrative judges to look to federal law in crafting decisions. Similarly, the misapplication of law in a mixed case could be corrected at the Federal Circuit without the overlapping set of appeals that confuse both employees and practitioners. Further, an appeal avenue to the Federal Circuit would benefit both agencies and employees by eliminating conflicting law; while such conflicts have traditionally favored employees, there is no guarantee that future appointees to the EEOC would not be of a more conservative tilt and refashion federal precedent that benefits employers. The fairest and most logical solution is to ensure consistency regardless of forum.

However, to the extent courts find a constitutional reason to require the availability of jury trials or to the extent there is insufficient political will to amend the CRA, the likely least controversial reform to the EEOC process would be the last given above as it would need the least statutory and regulatory changes. By granting the choice early in the process of (1) whether to seek compensatory damages and (2) whether to proceed to federal

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246 *See generally supra* Section III.B.1–5 (analyzing the issues surrounding federal sector employment law).

247 Some proposals would eliminate the EEOC hearing process entirely. *See* Stimson, *supra* note 94, at 170; DICKMAN & MARSHALL, *supra* note 50, at 13–19.

court or stay within the administrative process, this option would give employees the option for the jury trial the CRA allows. This would mean that by opting for the administrative process, the employee would be waiving their right to a jury trial, something that already sometimes occurs in Title VII cases in federal court.[248] In some ways this would be similar to the process in Fair Housing Act claims, where a complainant has an option to proceed in federal court (with the availability of a jury trial) or remain in an administrative process with hearings before administrative law judges, and then only an appeal avenue to the Federal Circuit.[249] This would provide compliance with the CRA as well as allowing compensatory damages in either forum, with either side having an appeal to the Federal Circuit. The largest issue with this proposal is that it is unclear whether it provides enough of an incentive for employees to remain in the administrative process, as opposed to federal court. As a policy matter, the EEOC is already underfunded and overworked.[250] While transferring some of this burden to federal court would help, policy makers would need to not cut the EEOC further[251] or the EEOC dysfunction would continue and push even more cases into an already burdened federal court.[252] However, even this would be preferable to the intersecting and duplicative procedures that currently govern the law in this area.

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248 *See* Moberly, *supra* note 219, at 378–83. Plaintiffs do sometimes waive the right to a jury trial and compensatory damages in general. *See, e.g.*, Busby v. City of Tulsa, No. 11-CV-447-JED-JFJ, 2018 WL 7286180, at *1 (N.D. Okla. Oct. 23, 2018) (noting that the plaintiff in a Title VII disparate treatment case "waived jury trial and any claim for compensatory damages"); McColm v. Cal. State Univ. Trs., No. 92-16913, 92-16934, 1996 WL 380484, at *1 (9th Cir. July 5, 1996) ("[The plaintiff's] attorney waived jury trial on the record at a pretrial conference, noting that [the plaintiff] was requesting only equitable relief, including back pay."). Moberly cited both cases. Moberly, *supra* note 219, at 399 n.456.

249 *See supra* note 143.

250 *See supra* text accompanying note 179.

251 *Trump Is Making It Easier for Employers to Discriminate. This Stifles Equity and Hurts Economic Growth.*, ECON. POL'Y INST.: BLOG (May 27, 2025, at 11:18 PT), https://www.epi.org/blog/trump-is-making-it-easier-for-employers-to-discriminate-this-stifles-equity-and-hurts-economic-growth/ [https://perma.cc/FYH9-5PPS] ("When adjusted for inflation (2024 dollars), the EEOC's budget declined slightly in the 2000s (-1.7%) before falling significantly in the 2010s (-11.9%) . . . . While staffing levels increased between 2020 and 2024, the budget declined by 3.6%.").

252 *See* Jon O. Newman, *The Current Challenge of Federal Court Reform*, 108 CALIF. L. REV. 905, 911–12 (2020) ("[C]aseload volume has risen, and with increases in population, not to mention new grounds for litigation, it will continue to increase.").

V. CONCLUSION

The current processes and procedures for federal sector employment law are a tangled mess that is patently unfair to federal agencies, while also creating a system where employees, even when successful, have dedicated years of their lives to litigation. While the promise of less formal agency procedures may seem appealing to employees who want to represent themselves, the procedures involved are so complicated as to almost require professional legal representation with expertise in this area. As multiple commentators have stated, this state of the law cannot continue, and in reforming the system, legislators and agencies should focus on pruning off unnecessary appellate branches, the equalization of appeal rights, and the establishment of the Federal Circuit as the primary authority (under the Supreme Court) responsible for hearing appeals. Until such reforms are made, both agencies and employees will continue to wander through the labyrinth knowing that, no matter how long it takes, the only way out is through.

The Military Discharge Review Boards' Irregular Presumption of Regularity

Jessica Lynn Wherry

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The Military Discharge Review Boards' Irregular Presumption of Regularity

Jessica Lynn Wherry∗

"There is a presumption of regularity in the conduct of governmental affairs." With these twelve words in the Department of Defense's Code of Federal Regulations, the military discharge review boards (DRBs) have denied relief to thousands of veteran-applicants seeking a discharge upgrade. While seemingly innocuous, this administrative principle has become a nearly insurmountable barrier to relief for veterans with a less-than-honorable discharge. Veterans with a less-than-honorable discharge are generally ineligible for a range of veterans benefits, including health care and education benefits, and they have higher suicide rates compared to honorably discharged veterans.

For most veteran-applicants, the administrative path to a discharge upgrade offers little more than a dead end. The DRBs routinely deny hundreds of discharge upgrade requests every year, often relying on a mere statement of the presumption of regularity without explanation. Used in this way, the presumption effectively operates as a rubber-stamp to affirm the original discharge characterization rather than as a framework for analyzing a discharge upgrade request.

Despite its wide-reaching negative impact on veterans, the presumption as used by the DRBs has received little scholarly attention. This Article offers the first in-depth examination of the presumption's regulatory history, revealing critical flaws in application. I argue that the DRBs erroneously apply the presumption and identify six irregularities in support of this thesis. I identify these irregularities in contrast to the presumption of regularity in other contexts and further characterize the irregularities as inconsistent with the DRBs' governing body of regulations and other guidance documents that demand more than a rubber-stamp. The Article then offers four parameters for resolving or at least mitigating the irregularities, with an eye toward full, fair, and impartial review balanced with an appropriate level of deference to the government.

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I. INTRODUCTION

"There is a presumption of regularity in the conduct of governmental affairs."[1] With these twelve words, the military discharge review boards (DRBs) have denied relief to thousands of veteran-applicants seeking a discharge upgrade. While seemingly innocuous, this administrative principle has become a nearly insurmountable barrier to relief for thousands of veterans with a less-than-honorable discharge.[2]

No one joins the military with the expectation that they will get a less-than-honorable discharge, yet, since 1941, millions of servicemembers have received one.[3] In the years 2002 through the first quarter of 2024, over 850,000 servicemembers received a less-than-honorable discharge[4]—a discharge characterization that can be devastating. Veterans with a less-than-honorable discharge are generally ineligible for a range of veterans benefits, including health care and education benefits.[5] Without access to benefits, veterans may experience "collateral consequences" including loss of access to state, federal, and Department of Veterans Affairs (VA) benefits, such as healthcare, housing, education,

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1 32 C.F.R. § 70.8(b)(12)(vi) (2025).

2 As suggested by several readers, this introduction could include examples of veterans who have struggled to receive a discharge upgrade and the consequences of their unsuccessful attempts. Illustrating the problem through narrative examples is a technique I have often used in my previous work. *See, e.g.*, Jessica Lynn Wherry, *Kicked Out, Kicked Again: The Discharge Review Boards' Illiberal Application of Liberal Consideration for Veterans with Post-Traumatic Stress Disorder*, 108 CALIF. L. REV. 1357, 1359–65 (2020) [hereinafter Wherry, *Kicked Out, Kicked Again*]. Indeed, it is a technique I recommend in my co-authored textbook on scholarly writing. JESSICA LYNN WHERRY & KRISTEN E. MURRAY, SCHOLARLY WRITING: IDEAS, EXAMPLES, AND EXECUTION 165–77 (4th ed. 2025). Here, however, I intentionally do not include narrative examples to avoid distracting the reader from this Article's goal to force into the light the story of the boards' egregious misapplication of the presumption of regularity.

3 *See* David F. Addlestone, *Preface* to MARGARET KUZMA ET AL., MILITARY DISCHARGE UPGRADE: LEGAL PRACTICE MANUAL, at xliii (2021) (citing VETERANS LEGAL CLINIC, LEGAL SERVS. CTR. OF HARVARD L. SCH., UNDERSERVED: HOW THE VA WRONGFULLY EXCLUDES VETERANS WITH BAD PAPER 43 (2016), https://www.swords-to-plowshares.org/research-publications/underserved [https://perma.cc/7V7B-HR5V]).

4 *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-25-107354, MILITARY DISCHARGE: ACTIONS NEEDED TO HELP ENSURE CONSISTENT AND TIMELY UPGRADE DECISIONS 75–81 (2025). This is nearly 20% of the total servicemembers discharged during this time period. *See id.*

5 *See Veterans Benefits Administration: Applying for Benefits and Your Character of Discharge*, U.S. DEP'T OF VETERANS AFFS. (Apr. 16, 2025) [hereinafter *Veterans Benefits Administration*], https://www.benefits.va.gov/benefits/character_of_discharge.asp [https://perma.cc/2R9L-QB6C]; SUNDIATA SIDIBE & FRANCISCO UNGER, VETERANS LEGAL SERVS. CLINIC, UNFINISHED BUSINESS: CORRECTING "BAD PAPER" FOR VETERANS WITH PTSD 3 (2017) (identifying discharge requirements for disability compensation, education, and healthcare benefits, among others).

and employment programs, as well as "[m]oral [i]njury."[6] Furthermore, veterans with a less-than-honorable discharge "take their own lives twice as often as other veterans."[7]

A less-than-honorable discharge is not necessarily permanent. Veteran-applicants can seek an upgrade through an administrative process.[8] Unfortunately, for many, this process is just another barrier; the DRBs deny hundreds of discharge upgrade requests every year.[9] In the first quarter of 2025, the rate of denial was about 50%, with a staggering disparity among the boards.[10] The Air Force DRB (AFDRB) denied 92.4% of mental health claims, 100% of sexual assault claims, and 50% of claims other than mental health and sexual assault.[11] The Army DRB (ADRB) denied 47.9% of mental health claims, 31.1% of sexual assault claims, and 35% of other claims.[12] The Naval DRB (NDRB) denied 56.7% of mental health claims, 61.1% of sexual

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6 Hugh McClean, *Discharged and Discarded: The Collateral Consequences of a Less-than-Honorable Military Discharge*, 121 COLUM. L. REV. 2203, 2231–55 (2021) (cataloging the collateral consequences of a less-than-honorable discharge and comparing those consequences to collateral consequences in the criminal context).

Professor McClean defines collateral consequences as "the legal constraints placed on individuals with criminal records in the communities to which they return." *Id.* at 2219–20; *see* HUM. RTS. WATCH, BOOTED: LACK OF RECOURSE FOR WRONGFULLY DISCHARGED US MILITARY RAPE SURVIVORS 4–5 (2016) (discussing the correlation between "bad paper" and "high suicide rates, homelessness, and imprisonment").

7 Michael J. Wishnie, *"A Boy Gets into Trouble": Service Members, Civil Rights, and Veterans' Law Exceptionalism*, 97 B.U. L. REV. 1709, 1724 (2017); *see also* VETERANS LEGAL CLINIC, LEGAL SERVS. CTR. OF HARVARD L. SCH., UNDERSERVED: HOW THE VA WRONGFULLY EXCLUDES VETERANS WITH BAD PAPER 43 (2016), https://www.swords-to-plowshares.org/research-publications/underserved [https://perma.cc/5G52-Y587] ("Veterans with bad paper discharges are often in great need of the VA's support. They are more likely to have mental health conditions and twice as likely to commit suicide. They are more likely to be homeless and to be involved with the criminal justice system.").

8 10 U.S.C. §§ 1552–1553; *see infra* Part II.

9 *See* HUM. RTS. WATCH, *supra* note 6, at 5. The DRBs have been under scrutiny as their historically low grant rates have kept thousands of veterans from receiving the recognition and benefits that they deserve. *See id.* ("The vast majority of applicants seeking to alter their discharge status (well over 90 percent and in some years as high as 99 percent) are rejected . . . .").

Multiple class action lawsuits filed by Yale Law School's Veterans Legal Services Clinic and subsequent settlements also shed light on the DRBs' failure to implement policy in favor of granting relief. *See, e.g.*, Complaint at 4–6, 10–11, 23, 30, 32, 34, 36, 38–40, Manker v. Spencer, No. 3:18-cv-00372 (D. Conn. Mar. 2, 2018) [hereinafter Manker Complaint]. For a history of discharge upgrades, see Addlestone, *supra* note 3, at xxix–xlii.

10 *See* DEP'T OF THE AIR FORCE, SELECT CLAIMS DATA FOR REVIEW BOARDS: QUARTER (Jan - Mar 25) (Apr. 29, 2025), https://boards.law.af.mil/stats/CY2025/01.%20Jan-Mar%202025%20Quarterly%20Stats%20for%20Review%20Bds.pdf [https://perma.cc/AG2T-TZEX]. As of December 15, 2025, the boards had not posted any statistics for the second and third quarters of 2025. *Id.*

11 *Id.*

12 *Id.*

assault claims, and 38.3% of other claims.[13] Combined, the boards denied 611 of 1224 cases, at a rate of 49.9%.[14] This rate is consistent with recent years, though a bit lower than the overall denial rate of 57.6% in 2023.[15]

It may not be possible to determine the "right" rate of denial, but the disparities among the boards and the relative role the presumption of regularity plays at least merit examination. For example, the AFDRB's high rate of denial may correlate to its practice to include a statement of the presumption in every discharge decision while the ADRB's higher grant rate may reflect the absence of the presumption in discharge decisions. It's also possible to speculate that the boards get it wrong often enough to question the denial rates. In a recent report from the ADRB related to court-mandated reconsideration of previous denials, the Board reported that it granted relief in 47.5% of the cases it had previously denied.[16]

Though there can be legitimate reasons for denying relief, the DRBs often state the presumption of regularity as a justification for denial without explanation. For example, "Since the Board relies on the presumption of regularity, it concluded that the discharge received by the Applicant was appropriate."[17] Or, in disregarding veteran-applicants' statements in support of an upgrade, the NDRB relies on boilerplate language to invoke the presumption as a tool for denying relief: "The Applicant's statements alone do not overcome the government's presump-

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13 *Id.*

14 *Id.*

15 The DRBs' overall denial rate was 51% in 2024 and 57.6% in 2023. *Boards Statistics: CY 2023*, DEP'T OF THE A.F. (Jul. 18, 2025, at 13:01 CT), https://boards.law.af.mil/stats_CY2023.htm [https://perma.cc/5Q74-7HSQ] (choose "Jan-Mar 2023 Quarterly Stats for Review Bds.pdf," "Mar-Jun 2023 Quarterly Stats for Review Bds.pdf," "Jul-Sep 2023 Quarterly Stats for Review Bds.pdf," and "Oct-Dec 2023 Quarterly Stats for Review Bds.pdf"; then open the downloaded files); *Boards Statistics: CY 2024*, DEP'T OF THE A.F. (Jul. 18, 2025, at 13:01 CT), https://boards.law.af.mil/stats_CY2024.htm [https://perma.cc/M5LU-K6JQ] (choose "Jan-Mar 2024 Quarterly Stats for Review Bds.pdf," "Apr-Jun 2024 Quarterly Stats for Review Bds.pdf," "Jul-Sep 2024 Quarterly Stats for Review Bds.pdf," and "Oct-Dec 2024 Quarterly Stats for Review Bds.pdf"; then open the downloaded files).

16 *See* Letter from the Army Rev. Bds. Agency, Dep't of Def., to Charles S. Haight, Judge (Dec. 1, 2025), https://law.yale.edu/sites/default/files/documents/documents/pdf/Clinics/six-monthreport_letter_20251112b-final.pdf [https://perma.cc/XQL4-CEQF]; *see also infra* note 21 and text accompanying note 312.

17 Air Force Discharge Review Board Decisional Document, Case No. FD-2025-00036 (Air Force Rev. Bds. Agency Apr. 9, 2025), https://boards.law.af.mil/AF/DRB/CY2025/FD-2025-00036%2001%20FD202500036.pdf [https://perma.cc/75AL-A3FJ].

tion of regularity in this case."[18] This boilerplate language is typically included as a final statement that stands on its own without explanation.[19]

Used in this way, the presumption effectively operates as a rubber-stamp affirming the original discharge characterization rather than as a framework for analyzing a discharge upgrade request. The boards use the presumption to deny relief rather than engage with the presumption as a rebuttable standard as intended—and indeed as the word "presumption" implies.[20] Thus, the presumption can, and often does, stand in the way of a veteran-applicant's eligibility for health care, education benefits, and even peace of mind.

The presumption has been challenged in class action lawsuits[21] and on a case-by-case basis,[22] and veterans law scholars and advocates have criticized the presumption.[23] Yet, the pre-

18 Naval Discharge Review Board (NDRB) Discharge Review Decisional Document, No. ND22-00064 (Dep't of the Navy Apr. 11, 2022), https://boards.law.af.mil/NAVY_DRB_2022_Navy.htm [https://perma.cc/3DPA-KWWQ] (choose "ND22-00064.rtf"; then open the downloaded file).

19 *Id.*

20 Black's Law Dictionary defines "presumption of regularity" as "[t]he law's robust assumption that, unless there is a clear showing to the contrary, all official actions have taken place in the ordinary course of governmental administration and according to lawful authority." *Presumption of Regularity*, BLACK'S LAW DICTIONARY (12th ed. 2024). That there could be "a clear showing to the contrary" means the presumption is rebuttable rather than absolute. *See id.* A conclusive presumption is one "that cannot be overcome by any additional evidence or argument because it is accepted as irrefutable proof that establishes a fact beyond dispute . . . ." *Conclusive Presumption*, BLACK'S LAW DICTIONARY (12th ed. 2024).

21 *See, e.g.*, Manker Complaint, *supra* note 9, at ¶¶ 17–19, 92–94, 185–86, 209, 214–15, 233, 240. Though *Manker* and other cases settled, the settlements did not reflect a substantive determination on the presumption of regularity. For example, the NDRB agreed to annual training on the presumption of regularity, but nothing further. *See* Stipulation and Agreement of Settlement at 15, Manker v. Del Toro, No. 3:18-cv-00372 (D. Conn. Sep. 17, 2021). The class action settlement against the Army, *Kennedy v. McCarthy*, made no mention of the presumption of regularity in the settlement agreement. *See generally* Stipulation and Agreement of Settlement, No. 3:16-cv-02010 (D. Conn. Nov. 17, 2020) (omitting the "presumption of regularity" language).

The same is true for the class action settlement against the Air Force. *See generally* Stipulation and Agreement of Settlement, Johnson v. Kendall, No. 3:21-cv-01214 (D. Conn. Apr. 24, 2023) (omitting the "presumption of regularity" language).

22 Anecdotal evidence of this includes conversations with veterans' advocates. For my clients, I have raised arguments (in written briefs and oral argument) about the presumption as problematic and explained why the board should not rely on the presumption in deciding the cases.

23 Jessica Lynn Wherry, Geo. U.L. Ctr., What Does 'Review' Mean in Discharge Review Board?, Address at the National Law School Veterans Clinic Consortium Annual Conference 2022 (June 23, 2022) (on file with author) (discussing the presumption of regularity and how the boards misinterpret the presumption as substantive); Wherry, *Kicked Out, Kicked Again*, *supra* note 2, at 1389–92.

sumption as used by the DRBs has received little scholarly attention. This Article offers the first in-depth examination of the presumption's regulatory history, revealing critical flaws in application. I argue that the DRBs misapply the presumption and identify six irregularities in support of this thesis. I identify these irregularities by contrasting applications of the presumption in other contexts and further characterize the irregularities as inconsistent with the DRBs' governing body of regulations and other guidance documents that demand more than a rubber-stamp. This Article thus begins a robust scholarly discussion by uncovering the numerous irregularities and setting the groundwork for resolving or at least mitigating these irregularities.

This Article's examination of the presumption as used by the DRBs proceeds as follows. In Part II, the Article provides brief background on discharge characterizations, the discharge upgrade process, and the DRBs. This background is intentionally brief to give the reader a basic understanding of what is at stake for veterans with a less-than-honorable discharge, the limited opportunity for discharge upgrade, and the discharge review boards' role in those decisions.

In Part III, the Article explores the body of law involving the presumption of regularity in two distinct areas: (1) generally in federal case law, and (2) in cases at the United States Court of Appeals for Veterans Claims (CAVC) involving VA mailing procedures. This discussion creates context for identifying and understanding the DRB presumption's irregularities in Part IV.

Part IV identifies six irregularities in the DRB presumption, beginning with irregularities related to the DRB presumption's regulatory history. This Article's exploration of the origin and regulatory history of the DRB presumption is significant because no other presumption of regularity has a robust regulatory framework. This regulatory history on its face is a significant irregularity. Furthermore, despite the DRBs' robust regulatory framework calling for explanation when relying on the presumption, DRB decisions are typically inconsistent with the prescribed framework, revealing further irregularities by way of misapplication of the presumption. Finally, this Part discusses irregularities in the intersection of branch-specific and Department of Defense (DoD) guidance, and how federal courts reinforce the presumption.

In Part V, the Article sketches out considerations for realigning the DRB presumption consistent with its regulatory framework and the broader body of law on the presumption of regularity. For example, the Article advocates for a robust analytical

framework for accurately and fairly applying the presumption of regularity as a path forward. The Article then concludes by calling for change as informed by the DRB presumption's irregularities.

II. DISCHARGE CHARACTERIZATIONS, DISCHARGE UPGRADES, AND MILITARY DISCHARGE REVIEW BOARDS

This Part is intentionally brief in focusing on only the background needed to understand the role of the presumption in discharge upgrades. Here, the Article identifies types of discharges, describes the mechanism for changing a discharge, and explains the DRBs' role in the discharge upgrade process. Interested readers may consult various resources for further background on military discharges and upgrades, including some of my previous work.[24]

A. Discharge Characterizations

Upon completion of service, a servicemember is discharged and their service is characterized based on the circumstances of their service and "a commander's discretionary determination."[25] There are two categories of discharge characterizations: administrative and punitive.[26] Administrative separations are the most common and include Honorable, General (Under Honorable Conditions), Under Other Than Honorable Conditions, and Uncharacterized.[27] Punitive discharges are Bad Conduct and Dishonorable.[28] Even though General (Under Honorable Conditions) and Under Other Than Honorable Conditions are administrative separations, they are punitive in nature. These less-than-honorable discharges are stigmatizing, and they "bar[] access to many veterans' benefits."[29] As mentioned in Part I and discussed in depth by Professor McClean, veterans with a less-than-honorable discharge may experience devastating collateral consequences ranging from ineligibility for veterans benefits and higher rates of homelessness and suicide. A veteran's discharge characterization can quite literally be a matter of life or death. Fortunately, there

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24 *See, e.g.*, Wherry, *Kicked Out, Kicked Again*, *supra* note 2, at 1365–70; Jessica Lynn Wherry, *Denied by Dysfunctional Design: How the DD-293 Application Form Thwarts Pro Se Veteran-Applicants' Discharge Upgrade Requests*, 74 AM. U. L. REV. 1057, 1059–67 (2025) [hereinafter Wherry, *Denied by Dysfunctional Design*]; KUZMA ET AL., *supra* note 3, at 13–62; McClean, *supra* note 6, at 2210–19.

25 Wherry, *Kicked Out, Kicked Again*, *supra* note 2, at 1368.

26 *Id.* at 1366.

27 *Id.*

28 *Id.*

29 *Id.* at 1368.

is a mechanism for changing a discharge characterization that can lead to restoration of benefits eligibility.[30]

B. Discharge Upgrade Requests and Grounds for Relief

Veterans with a less-than-honorable discharge may apply for a discharge upgrade by submitting the requisite application to a DRB, records correction board, or both depending on the timing and nature of the request.[31] Applications for discharge upgrade are submitted via a DoD form.[32] Veterans may ask for record review, a hearing, or both if they request record review first.[33] "The objective of a discharge review is to examine the propriety and equity of the applicant's discharge and to effect changes, if necessary."[34] In assessing a discharge, the regulations prohibit any factor from "requir[ing] automatic change or denial of a change in discharge."[35] The boards and Service Secretaries are obligated to "give full, fair, and impartial consideration[] to all applicable fac-

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30 *Veterans Benefits Administration*, *supra* note 5 (explaining that there is an alternative path to benefits via the VA's character of discharge determinations).

VA can "expand[] access to VA care and benefits for some former service members discharged under other than honorable conditions or by special court-martial." *Id.* For a discussion of the presumption of regularity in context of advocating for collaboration between VA and DoD, see Brent Filbert, Elizabeth G. Kubala & Seth M. Owens, *"Out of Step": How Executive Departments Must March Together in Recognizing "Honorable" Service*, SSRN (Feb. 4, 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6178245 [https://perma.cc/867M-X8NS].

31 *See Military/Civilian Records, DEERS, and DOW ID Cards: Request Correction of Military Records*, U.S. DEP'T OF DEF. (Sep. 5, 2025), https://www.defense.gov/Contact/Help-Center/Article/Article/2742476/request-correction-of-military-records/ [https://perma.cc/ECA5-6ZKF].

32 DEP'T OF DEF., OMB NO. 0704-0004, DD FORM 293: APPLICATION FOR THE REVIEW OF DISCHARGE FROM THE ARMED FORCES OF THE UNITED STATES (2025), https://www.esd.whs.mil/portals/54/documents/dd/forms/dd/dd0293.pdf [https://perma.cc/2PAV-JY9Q]; DEP'T OF DEF., OMB NO. 0704-0003, DD FORM 149: APPLICATION FOR CORRECTION OF MILITARY RECORD UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SECTION 1552 (2025), https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd0149.pdf [https://perma.cc/C8HN-622Q].

33 10 U.S.C. § 1553(c); *see also* KUZMA ET AL., *supra* note 3, at 66 ("Every applicant has the option for the Discharge Review Board to decide the application on a records review or to appear before the board at a personal appearance hearing. In most cases, it is preferable to first apply to the DRB for a records review . . . ."); Council of Rev. Bds., *FAQs*, DEP'T OF THE NAVY, https://www.secnav.navy.mil/mra/CORB/Pages/FAQS.aspx [https://perma.cc/RKS8-H6C6] (last visited Feb. 16, 2026) ("Determine a type of discharge review you prefer. If you never had a discharge review with the NDRB before, you are eligible for 2 reviews. The first one is a record review. Next is a personal appearance hearing review. However, if you choose to have a personal appearance hearing first, you will no longer be eligible for a document review or an additional personal appearance hearing.").

34 32 C.F.R. § 70.9(a) (2026); DEP'T OF DEF., INSTRUCTION NO. 1332.28, DISCHARGE REVIEW BOARD (DRB) PROCEDURES AND STANDARDS enclosure 4, para. E4.1 (2004) [hereinafter DODI 1332.28].

35 32 C.F.R. § 70.9(a); DODI 1332.28, *supra* note 34.

tors before reaching a decision."[36] The DRBs must "review[] the individual merits of each application on a case-by-case basis."[37]

There are three bases for relief: (1) impropriety (e.g., error of fact, law, or procedure), (2) inequity (e.g., current policies or procedures represent a substantial enhancement of rights), and (3) clemency (e.g., fundamental fairness and second chances). Only propriety and equity are included in the governing regulations while clemency has been more recently recognized in policy guidance.[38]

As for propriety, a discharge is "deemed proper unless" there is "an error of fact, law, procedure, or discretion associated with the discharge at the time of the issuance," and this error caused the discharge characterization.[39] Relief may also be granted on propriety grounds due to a policy change "made expressly retroactive to the type of discharge under consideration."[40]

There are three paths to relief based on equity. First, a discharge is inequitable when "the policies and procedures under which the applicant was discharged differ in material respects from policies and procedures currently applicable" as long as the "[c]urrent policies or procedures represent a substantial enhancement of the rights afforded . . . and [t]here is substantial doubt that the applicant would have received the same discharge if relevant current policies and procedures had been available . . . at the time of the discharge proceedings under consideration."[41] Second, there is an inequity if "the discharge was incon-

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36 32 C.F.R. § 70.9(a); DODI 1332.28, *supra* note 34.

37 32 C.F.R. § 70.9(b)(3). The DoDI does not include this reference to equity in the propriety subsection.

38 *See* 32 C.F.R. § 70.9(b)–(c); Memorandum from Robert L. Wilkie, Under Sec'y of Def. for Pers. & Readiness, to Sec'ys of the Mil. Dep'ts (July 25, 2018) [hereinafter Wilkie Memo], https://afrba-portal.cce.af.mil/app/assets/2018-Wilkie-Memo-25-Jul-2018-DRB-Guidance.pdf [https://perma.cc/Q5CU-P9V5].

39 32 C.F.R. § 70.9(b)(1)–(1)(i); *see* DODI 1332.28, *supra* note 34, enclosure 4, paras. E4.2.1–4.2.1.1.

40 32 C.F.R. § 70.9(b)(1)(ii); DODI 1332.28, *supra* note 34, enclosure 4, para. E4.2.1.2.

41 32 C.F.R. § 70.9(c)(1)(i)–(ii); DODI 1332.28, *supra* note 34, enclosure 4, paras. E4.3.1–4.3.1.2. For example, service members discharged for failing to comply with orders to receive the COVID-19 vaccine can receive an upgrade due to the rescission of the vaccine mandate. Memorandum from Lloyd J. Austin, Sec'y of Def., to Senior Pentagon Leadership et al. (Aug. 24, 2021), https://media.defense.gov/2021/Aug/25/2002838826/-1/-1/0/Memorandum-for-mandatory-coronavirus-disease-2019-vaccination-of-department-of-defense-service-members.pdf [https://perma.cc/WFQ5-GD8V]; Memorandum from Lloyd J. Austin, Sec'y of Def., to Sec'ys of the Mil. Servs. et al. (Nov. 30, 2021), https://media.defense.gov/2021/Nov/30/2002900918/-1/-1/1/MEMORANDUM-ON-CORONAVIRUS-DISEASE-2019-VACCINATION-FOR-MEMBERS-OF-THE-NATIONAL-GUARD-AND-THE-READY-RESERVE.PDF [https://perma.cc/U5CW-EZVT].

sistent with standards of discipline" that existed at the time of discharge for the applicant's particular branch of service.[42] Third, inequity can be determined "based upon consideration of the applicant's service record and other evidence presented to the DRB viewed in conjunction with the factors listed in this section . . . , even though the discharge was determined to have been otherwise equitable and proper at the time of issuance."[43] The nonexclusive factors are divided into two categories. "Quality of service" includes awards, time in service, service history, promotions or demotions, and civil or court-martial convictions.[44] "Capability to serve" includes (1) "[t]otal capabilities" as demonstrated by "age, educational level, and aptitude scores," (2) "[f]amily and [p]ersonal [p]roblems" that may have contributed to and therefore mitigated the veteran's behavior, (3) "[a]rbitrary or capricious action" that shows "a clear abuse of . . . authority," and (4) "[d]iscrimination."[45]

In addition to propriety and equity grounds, relief may be granted for clemency. In a July 25, 2018, memorandum to the military review boards, then Under Secretary of Defense Robert L. Wilkie directed the boards to "upgrade discharges or correct military records to ensure fundamental fairness."[46] Secretary Wilkie issued this memo in response to the "[i]ncreasing attention . . . being paid to pardons for criminal convictions and the circumstances under which citizens should be considered for second chances."[47] The guidance creates space for relief on the grounds of fairness.[48] The Wilkie Memo defines clemency as "re-

The DoD subsequently rescinded the vaccination mandate. Memorandum from Lloyd J. Austin, Sec'y of Def., to Senior Pentagon Leadership et al. (Jan. 10, 2023), https://media.defense.gov/2023/Jan/10/2003143118/-1/-1/1/SECRETARY-OF-DEFENSE-MEMO-ON-RESCISSION-OF-CORONAVIRUS-DISEASE-2019-VACCINATION-REQUIREMENTS-FOR-MEMBERS-OF-THE-ARMED-FORCES.PDF [https://perma.cc/FVL7-A37F]. As an example of how this policy change affects discharge upgrade requests, the AFDRB granted an upgrade because "involuntary separation actions were taken in accordance with valid lawful policy in effect at the time, however, the Applicant's discharge is now inequitable due to the changes in law and policy." Air Force Discharge Review Board Decisional Document, Case No. FD-2025-00025 (Air Force Rev. Bds. Agency Apr. 25, 2025), https://boards.law.af.mil/AF/DRB/CY2025/FD-2025-00025%2001%20FD202500025.pdf [https://perma.cc/9H9C-C9HH].

42 32 C.F.R. § 70.9(c)(2); DODI 1332.28, *supra* note 34, enclosure 4, para. E4.3.2.

43 32 C.F.R. § 70.9(c)(3); DODI 1332.28, *supra* note 34, enclosure 4, para. E4.3.3.

44 32 C.F.R. § 70.9(c)(3)(i); DoDI 1332.28, *supra* note 34, enclosure 4, para. E4.3.3.1.

45 32 C.F.R. § 70.9(c)(3)(ii); DoDI 1332.28, *supra* note 34, enclosure 4, para. E4.3.3.2.

46 Wilkie Memo, *supra* note 38.

47 *Id.*

48 *Id.* ("While not everyone should be pardoned, forgiven, or upgraded, in some cases, fairness dictates that relief should be granted.").

lief specifically granted from a criminal sentence and is a part of the broad authority that [military boards] have to ensure fundamental fairness."[49] Clemency in this context is broader than that and "applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds."[50] The Wilkie Memo sets forth twelve factors for consideration including "favor[ing] second chances" and recognizing that "[e]vidence in support of relief may come from sources other than a veteran's service record."[51] The Memo further directs the boards to consider another eighteen factors including "[l]ength of time since misconduct" and "[w]hether misconduct may have been youthful indiscretion."[52] Clemency is not yet codified in the regulations.

C. Military Discharge Review Boards

There are three main DRBs: Army, Naval (which reviews both Navy and Marine Corps applications), and Air Force.[53] A board is typically a three- or five-member panel of active-duty military servicemembers.[54] Board members are not law-trained and there is little information about what kind of training they receive. Most "decisions" are just templates with little reasoning, and a common "reason" for denial is the "presumption of regularity in the conduct of governmental affairs."[55] The boards are supposed to provide "uniformity among the Military Departments in

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49 *Id.* attach., para. 2.

50 *Id.* attach., para. 4.

51 *Id.* attach., para. 6(a–*l*).

52 *Id.* attach., para. 7(a–r). *See generally* Ashlyn Anderson-Keelin, *"I Was Young and Dumb": Why Age Should Be Considered in the Military Discharge Upgrade Process*, 12 TEX. A&M L. REV. 431 (2025) (offering proposals to factor age into the discharge upgrade process as an explicit consideration).

53 *See Boards of Review Reading Rooms*, DEP'T OF DEF., https://boards.law.af.mil/index.htm [https://perma.cc/G3L9-LP9R] (last visited Mar. 3, 2026) (listing the military DRBs, including one for the Air Force, the Army, and the Navy).

The Coast Guard also has a DRB, but that Board has fewer cases posted in comparison to the other boards. *See Coast Guard Discharge Review Board Records (DRB)*, U.S. COAST GUARD (Jan. 9, 2026), https://boards.law.af.mil/CG_DRB.htm [https://perma.cc/YN5W-UX3G]. There is also the DoD Discharge Appeal Review Board (DARB). In its first three annual reports, the DARB reported only one "viable request" without any context or result. *See DoD Discharge Appeal Review Board (DARB)*, DEP'T OF DEF. (Jul. 18, 2025), https://boards.law.af.mil/OSD_DARB.htm [https://perma.cc/CJ65-Z8XY].

54 10 U.S.C. § 1553(d)(1)(A).

55 32 C.F.R. § 70.8(b)(12)(vi) (2026); Wherry, *Kicked Out, Kicked Again*, *supra* note 2, at 1389 ("[T]he presumption is an often-used default basis to deny upgrade requests . . . [and it] assumes the original [discharge characterizations] were correct, lawful, and in good faith . . . .").

the rights afforded applicants in discharge reviews," but each branch has its own policies and procedures.[56]

III. THE PRESUMPTION OF REGULARITY

The presumption of regularity is a common law principle of administrative law with a long history reaching back to English common law.[57] The United States Supreme Court first stated the presumption in the 1926 case, *United States v. Chemical Foundation*: "[I]n the absence of clear evidence to the contrary, courts presume that [government officials] have properly discharged their official duties."[58] Generally speaking, official government acts performed by government officials are presumed to have been carried out properly.[59]

In examining the presumption of regularity in DRB decisions, this Article first explores the presumption in two other contexts—federal case law generally and CAVC case law involving VA mailing procedures—to better understand the presumption as a legal principle and how decisionmakers engage with it. The CAVC has a well-developed body of law involving the presumption of regularity in cases involving VA mailing practices within VA's duty to provide notice of decisions.[60] Thus, this Article identifies three categories of the presumption of regularity and will refer to them by category going forward:

(1) "General presumption," the general presumption of regularity in federal courts excluding the CAVC;

(2) "VA mailing presumption," the presumption of regularity in CAVC cases involving questions of VA mailing practices;[61] and

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56 32 C.F.R. § 70.4(b)(2); *see infra* Part V.

57 *See* Aram A. Gavoor & Steven A. Platt, *In Search of the Presumption of Regularity*, 74 FLA. L. REV. 729, 734–36 (2022) [hereinafter Gavoor & Platt, *In Search of*].

58 272 U.S. 1, 14–15 (1926); *see also* Gavoor & Platt, *In Search of*, *supra* note 57, at 737 (summarizing *Chemical Foundation* as "an early example of the presumption being used as a sword against the government instead of a shield").

59 *See* Gavoor & Platt, *In Search of*, *supra* note 57, at 733.

60 *See* 38 U.S.C. § 5104 (requiring VA to "provide to the claimant (and to the claimant's representative) notice of such decision"); 38 C.F.R. § 3.103(b)(1) (2026) ("Claimants and their representative are entitled to notice of any decision made by VA affecting the payment of benefits or the granting of relief."); *see also* § 3.103(f) (listing the elements required to be included in the notice); *infra* Section III.B (discussing the VA mailing presumption's analytical framework).

61 The Board of Veterans' Appeals (BVA) also relies on the VA mailing presumption. BVA decisions are consistent with the CAVC's approach to VA mailing decisions, but because they are non-precedential agency decisions, they are outside the scope of this Arti-

(3) "DRB presumption," the presumption of regularity as used by the DRBs.

Though all three categories of the presumption share a common origin in English common law and Supreme Court precedent citing English common law, the DRB presumption stands out in contrast to both the general presumption and the VA mailing presumption. While there are some similarities among the presumptions, the DRB presumption is used far more often and much more substantively than the other presumptions. Many veteran-applicants have had no chance at relief given the power of the presumption as wielded by the DRBs.

In this Part, I provide background on the general presumption and the VA mailing presumption to contextualize the forthcoming examination of the DRB presumption. The general presumption is flexible with legal principles that have sometimes suggested an expanded presumption and a varied level of engagement with the analytical framework. Given the CAVC's limited jurisdiction,[62] the VA mailing presumption has developed in a more concrete factual realm and with a clearer analytical framework, distinct from, but consistent with, the body of law involving the general presumption. While the general presumption lacks clarity on what generally counts as "clear evidence" to rebut the presumption, the VA mailing presumption operates within a concrete analytical framework and yields robust examples of what evidence counts as substantial enough to rebut the presumption.

Together, the general and VA mailing presumptions create a lens through which to view and examine the DRB presumption. After exploring the principles of the general presumption and the parameters of the VA mailing presumption, this Part will conclude by threading together the characteristics of the two presumptions before turning to an examination of the DRB presumption's irregularities. This discussion is intentionally limited in scope; it does not discuss the general presumption in depth but rather draws out governing principles based on the body of

cle. *See, e.g.*, Title Redacted by Agency, No. 23024631, 2023 WL 5707158, at *1–2 (Bd. Vet. App. Apr. 27, 2023).

62 *See* 38 U.S.C. § 7252(a) (establishing that the court has "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals"); *see also* Jonathan M. Gaffney, *U.S. Court of Appeals for Veterans Claims: A Brief Introduction*, CONG. RSCH. SERV. (Apr. 22, 2021), https://www.congress.gov/crs-product/IF11365 [https://perma.cc/H62Z-D6PK] ("These decisions concern entitlement to various types of VA benefits, including disability compensation, pensions, education benefits, and survivor benefits.").

law.[63] Given the nature of the CAVC case law, the discussion of the VA mailing presumption is more detailed in discussing the analytical framework.

A. Principles of the General Presumption of Regularity

Despite its long history, there is limited scholarship engaging with the presumption of regularity.[64] In a 2022 article, scholars Aram A. Gavoor and Steven A. Platt cataloged various instances of the presumption, explaining that the presumption of regularity "applies in a number of ways that are not identified by or discussed in the current literature or corpus of judicial opinions," and identified the "hazards of the presumption's vagueness."[65] The presumption of regularity is "amorphous" and "heavily weigh[s] in favor of the government."[66]

For the purposes of this Article, I limit the discussion to focus on what is relevant in the context of comparing the general presumption to the VA mailing presumption and ultimately to the DRB presumption to uncover the DRB presumption's irregularities.[67] Thus, I set forth the overarching characteristics of the general presumption with some examples for context.

The presumption of regularity gained some attention during the first Trump administration.[68] Scholars addressed the pre-

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63 Readers interested in learning more about the general presumption of regularity are encouraged to read Gavoor and Platt's article, *In Search of*, *supra* note 57, and Ryan Goodman et al., *The "Presumption of Regularity" in Trump Administration Litigation*, JUST SEC. (Nov. 20, 2025), https://www.justsecurity.org/120547/presumption-regularity-trump-administration-litigation/ [https://perma.cc/ACG7-HNHR].

64 *See* Gavoor & Platt, *In Search of*, *supra* note 57, at 731 (noting that the presumption is "a largely under-researched concept"); Wherry, *Kicked Out, Kicked Again*, *supra* note 2, at 1389–91.

65 Gavoor & Platt, *In Search of*, *supra* note 57, at 757. Gavoor and Platt catalog instances of the presumption of regularity in federal courts. *Id.* at 732. The presumption of regularity as used by the DRBs is outside the scope of Gavoor and Platt's work.

66 *Id.* at 733–34 ("[C]ourts are imprecise on the domain of the presumption of regularity. This classification uncertainty is exacerbated by the fact that the Supreme Court has not comprehensively set out the presumption's contours.").

Gavoor & Platt note the impossibility of "discern[ing] a unified conception of the presumption across the federal judiciary." *Id.* at 747.

67 *See* Note, *The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 HARV. L. REV. 2431 (2018) [hereinafter *The Presumption of Regularity*] (examining the basic typology and underlying theories of the presumption of regularity to "shed[] light on how the presumption has evolved alongside the Court's attitude"). *See generally* Gavoor & Platt, *In Search of*, *supra* note 57 (discussing the "contemporary domain of the presumption [of regularity] and its applications from its pre-Founding Era source").

68 *See The Presumption of Regularity*, *supra* note 67, at 2432 ("[T]he presumption has never been the subject of focused academic treatment."); Aram A. Gavoor & Steven A. Platt, *A History, Taxonomy and Qualified Defense of the Presumption of Regularity*,

sumption's imprecise contours and argued for "a strict presumption that a government official performed ministerial tasks and . . . [a] rebuttal standard for a preponderance of the evidence, not clear evidence."[69] Based on their robust research, Gavoor and Platt concluded that it was "impossible to discern a unified conception of the presumption across the federal judiciary."[70] The presumption can mean not only that "a public official followed all of the procedures required," but also something broader and harder to determine: that "a public official acted with lawful motivation."[71] The presumption, however, is not so amorphous as to legitimize any action. As Gavoor and Platt argued, "The current state of the presumption poses a threat with its unduly high rebuttal standard" and its "unbounded expansive use" that "amounts to an inappropriate distortion of the separated powers by executive aggrandizement."[72] With similar concerns about "unbounded expansive use," I draw on the general presumption to uncover the DRB presumption's irregularities.[73]

As to the broader scope of the general presumption, Gavoor and Platt cataloged "at least fifteen unique uses" of the presumption and identified over 800 cases citing *United*

LAWFARE (Oct. 6, 2021, at 10:53 PT) [hereinafter Gavoor & Platt, *A History*], https://www.lawfaremedia.org/article/history-taxonomy-and-qualified-defense-presumption-regularity [https://perma.cc/CR9Y-Q64Z] ("The presumption gained national significance during the Trump administration, but, with a few notable exceptions, the presumption of regularity has benefited from little scholarly engagement.").

69 Gavoor & Platt, *In Search of*, *supra* note 57, at 757; *see also* Gavoor & Platt, *A History*, *supra* note 68 ("We conclude by making the case that the Supreme Court or Congress should articulate a lawful and sensible doctrinal standard for the presumption of regularity to benefit each of the branches of the federal government and the American public."); Carissa Byrne Hessick, *A Bit of History on the Presumption of Regularity*, PRAWFSBLAWG (Jan. 14, 2019, at 7:06 PT), https://prawfsblawg.blogs.com/prawfsblawg/2019/01/a-bit-of-history-on-the-presumption-of-regularity.html [https://perma.cc/DD23-W9X4] ("[I]t is worth noting the shaky foundations of the modern presumption of regularity. History shows that it is an evidentiary presumption that applied to public and private actors alike; it was used to allocate burdens of proof, not to prevent discovery or to insulate executive action from judicial review.").

70 Gavoor & Platt, *A History*, *supra* note 68.

71 Gavoor & Platt, *In Search of*, *supra* note 57, at 743.

72 *Id.* at 762.

73 Though in this Article I do not question the presumption of regularity's general legitimacy or explore potential inconsistencies between the presumption and due process, the set of class actions against the boards raised due process concerns related to the presumption of regularity. *See, e.g.*, Complaint ¶ 169, Johnson v. Kendall, No. 3:21-cv-01214 (D. Conn. filed Sep. 13, 2021) ("The failure of the AFDRB to explain how the presumption of regularity operates, when it is rebutted, and why it is justified results in veterans lacking adequate notice of the standards that will be used to adjudicate their applications. This violates constitutional rights to procedural due process, which is a violation of the [Administrative Procedure Act]'s guarantee of constitutional agency actions.").

These due process questions certainly deserve further research.

States v. Chemical Foundation as of August 14, 2021.[74] The "fifteen unique uses" ranged from general to specific. For example, the general uses include a "presumption that a public official has the authority to act" and "presumption that an agency has produced a complete administrative record."[75] More specifically, there is a "presumption that a prosecutor is not committing unconstitutional selective prosecution."[76] Despite the impossibility of discerning "a unified conception of the general presumption," there are four identifiable characteristics of the general presumption relevant to this Article.

1. The Presumption of Regularity is Deferential

First, the presumption of regularity is deferential to government actor decisions. As stated in *Chemical Foundation*, "The presumption of regularity supports the official acts of public officers" and "courts presume that they have properly discharged their duties."[77] That, of course, seems to be the basic purpose of the presumption: to give deference to government actors.[78] Deference is at the core of the presumption, but it is not deference unbounded.

2. The Presumption Requires Engagement with an Analytical Framework

Second, because the general presumption is "not . . . a legal fiction wholly beyond judicial review or impervious to rebuttal,"[79] it requires engagement with an analytical framework. Though the framework is not always clearly stated in federal case law, it consists of three steps: (1) applicability, (2) rebuttal evidence, and (3) shifted burden. For example, in a 2022 case, *Broadgate,*

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74 Gavoor and Platt organized the cases into several categories including "Cases In Which the Presumption of Regularity Is Described As Being Rebutted (to any degree)," "Cases In Which The Presumption Of Regularity Was Not Rebutted," and "Cases In Which The Court Takes No Position Or Only Describes The Presumption Of Regularity." Gavoor & Platt, *In Search of*, *supra* note 57, at 732, 772–74.

75 *Id.* at 732, 748.

76 *Id.* at 750.

77 United States v. Chem. Found., Inc., 272 U.S. 1, 14–15 (1926) (first citing The Confiscation Cases, 87 U.S. (20 Wall) 92, 108 (1873); then citing United States v. Page, 137 U.S. 673, 679–80 (1891); and then citing United States v. Nix, 189 U.S. 199, 205 (1903)); *see also* Hessick, *supra* note 69 (explaining how "the presumption has expanded well beyond the cases that have been used to justify it").

78 *See* Alaska Airlines v. Johnson, 8 F.3d 791, 795 (Fed. Cir. 1993) ("[T]his presumption usually runs in favor of the government."); Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157, 174 (2004) (referring to the presumption as "a presumption of legitimacy" of "the Government's official conduct").

79 Gavoor & Platt, *In Search of*, *supra* note 57, at 761.

Inc. v. Secretary, Department of Labor, the United States District Court for the District of Michigan first determined that the presumption applied to the case because it involved a question of a public officer's authority to take an action.[80] In this case, the action was issuing a determination letter, and the court decided that, because the public officer issued the letter, she had authority to do so, and thus "create[d] a presumption that she did."[81] The court then assessed whether the presumption was rebutted by clear evidence, noting that the plaintiff "produced no evidence to rebut" and thus the presumption was not rebutted.[82] In that situation, there was no shifting of the burden to the agency to prove actual authority to issue the letter because the presumption was not rebutted.[83] But the court did recognize that had the presumption been rebutted, the burden would have shifted to the Secretary to "produce evidence to show that the District Director was actually redelegated authority to issue the letter."[84]

In some instances, the first step—applicability—is assumed. For example, in a case involving prosecutorial discretion, the Supreme Court explained, "'The presumption of regularity supports' their prosecutorial decisions and, 'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'"[85] The Court did not explicitly make an initial determination as to whether the presumption applied to the case but noted that "[a] selective prosecution case asks a court to exercise judicial power over a 'special province' of the Executive."[86] Thus, the Court implied that the presumption applied to prosecutors because "they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'"[87]

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80 631 F. Supp. 3d 449, 458 (E.D. Mich. 2022).

81 *Id.*

82 *Id.*

83 *Id.* at 457–58. Consistent with *Broadgate*, the Federal Circuit in *Alaska Airlines* also engaged a three-step analytical framework, though the court did not identify the framework in those terms. *Alaska Airlines*, 8 F.3d at 795–96.

84 *Broadgate*, 631 F. Supp. 3d at 458. Interestingly, the court relied on a CAVC case, *Romero v. Tran*, to acknowledge the burden shifting after the presumption is rebutted and distinguished that situation from this case. *Id.* (citing Romero v. Tran, 33 Vet. App. 252 (2021)); *see also infra* Section III.B.ii (discussion of *Romero*).

85 United States v. Armstrong, 517 U.S. 456, 464 (1996) (quoting United States v. Chem. Found., Inc., 272 U.S. 1, 14–15 (1926)).

86 *Id.* at 464.

87 *Id.*

3. Some Level of Evidence is Required to Rebut the Presumption

Third, and consistent with the preceding discussion about the analytical framework, some level of evidence is required to rebut the presumption—but what exactly that level is and what it takes to satisfy it are unclear.[88] According to *Chemical Foundation*, "clear evidence to the contrary" is required to rebut the presumption but there is no unified understanding of "clear evidence" in this context.[89] For example, in *Latif v. Obama*, dissenting Judge Tatel questioned the majority's application of the general presumption: "Whether the presumption can be overcome by a preponderance of the evidence or by clear and specific evidence—this court never says which . . . ."[90]

In the selective-prosecution case *United States v. Armstrong*, the Court noted the "clear evidence" standard for rebuttal. The Court did not explain the standard but determined that, in selective-prosecution claims, "clear evidence" means "a showing of failure to prosecute similarly situated individuals."[91] The Court discussed "convincing direct evidence" and "indisputable evidence" in another case, *Hunter v. Underwood*.[92] Distinguishing from *Hunter*, the Court further explained what was needed: "some evidence that similarly situated defendants of other races could have been prosecuted, but were not."[93] The Court then rejected each piece of evidence offered by the respondents to establish a failure to prosecute similarly situated individuals for various inadequacies: a study that did not "identify individuals who were not black," a newspaper article about irrelevant "drug sentencing laws," and affidavits that "recounted hearsay and reported personal conclusions based on anecdotal evidence."[94] The Court thus suggested, without articulating to a certainty, that

88 *See* Gavoor & Platt, *In Search of*, *supra* note 57, at 765–66 (calling for the Supreme Court to "clarify" the "clear evidence" required by *Chemical Foundation* and advocating for "the preponderance of the evidence" standard instead as the requisite for rebuttal).

89 *Chem. Found.*, 272 U.S. at 14–15. Gavoor & Platt argue that "clear evidence" is too high a burden under the Administrative Procedure Act and SCOTUS decisions. *See* Gavoor & Platt, *In Search of*, *supra* note 57, at 765. They suggest that "the preponderance of the evidence standard" is a better standard for showing that "the government is acting unlawfully." *Id.* at 765.

90 666 F.3d 746, 779 (D.C. Cir. 2011) (Tatel, J., dissenting).

91 *Armstrong*, 517 U.S. at 467.

92 *Id.* (citing Hunter v. Underwood, 471 U.S. 222, 227, 229–31 (1985)).

93 *Id.* at 469.

94 *Id.* at 470.

this flawed evidence did not rise to the level of "clear evidence,"[95] whatever that means. Even so, it remains the case that some level of evidence is required and—significantly—that it must be evaluated within the presumption's analytical framework.

Finally, a recent case involving a challenge to an executive order that "removed [substantial] bargaining rights from approximately two-thirds of the federal workforce" addressed the presumption of regularity, followed the standard three-step analytical framework, and assessed each piece of evidence.[96] In looking for "'clear evidence' that the official did not discharge his or her official duties properly," the court determined that the plaintiff rebutted the presumption, thus satisfying the requirement for clear evidence.[97] First, the executive order was in "stark contrast" to relevant congressional findings and "directly contrary to Congress's conclusion" about "labor policy and labor organizations."[98] Second, statements in the "White House Fact Sheet reflect[ed] retaliatory motive towards certain unions."[99] Third, the executive order was "in furtherance of unrelated policy goals rather than based on the statutory criteria."[100] Thus, in sum, clear evidence to rebut includes various instances of measurable contradictions and inconsistencies that at least indicate the possibility of an irregularity.[101]

4. The Presumption Exists Only in Common Law

Fourth, the presumption is not codified in the U.S. Code.[102]

B. The VA Mailing Presumption's Analytical Framework

As a federal court, the United States Court of Appeals for Veterans Claims could be included in the discussion of the general presumption in federal case law, but I discuss the presumption in CAVC case law separately and in greater depth because of

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95 *Id.* at 470–71.

96 Nat'l Treasury Emps. Union v. Trump, 780 F. Supp. 3d 237, 245 (D.D.C.), *stay granted*, 2025 WL 1441563 (D.C. Cir. 2025).

97 *Id.* at 254 (quoting Owlfeather-Gorbey v. Avery, 119 F.4th 78, 86 (D.C. Cir. 2024)).

98 *Id.* at 254–55.

99 *Id.* at 255.

100 *Id.* at 254.

101 *See* Am. Foreign Serv. Ass'n v. Trump, 783 F. Supp. 3d 248, 262 (D.D.C.) (citing *Nat'l Treasury Emps. Union*, 780 F. Supp. 3d at 254), *stay granted*, 2025 WL 1742853 (D.C. Cir. 2025). In both cases, the court did not address burden shifting because the procedural posture of the case was a preliminary injunction. *Id.*; *Nat'l Treasury Emps. Union*, 780 F. Supp. 3d at 254.

102 Gavoor & Platt, *In Search of*, *supra* note 57, at 743.

its unique characteristics. First, unlike the general presumption that covers a vast range of factual scenarios, the VA mailing presumption applies to a narrow context: VA's official duty to provide notice to a claimant and claimant's representative, if any. Second, the presumption in CAVC case law has a more developed analytical framework, though it is consistent with the general presumption. Third, the CAVC case law has developed an understanding of what does and does not count as "clear evidence." I provide some limited background on the veterans disability compensation benefits system to set the stage for explaining the VA mailing presumption.

1. A Brief Sidebar: Notice and Deadlines in Veterans Disability Compensation Benefits Claims

For context, I briefly explain veterans disability compensation as it relates to the VA mailing presumption.[103] Veterans with a service-connected disability or condition may be eligible for veterans disability compensation benefits.[104] The process for applying for benefits involves submitting forms and evidence to VA. These applications are called "claims"[105] and are processed by a regional office.[106] Regional office decisions may be appealed.[107]

Throughout the claims and appeals processes, there are statutory notice requirements for VA to communicate information with veteran-claimants and veteran-claimants' representatives, if any. For example, 38 U.S.C. § 5104(a) requires that

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103 As any veterans advocate can attest, the law and regulatory scheme of veterans disability compensation benefits is complicated—much more complicated than this brief sidebar suggests.

104 *Eligibility for VA Disability Benefits*, U.S. DEP'T OF VETERANS AFFS. (Apr. 23, 2025), https://www.va.gov/disability/eligibility/ [https://perma.cc/N6YU-CEYZ].

105 *VA Disability Compensation*, U.S. DEP'T OF VETERANS AFFS. (Sep. 16, 2025), https://www.va.gov/disability/ [https://perma.cc/6PG2-X3RV]; *see also* STACEY-RAE SIMCOX & DAVID E. BOELZNER, VETERANS BENEFITS: LAW, THEORY, AND PRACTICE 29 (2023) (explaining the "claims" are processed for the various types of benefits that VA offers).

106 *How to File a VA Disability Claim*, U.S. DEP'T OF VETERANS AFFS. (Jan. 6, 2026), https://www.va.gov/disability/how-to-file-claim/ [https://perma.cc/KEF3-8LQM]; *see also* SIMCOX & BOELZNER, *supra* note 105, at 29 (explaining how the regional office process has changed over time); Michael Serota & Michelle Singer, *Veterans' Benefits and Due Process*, 90 NEB. L. REV. 388, 397–99 (2011) (describing the claims process at the regional office level).

107 *See VA Decision Reviews and Appeals*, U.S. DEP'T OF VETERANS AFFS. (Feb. 10, 2026), https://www.va.gov/decision-reviews/ [https://perma.cc/GQ56-J3KH] (identifying the three decision review options: supplemental claim, higher-level review, or board appeal); *Choosing a Decision Review Option*, U.S. DEP'T OF VETERANS AFFS. (Apr. 19, 2024), https://www.va.gov/resources/choosing-a-decision-review-option/ [https://perma.cc/ZAT8-KERT]; *see also* SIMCOX & BOELZNER, *supra* note 105, at 29–33 (describing the appeals process).

"the Secretary shall, on a timely basis, provide to the claimant (and to the claimant's representative) notice of [a decision by the Secretary involving a benefits claim]. The notice shall include an explanation of the procedure for obtaining review of the decision."[108] The Board of Veterans' Appeals (one of the avenues of appeal) has a similar notice requirement under 38 U.S.C. § 7104(e).[109] Notice is typically sent by traditional mail to the veteran's last known physical address as indicated in the veteran's claim file.[110] These statutory "official duties" to provide notice trigger the presumption of regularity because the presumption generally applies to official government acts, including these requirements to provide notice.

2. The VA Mailing Presumption's Concrete Analytical Framework: *Romero v. Tran*

Within this context of VA notice requirements, the CAVC has a robust body of case law involving the presumption of regularity.[111] This body of law provides an example of how the presumption of regularity operates within another agency, in contrast to DoD. This section discusses *Romero v. Tran* in detail to define and explain the VA mailing presumption.

Building on previous CAVC decisions, now-Chief Judge Allen provided a primer on the presumption of regularity and set forth a clear analytical framework in the 2021 case, *Romero v. Tran*. Judge Allen's decision in *Romero* began with a clear description of the presumption of regularity, rooting the presumption in *Chemical Foundation*:

> This case is about the presumption of regularity—how it may be triggered as well as rebutted. Courts often cite *United States v. Chemical Foundation, Inc.*, for the Supreme Court's statement of the presump-

108 38 U.S.C. § 5104(a); *see also* 38 C.F.R. § 3.103(b)(1) (2026) (noting when claimants and their representatives have a right to notice).

109 38 U.S.C. § 7104(e) ("After reaching a decision on an appeal, the Board shall promptly issue notice (as that term is defined in section 5100 of this title) of such decision . . . .").

110 *See* 38 C.F.R. § 19.30(a) (explaining that the BVA must send the Statement of the Case and directions for appealing to "the appellant at the latest address of record and a separate copy provided to his or her representative (if any)").

111 The Federal Circuit recognized the CAVC's analytical framework in *Toomer v. Shinseki*, 524 F. App'x. 666, 668–69 (Fed. Cir. 2013) ("The Veterans Court has developed a specific process to evaluate whether the veteran has rebutted the presumption. Beginning with *Ashley v. Derwinski*, 2 Vet. App. 307, 309 (1992), and continuing in a long line of cases, the Veterans Court requires clear evidence that the VA's normal mailing practices were not followed. If the veteran presents clear evidence to rebut the presumption, the burden then shifts to the government to affirmatively prove that they followed their normal practices and mailed the decision.").

> tion: "The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." The presumption of regularity reflects Federal courts' deference to the other branches of Government and efficiency concerns. But it is not a carte blanche. After all, the presumption of regularity is rebuttable.[112]

In brief, the facts in *Romero* involved the VA mailing a Statement of the Case (SOC) to a veteran-applicant without mailing a copy to the veteran's representative despite VA's legal duty to do so.[113] According to the governing appeals process at the time, an appeal of a SOC must be submitted to VA within 60 days from the date on the SOC.[114] The SOC, dated August 16, 2017, "den[ied] [the veteran's] claim for an increased disability rating for [post-traumatic stress disorder], as well as entitlement to [Total Disability Individual Employability] and service connection for the other conditions."[115] Upon discovering on November 2, 2017—a date well past the sixty-day period that began on August 16, 2017—that the veteran-applicant's claims file included the August 16, 2017, SOC, the veteran-applicant's representative realized they had not received a copy and notified VA of the error.[116] The representative therefore "argu[ed] that VA was not entitled to the presumption of regularity and alleg[ed] ongoing problems with VA's mailing system that called into question its regularity."[117] Four days after discovering the error, the representative filed a Substantive Appeal of "all the issues listed in the SOC"—well beyond the sixty-day time limit if measured by the date on the SOC that the representative did not receive.[118] The representative "argued that the appeal was timely because VA failed to notify it of the SOC," and again "assert[ed] that VA's mailing practices are irregular."[119] VA determined that the appeal was untimely because it was submitted more than sixty days after August 16, 2017.[120] The representa-

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112 Romero v. Tran, 33 Vet. App. 252, 254 (2021) (quoting United States v. Chem. Found., Inc., 272 U.S. 1, 14–15 (1926)).

113 *Id.* at 254–55.

114 *Manage a Legacy VA Appeal*, U.S. DEP'T OF VETERANS AFFS. (Apr. 30, 2025), https://www.va.gov/decision-reviews/legacy-appeals/ [https://perma.cc/UP4N-XDZX]. This sixty-day period was under the legacy system that applied at the time. *Id.*

115 *Romero*, 33 Vet. App. at 255.

116 *Id.* at 255–56.

117 *Id.* at 256.

118 *Id.*

119 *Id.*

120 *Id.*

tive then filed a Notice of Appeal, "arguing for the timeliness of appellant's Substantive Appeal."[121]

The representative put forth three documents in support of the argument that the Substantive Appeal was timely. First, a 2017 Government Accountability Office study and report of VA mailing concluded that "VA is not managing its mail program effectively, as it lacks key elements of an effective mail management program," and "VA is unable to determine the extent to which its mail operations are efficient and effective."[122] Second, a lawyer from the representative firm provided a statement of his "aware[ness] of at least 863 instances between July 2015 and May 2018 where VA failed to mail him a copy of a case-related document."[123] In conversations between firm staff and VA employees, VA "acknowledged VA's continued failure to consistently mail representatives copies of their claimants' decisional documents as required" by law.[124] VA did not dispute this description of the conversation.[125] Third, "Diane Rauber, executive director of the National Organization of Veterans' Advocates, Inc. (NOVA) . . . described NOVA's efforts to inform VA of mailing failures."[126] Rauber noted "272 examples of VA mailing failures."[127]

In denying the appeal as untimely, the Board of Veterans' Appeals determined that VA mailed a copy of the August 16, 2017, SOC to the representative; that the SOC included correct addresses for both the veteran and the representative; that the Substantive Appeal was filed on November 6, 2017; and that "the evidence she submitted was 'not clear evidence sufficient to rebut the presumption that the August 16, 2017[,] SOC was mailed to' appellant and [her representative]."[128]

The Board recognized "the substantial evidence . . . that reflects a widespread problem with VA not mailing correspondence," but then concluded that "there is no clear evidence that VA did not mail the actual August 2017 SOC."[129] Furthermore, "[t]he Board reasoned that [the representative's] statement of nonre-

121 *Id.*
122 *Id.*
123 *Id.*
124 *Id.*
125 *Id.*
126 *Id.* at 256–57.
127 *Id.* at 257.
128 *Id.*
129 *Id.*

ceipt alone was not sufficient to rebut the presumption."[130] The Board explained that evidence to clearly rebut the presumption of regularity "should be specific to the facts of the case at hand."[131] Although there was evidence of a general mailing problem, the Board stated that "the Veteran has not submitted any evidence specific to this Veteran's file of the mailing practices as applicable to the handling of this Veteran's case."[132] The Board also relied on VA's acknowledgement of a general mailing problem but lack of admitting a problem with the specific August 16, 2017, mailing.[133] With a focus on what was missing, "[t]he Board concluded that the evidence '[d]id not *clearly* rebut the presumption that the August 16, 2017[,] SOC was mailed' because there was 'little, if any, evidence' of a failure to mail the August 16, 2017, SOC."[134] Without "any" evidence to rebut the presumption, the presumption of regularity applied to the August 16, 2017, SOC as "properly mailed."[135]

In discussing the presumption of regularity, Judge Allen acknowledged that the "presumption of regularity's origins are not entirely clear from or well explained in case law."[136] The presumption is "'less a rule of evidence than a general working principle' or 'a collection of deference doctrines.'"[137] The distinction between an evidentiary rule and deference doctrine is significant, as the court noted, because "[e]videntiary presumptions typically apply only upon a showing of predicate evidence," but for the presumption of regularity, "*either* evidence or law can trigger it."[138] The presumption of regularity, therefore, means that "if law imposes a relevant, official duty on an official, we presume that the official has properly performed that duty, unless there is evidence to the contrary."[139]

Judge Allen discussed various rationales underlying the presumption of regularity, "includ[ing] separation of powers and

130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.*

134 *Id.*

135 *Id.* at 257–58.

136 *Id.* at 258 (citations omitted).

137 *Id.* at 259 (first quoting Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157, 174 (2004); and then quoting Alan Z. Rozenshtein, *Another Blow to the Presumption of Regularity*, LAWFARE (Mar. 10, 2020, at 13:47 PT), https://www.lawfareblog.com/another-blow-presumption-regularity [https://perma.cc/KS97-5LG4]).

138 *Id.* (citing Routen v. West, 142 F.3d 1434, 1440 (Fed. Cir. 1998)).

139 *Id.* (citing Ashley v. Derwinski, 2 Vet. App. 307, 308 (1992)).

administrative efficiency."[140] But even with these important principles, there are limits to the presumption. For example, "when irregularity plainly appears from the record, both the Federal Circuit and this Court have refused to presume regularity."[141] In these situations of plain irregularity, the courts have "'reverse[d],' or inverted, the presumption—or assumed that that which appears irregular is in fact irregular."[142] In such a situation, the government then has the opportunity "to disprove the appearance of irregularity."[143] Without a plain irregularity, "a challenger gets an opportunity to produce clear evidence to rebut the presumption," and if that is successful, the burden shifts to the government.[144]

The court then considered the facts and arguments within the presumption of regularity's analytical framework. The first step is a question of the presumption's applicability and requires determining whether there is an official duty at issue. Judge Allen refers to this step as the "predicate" in *Romero*. Relying on previous CAVC decisions, Judge Allen explained that the presumption of regularity applied in this case because it "concerns VA's performance of [a] legal duty as provided in statute and regulation."[145] An "official duty" triggers the presumption, and "the presumption of regularity applies" to "presume" performance of an official duty "unless there is clear evidence to the contrary."[146] Thus, the predicate was satisfied, and the presumption applied to the official duty.

The second step is determining whether the presumption is rebutted by "clear evidence."[147] This is a "question of law that the Court considers de novo."[148] As Judge Allen explained, "the inquiry here is whether [the] appellant has produced clear evidence sufficient to persuade us that we should not continue to *presume* that VA did its duty and instead should require VA to *prove* that it did its duty in *this* case."[149] In this case, the evidence included

140 *Id.* at 259–60 (summarizing SCOTUS case law on the presumption).

141 *Id.* at 260 (first citing United States v. Roses, Inc., 706 F.2d 1563, 1567 (Fed. Cir. 1983); and then citing Wise v. Shinseki, 26 Vet. App. 517, 527 (2014)).

142 *Id.* at 261 (alteration in original) (quoting *Roses, Inc.*, 706 F.2d at 1567).

143 *Id.* (citing *Roses, Inc.*, 706 F.2d at 1567).

144 *Id.* (citing Crumlich v. Wilkie, 31 Vet. App. 194, 205–06 (2019)).

145 *Id.* at 262.

146 *Id.* (citing Kyhn v. Shinseki, 716 F.3d 572, 577 (Fed. Cir. 2013)). If there is no predicate, step one is not satisfied and no presumption of regularity is applied.

147 *Id.* at 264 (quoting *Crumlich*, 31 Vet. App. at 205).

148 *Id.* (quoting *Crumlich*, 31 Vet. App. at 205).

149 *Id.*

"a statement of nonreceipt" of the VA mailing plus evidence "that reflects a widespread problem with VA not mailing correspondence."[150] Thus, the combined statement of nonreceipt particular to this case and the general problem was enough to count as "clear evidence . . . to the contrary."[151] Judge Allen explained that the rebuttal was "like a finding of substantial evidence that says 'VA's "regular" mailing practices are not regular' where the presumption concerns the regularity of particular VA mailing practices."[152] Though it may be impossible to "prove that the SOC was or was not, in fact, mailed," VA is not "entitled to the benefit of the presumption" in these circumstances.[153]

As for the clear evidence requirement, the court explained that the evidence may be general or specific and rejected the Board's approach to require rebuttal evidence "specific to the facts of the case at hand."[154] The court already held that "non-claimant-specific evidence could be clear rebuttal evidence" in a previous case.[155] Indeed, that case "instructs [the court] that the standard for what evidence suffices as clear rebuttal evidence in a given case certainly depends on the nature of the presumption at issue in a given case, but clear evidence need not be claimant specific."[156] With this understanding of the requisite evidence, the court concluded that the general "widespread problem" plus specific nonreceipt was enough: "Presumption rebutted."[157]

With the presumption rebutted, the third and final step shifted the burden to the government. "[T]he standard of proof is preponderance of the evidence" and requires the government to show that it met the specific official duty.[158] In this case, the court noted that VA "conceded that there is nothing in the record that could demonstrate actual mailing."[159] Given that concession, the court determined that VA "fail[ed] to carry [its] burden to show actual mailing or receipt."[160]

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150 *Id.* at 265.

151 *Id.* at 267.

152 *Id.* at 265 (quoting Ashley v. Derwinski, 2 Vet. App. 307, 309 (1992)).

153 *Id.* (second quotation quoting *Ashley*, 2 Vet. App. at 309).

154 *Id.* at 266.

155 *Id.* at 267 (citing *Ashley*, 2 Vet. App. at 310).

156 *Id.*

157 *Id.*

158 *Id.* (citing Toomer v. Shinseki, 524 F. App'x 666, 669 (Fed. Cir. 2013)).

159 *Id.* at 268.

160 *Id.* at 268–69.

In sum, the CAVC's robust body of law involving the VA mailing presumption is consistent with the general presumption's origin and governing principles.[161] The CAVC case law includes a clear analytical framework for the presumption:

(1) Predicate

(2) Rebuttal

(3) Burden-Shifting[162]

In addition, the case law yields abundant examples of evidence that both rebutted and failed to rebut the presumption. For example, nonreceipt alone[163] and an address omitting a directional street designator were insufficient to rebut the presumption.[164] On the other hand, nonreceipt in addition to evidence that VA did not have the current address on file,[165] a missing signature on a Board decision,[166] an undated letter,[167] and mailing to the wrong street name were sufficient to rebut the presumption.[168]

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161 This robust body of law is reflected in Board of Veterans' Appeals decisions. *See, e.g.*, Title Redacted by Agency, No. 24005208, 2024 WL 1365304, at *2–3 (Bd. Vet. App. Feb. 1, 2024) (citing Ashley v. Derwinski, 2 Vet. App. 307, 308 (1992) and other cases) (discussing the presumption of regularity's burden shifting and analyzing a challenge to the presumption).

162 Expressed another way:

(1) Does the presumption of regularity apply in this case? (If no, stop. If yes, go to 2.)

(2) Is there clear evidence that rebuts the presumption? (If no, presumption carries in favor of the government. If yes, go to 3.)

(3) Does the government's evidence overcome the presumption's rebuttal to show that the government action was regular?

163 *Romero*, 33 Vet. App. at 264–65 ("Though a statement of nonreceipt standing alone is not enough to rebut the presumption, a statement of nonreceipt coupled with other evidence can be.").

164 Clarke v. Nicholson, 21 Vet. App. 130, 135 (2007) (finding that the claimant's omission of "the 'NE.' postdirectional designator from his address when [VA] mailed him notice of the decision . . . was inconsequential to delivery" and was therefore not enough to rebut the presumption).

165 Sthele v. Principi, 19 Vet. App. 11, 17–18 (2004) (nonreceipt plus file had the claimant's son's address rather than the claimant's address); Crain v. Principi, 17 Vet. App. 182, 189 (2003) (nonreceipt plus wrong zip code).

166 Alexander v. Principi, No. 04-62, slip op. at *1 (Vet. App. Mar. 16, 2004) ("[T]he document . . . is missing a signature and has its own, originally-affixed issuance date (as opposed to a copy of the original date), and therefore does not appear to be regular on its face.").

167 Crumlich v. Wilkie, 31 Vet. App. 194, 205 (2019) ("[T]he notice letter in this case was undated, and the Secretary conceded that, in practice, notice letters are sometimes dated later than the date of the SOC itself. This alone is sufficient to show that, even, assuming the Secretary has a regular procedure for dating and mailing SOCs as he described, that procedure was not followed in this case." (citations omitted)).

168 Fluker v. Brown, 5 Vet. App. 296, 298 (1993) ("The Court finds that the mailing by VA to an incorrect address on December 17, 1990, constitutes the 'clear evidence' necessary to rebut the presumption of regularity . . . .").

In threading together the general and VA mailing presumptions' characteristics, the presumptions' analytical framework is clear and consistent. Despite the more flexible approach appropriate to the broad range of government actors and actions in the general presumption, contrasted with the concrete approach in the limited context of VA mailings, there is no question that the presumption requires analysis, even if the case law does not always reflect a step-by-step approach. The case law reflects the core reality: The presumption did not originate as a rubber-stamp, and it is not one now. The narrow scope of the VA mailing presumption reinforces that core reality and provides a strong model for analysis—a model that is consistent with, though better developed than, the general presumption.

With this understanding of the general and VA mailing presumptions, including the various governing legal principles, the analytical framework, and examples of evidence sufficient for rebuttal, I now turn to an examination of the DRB presumption presented as a catalog of irregularities. After identifying the irregularities and why they matter, this Article explores how the DRB presumption's irregularities could be resolved.

IV. The Irregular DRB Presumption

This Part identifies six irregularities stemming from differences between the DRB presumption and the general and VA mailing presumptions, as well as inconsistencies with the DRB presumption's own governing regulations (the existence of which is itself an irregularity!). In uncovering these irregularities, I rely on regulatory history and guidance to reveal how the DRBs misuse and misapply the presumption to deny relief to thousands of veterans without justification. The body of governing regulations includes the Code of Federal Regulations (C.F.R.), DoD instructions, and branch-specific guidance.[169]

169 The branch-specific regulations reinforce the DRB presumption as stated in the DoD-level C.F.R. and Instruction, often merely restating the DoD-level regulations within a varied organizational scheme. However, the branch-specific regulatory approaches sometimes exceed the scope of the higher-level authorities and are inconsistent among the branches. The Navy and Air Force DRBs have similar branch-specific regulations that track much of the DoD-level C.F.R. language while the Army DRB's governing regulations provide less branch-specific guidance. Relevant in the context of this Article, the Navy and Air Force DRBs' regulations address the presumption of regularity, but the presumption of regularity is not mentioned in the Army DRB regulations. Though beyond the scope of this Article, the Army DRB's lack of reliance on the presumption of regularity may be related to its higher grant rates.

A. Irregularity No. 1: The DRB Presumption has a Regulatory Origin and Robust Regulatory History

Like the general and VA mailing presumptions, there is no statutory DRB presumption. The DRB presumption, however, is codified in the C.F.R., military directives, and other governing documents. The discussion of the presumption throughout the rulemaking process establishes robust context for the presumption—context that is unique compared to the case law development of the general and VA mailing presumptions. Though the case law engaging the general and VA mailing presumptions provides some context or explanation for the presumption's existence, only the DRB presumption has an origin story that can be traced through the regulatory history. Thus, the first irregularity: the mere existence of regulations that identify and engage with the presumption.

The DRB presumption began in the C.F.R. and shares the same common law history as the general and VA mailing presumptions. The existence of the regulatory history is itself irregular, but there is more to it—the regulatory history and current regulations are threaded throughout all the other irregularities. The regulatory history unveils how the DRB presumption has evolved away from the legal principles governing the general and VA mailing presumptions despite continuing to share a common legal basis. The regulations also provide robust guidance to the DRBs for engaging with the presumption, creating an opportunity to check the DRB decisions for regulatory compliance. In addition to the mere existence of regulations as an irregularity, a deep reading of the regulatory history and governing regulations and other guidance uncovered multiple substantive irregularities, as discussed next.

B. Irregularity No. 2: The DRB Presumption Applies to "Any Review"

Congress established the discharge review boards in Public Law 87-651, amending title 10 of the United States Code to require the Defense Secretary to "establish a board of review."[170] Regulations followed. Unlike the general and VA mailing presumptions that require a predicate—some initial determination of a government official and an official act—for the presumption

170 Act of Sep. 7, 1962, Pub. L. No. 87-651, sec. 110, § 1553, 76 Stat. 506, 509.

to apply, the DRB presumption applies to any review, according to the regulations.[171]

But the DRB presumption was not always this broad. The presumption of regularity had a narrow beginning in a 1977 initial rule, relevant only to cases involving lack of records.[172] Over time, however, and without explanation, the presumption expanded to "any review," essentially eliminating the predicate requirement. This expansive statement of the presumption remains in effect today and appears to give the DRB presumption more substantive power than the general and VA mailing presumptions.

The presumption of regularity initially appeared in the C.F.R. subpart on discharge review procedures, specifically 70.5(b)(9)(iii)(C), under the "availability of records" heading in the "conduct of reviews."[173] The presumption's placement within this availability of records subpart illustrated the presumption's original narrow applicability and procedural nature.[174] The discussion of availability of records began by noting that the applicant "may have access to the records considered by the DRB in the review."[175] The rule explained how to obtain copies of military records and advised applicants to request documents before submitting the discharge upgrade application form.[176] The rule addressed missing records and identified actions to take when "the official records relevant to the discharge review are not available at the agency having custody of the records."[177]

The rule provided a three-step process for dealing with missing records. The first two steps involved notice to the petitioner and a request "to provide such information and documents as may be desired in support of the request for discharge review," and after either a response to the request for documents and information or "the expiration of a reasonable period of time . . . , the review shall be conducted with information available to the DRB."[178] The third step governed cases with unavailable records even after steps one and two were completed, and this is where the DRB presumption originated:

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171 32 C.F.R. § 70.8(b)(12)(vi) (2026).

172 Discharge Review Boards (DRBs) Procedures and Standards, 42 Fed. Reg. 62934, 62935–36 (proposed Dec. 14, 1977) (to be codified at 32 C.F.R. pt. 70).

173 *Id.*

174 *See id.*

175 *Id.* at 62936 (quoting proposed § 70.5(b)(9)(i)).

176 *Id.* (referencing proposed § 70.5(b)(9)(ii)).

177 *Id.* (quoting proposed § 70.5(b)(9)(iii)).

178 *Id.* (quoting proposed § 70.5(b)(9)(iii)(A–B)).

> If the information/documents furnished by the petitioner are not sufficient to provide a basis for the determination that a change in the type or nature of the discharge is warranted, the discharge shall be deemed to be proper under the legal principle that there is a presumption of regularity in the conduct of government affairs. The application of this presumption is not restricted solely to those reviews in which the entire official record is missing, but rather can be applied in any review in which there are missing documents and the evidence of record does not establish sufficient grounds to overcome this presumption.[179]

This subsection on availability of records concluded with guidance to the DRBs. This guidance implored the DRBs to get additional information "when a review of available evidence suggests certain aspects of the review would be incomplete without the additional information or when the applicant presents testimony or documents which require additional information to evaluate properly."[180] The rule further required a board to share with the applicant any information the board obtained, "if requested."[181]

This original statement of the DRB presumption emphasized the limited application to cases involving missing records and reflected the core of any presumption—some initial condition that makes the presumption relevant. The sentence was a conditional: "if" there's not enough information or documentation, then the presumption of regularity can justify deeming the discharge proper. Furthermore, this initial rule acknowledged the presumption was available in limited circumstances: when the entire record is missing, or "in any review in which there are missing documents" and there is not enough evidence to overcome the presumption. Thus, the original DRB presumption was intentionally limited to decisions involving missing or otherwise unavailable records. But then the presumption changed.

After the initial rule, there was a four-year period of robust rulemaking with proposed and final rules, discussion of comments, and lengthy commentary on the final rule. There was also litigation during this time that heavily contributed to the rule changes and commentary. Here, I highlight the significant devel-

179 *Id.* (quoting proposed § 70.5(b)(9)(iii)(C)).

180 *Id.* (quoting proposed § 70.5(b)(9)(iv)).

181 *Id.* (quoting proposed § 70.5(b)(9)(iv)). The proposed rule underwent a comment period that was originally scheduled to end on January 13, 1978, but was extended to January 23, 1978. *Id.* at 62934; Discharge Review Boards (DRBs) Procedures and Standards; Extension of Comment Period, 43 Fed. Reg. 2634 (proposed Jan. 18, 1978) (to be codified at 32 C.F.R. pt. 70).

opments—instances of the DRB presumption's revision and relocation—during this period to understand how the presumption expanded beyond the limited scope of missing records to any review.

Without explanation, the text of the presumption of regularity was revised and relocated in a supplemental notice of proposed rule for DRB procedures and standards in February 1978.[182] The revised presumption of regularity was stated as follows: "There is a presumption of regularity in the conduct of governmental affairs. This presumption can be applied in any review unless there is substantial credible evidence to rebut the presumption."[183]

The revised text broadened the presumption's applicability to "any review," in contrast to the initial rule's limited scope of applicability to cases involving missing documents.[184] The proposed rule also added the phrase "substantial credible evidence" as the burden to rebut the presumption, though it did not define that phrase.[185]

In addition to these substantive revisions, the presumption of regularity was relocated from the narrower subpart "availability of Records" in § 70.5(b)(9) to § 70.5(b)(12)(vi), a subpart of "Discharge Review [P]rocedures" about evidence and testimony in the "[c]onduct of reviews."[186] This relocation further broadened the presumption's applicability because it moved out of the narrower "Availability of Records" (a subsection that remained with-

182 Discharge Review Boards (DRBs) Procedures and Standards, 43 Fed. Reg. 8240, 8244 (proposed Feb. 28, 1978) (to be codified at 32 C.F.R. pt. 70). This supplemental notice was a republication from February 24, 1978, in the Federal Register "for the convenience of the public." *Id.* In the summary of the supplemental notice, DoD explained that the supplement:

> contains adoption of a number of recommendations made after the initial proposed rule was published, and reflects editorial format changes. Moreover, the Department of Defense has reevaluated both the proposed rule and the previous notice of rulemaking. Based upon that reevaluation, DOD has determined that a more detailed notice and a revised proposal should be published to provide a further opportunity for comment.

Discharge Review Boards (DRBs) Procedures and Standards, 43 Fed. Reg. 7932 (Feb. 24, 1978).

183 Discharge Review Boards (DRBs) Procedures and Standards, 43 Fed. Reg. 8240, 8244 (proposed Feb. 28, 1978) (to be codified at 32 C.F.R. pt. 70) (quoting proposed § 70.5(b)(12)(iv)).

184 *Id.* (referencing proposed § 70.5(b)(12)(iv)).

185 *Id.* (referencing proposed § 70.5(b)(12)(iv)).

186 *Id.* at 8243 (referencing proposed § 70.5(b)(9)). 32 C.F.R. § 70.5(b)(9) remained as "Availability of Records," but the original text and § 70.5(b)(9)(iii)(C) were eliminated without explanation. *See* 32 C.F.R. § 70.8(b)(9).

in the rule) to the broader "Evidence and testimony."[187] Even with the move, the presumption of regularity remained within § 70.5, discharge review procedures.[188]

DoD's final rule on March 31, 1978, included a discussion of the comments received "from some 80 organizations and individuals"[189] and responsive changes. DoD gave "[f]ull and careful consideration" to the comments and revised the rule "to clarify the directive, to facilitate access to the discharge review process, and to enhance the fairness of the proceedings."[190] DoD acknowledged "[m]ajor changes" to the rule and "numerous alterations . . . to eliminate repetitive material and to promote consistency and clarity in grammar, vocabulary, and style."[191] In the discussion of "major changes," DoD explained that "[v]arious changes were made with respect to the availability of records to insure [sic] that the applicant has reasonable access to information relevant to the review," but it did not address the relocation of the presumption of regularity or the presumption's extension to "any review."[192]

In the singular mention of the presumption of regularity in this discussion, DoD did not fully explain how or why the language and location changed. DoD merely stated, "The discussion of the presumption of regularity in governmental affairs has been revised in order to emphasize that the presumption may be rebutted by substantial credible evidence."[193]

This explanation addressed the change from the 1977 proposed rule's description of how to overcome the presumption.[194] The previous language, "sufficient grounds to overcome the presumption," was revised to "substantial credible evidence."[195] With

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187 Discharge Review Boards (DRBs) Procedures and Standards, 43 Fed. Reg. at 8243–44 (referencing proposed § 70.5(b)(9) and (b)(12)). The 1977 version of the proposed § 70.5 "Discharge Review Procedures" had subsections (a) through (*l*). Discharge Review Boards (DRBs) Procedures and Standards, 42 Fed. Reg. 62934, 62934–38 (proposed Dec. 14, 1977) (to be codified at 32 C.F.R. pt. 70) (referencing proposed § 70.5).

188 Discharge Review Boards (DRBs) Procedures and Standards, 43 Fed. Reg. 8240, 8244 (proposed Feb. 28, 1978) (to be codified at 32 C.F.R. pt. 70) (referencing proposed § 70.5(b)(12)(iv)).

189 Discharge Review Boards (DRBs) Procedures and Standards, 43 Fed. Reg. 13564, 13566 (proposed Mar. 31, 1978).

190 *Id.*

191 *Id.*

192 *Id.* at 13567.

193 *Id.*

194 *Id.*

195 Discharge Review Boards (DRBs) Procedures and Standards, 42 Fed. Reg. 62934, 62936 (proposed Dec. 14, 1977) (to be codified at 32 C.F.R. pt. 70) (quoting proposed § 70.5(b)(9)(iii)(C)); 32 C.F.R. § 70.8(b)(12)(vi) (2025).

no other explanation for the changes to the presumption of regularity, DoD was silent on the broadening of the presumption from its original applicability to cases of unavailable records to "any review" in the final rule.[196] There was also no definition provided for "substantial credible evidence."[197]

This expansive version of the presumption is mirrored in DoD Instruction 1332.28, which governs DRB procedures and standards, as well as in branch-specific guidance.[198] For the NDRB, 32 C.F.R. § 724.211, titled "Regularity of government affairs," mirrors the expansive presumption language from 32 C.F.R. § 70.8(b)(12)(vi) and the DoD Instruction.[199] Like § 70.8 and the DoD Instruction, the term "substantial credible evidence" is not defined in the Navy regulation, nor is there guidance on what it takes to rebut the presumption or what happens when the presumption is rebutted. The Navy regulations and instructions are also silent on the broadening of the presumption to apply to any review.[200]

The DRB presumption's applicability to "any review" is inconsistent with the concept of a presumption and the analytical framework's first step to determine whether the presumption applies. This irregularity indicates confusion about the meaning of "presumption"[201] and ignores the body of federal case law involving the presumption of regularity. Even if there is some legitimacy to the "any review" approach, automatically applying the presumption to "any review" skips the first step in the analytical framework: a determination of whether the presumption applies.[202] Analysis beyond the first step of applicability is still re-

196 Discharge Review Boards (DRBs) Procedures and Standards, 43 Fed. Reg. 13564, 13567 (proposed Mar. 31, 1978) (to be codified at 32 C.F.R. pt. 70).

197 *Id.* There were some other, less significant developments after this final rule and before the 1982 reissued final rule.

198 DoDI 1332.28, *supra* note 34, enclosure 4.

199 32 C.F.R. § 724.211; 32 C.F.R. § 70.8(b)(12)(vi); DoDI 1332.28, *supra* note 34, enclosure 4.

200 The Navy regulation retains a section on unavailable records. In 32 C.F.R. § 724.210, titled "Review action in instances of unavailable records," the presumption is stated as "applicable in instances of unavailable records depending on the circumstances of the case." 32 C.F.R. § 724.210. No further details are provided, for example, on what circumstances justify the presumption's applicability. *Id.*

201 *See supra* note 20 and accompanying text.

202 Nat'l Treasury Emps. Union v. Trump, 780 F. Supp. 3d 237, 254 (D.D.C. 2025) ("The presumption of regularity, however, is just that, a presumption. The presumption can be rebutted with 'clear evidence' that the official did not discharge his or her official duties properly." (quoting Owlfeather-Gorbey v. Avery, 119 F.4th 78, 86 (D.C. Cir. 2024))).

quired, just as the courts do with the general presumption when the first step of applicability is presumed rather than articulated.

C. Irregularity No. 3: The DRBs Do Not Engage an Analytical Framework When Applying the Presumption of Regularity Despite Regulations Requiring Explanation

The DRBs' lack of engagement with an analytical framework in decisions involving the presumption is a third irregularity. This irregularity stands out in stark contrast to the general and VA mailing presumptions, especially the CAVC's clear three-step analytical approach. Despite the robust regulatory guidance explaining the presumption and examples of how to engage with it, the DRBs typically do not engage either the standard three-step analytical framework nor the regulatory requirements to explain decisions involving the presumption. The regulations do not explicitly mention the presumption's three-step analytical framework, but DoD's response to litigation challenging the DRBs' boilerplate decisions and failure to provide documents under the Freedom of Information Act established a requirement for explanation when the boards rely on the presumption.[203] This requirement for explanation equates to the second step of the analytical framework: whether the presumption is rebutted.

Even though the presumption may be applied in "any review," which essentially eliminates the first step, there is no guidance that suggests a mere statement of the presumption is sufficient to deny relief. The governing regulations, military directives, and other governing documents require explanation of how and why the presumption applies as a basis for denying relief and why the applicant's evidence was "insufficient to overcome the presumption."[204] As the subsequent discussion indicates, nowhere in the governing regulations and other documents is there a statement supporting the DRB presumption as a rubber-stamp or as a reason that stands for itself. And yet that is often how it operates, giving rise to the third irregularity.

Of course, the DRBs are not judicial bodies nor are the board members law-trained, and thus perhaps it is reasonable to expect less robust reasoning in a DRB decision as compared to a judicial decision. Even so, the gap between the two is too

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203 Discharge Review Boards (DRBs) Procedures and Standards, 47 Fed. Reg. 37770, 37789 (proposed Aug. 26, 1982) (to be codified at 32 C.F.R. pt. 70).

204 *Id.* at 37775.

broad, with almost no reasoning from the DRBs about how and why the presumption favors denial of relief. Furthermore, DoD recognized the flaws in this gapped approach and provided extensive guidance for closing the gaps—specifically in response to inadequate decisions.[205]

In discussing the 1982 final rule, DoD explained that "changes were made as a result of the Department's overall reexamination of the proposed amendments in light of the comments."[206] And it noted that other "changes were made as a result of the recently concluded proceedings in *Urban Law Institute of Antioch College, Inc. v. Secretary of Defense*."[207] The *Urban Law* litigation involved challenges to the boards' boilerplate decisions and failure to provide documents under the Freedom of Information Act.[208] The litigation aimed "to force the boards (DRBs and BCMRs) to issue and make public, non-boilerplate decisions to enable the public and advocates to understand why the boards decided to grant or deny relief."[209] Eventually, the Department of Justice agreed with the demands for better decisional documents, and the rule was revised to require the boards to "provide findings and reasons for their decisions and respond to contentions of the veteran."[210] This latter requirement concerns reasoning and engaging with an analytical framework, even though DoD did not use the phrase "analytical framework."

DoD provided in-depth discussion and guidance to the DRBs in the sectional analysis to the final reissued rule.[211] From this robust discussion, a clear main principle emerged: More explanation is needed in decisional documents.[212] For example, under the reissued rule, "the DRB must set forth reasons" when it "concludes that aggravating factors outweigh mitigating factors (or

205 *See id.* at 37781–82.

206 *Id.* at 37770.

207 *Id.*

208 Addlestone, *supra* note 3, at xxxiv (citing Urban Law Inst. of Antioch Coll., Inc. v. Sec'y of Def., No. 76-0530 (D.D.C. 1978)).

209 *Id.*

210 *Id.*

211 Discharge Review Boards (DRBs) Procedures and Standards, 47 Fed. Reg. at 37770–71. The sectional analysis of the reissued final rule is approximately fifteen pages of dense, three-column-per-page text in the Federal Register. The analysis began with a summary of changes to §§ 70.1–70.7 and then introduced the lengthy discussion that follows: "In order to provide the public with detailed background on these matters, the relevant portions of the Court Order and Settlement Agreement are printed below." *Id.* at 37771. These relevant portions include two annexes with "model statements." *Id.*

212 *Id.* at 37770–85.

vice versa),"[213] the decisions "must contain a statement of findings, conclusions, and reasons,"[214] and "[c]onclusory statements of reasons for the Board's findings and conclusions do not suffice."[215]

Consistent with the broad directive to provide more explanation, the regulations specifically address the presumption of regularity and its role in decisional documents in two categories: "[f]indings of fact" and "[c]omplaints concerning decisional documents and index entries."[216] Though DoD did not articulate it as such, the examples essentially direct the DRBs to engage with an analytical framework to explain the reasoning involving the presumption of regularity.

For example, when a board uses the presumption of regularity to resolve contradictory evidence, the decision must "explain why the information that was relied upon was more persuasive than the information that was rejected."[217] "If the presumption of regularity is cited as the basis for rejecting such information, the decisional document shall: (1) [s]et forth the basis for applying the presumption of regularity, and (2) explain why the contradictory evidence was insufficient to overcome the presumption."[218] This two-step approach is equivalent to the analytical framework in the general and VA mailing presumptions, except that it assumes the analysis ends with step two—the determination that the evidence was insufficient to rebut the presumption. This guidance also suggests that "any review" may not necessarily eliminate the need to establish a predicate for the presumption because decisional documents must "[s]et forth the basis for applying the presumption."[219]

As for explaining "why the contradictory evidence was insufficient to overcome the presumption," the sectional analysis provides further guidance. Such an explanation "may consist of a statement that the applicant failed to provide sufficient corroborating evidence, or that the DRB did not find the applicant's testimony to be sufficiently credible to overcome the presumption."[220] For example, the regulations provide an example of an

213 *Id.* at 37777.
214 *Id.*
215 *Id.* at 37782.
216 *Id.* at 37774–76, 37779–80.
217 *Id.* at 37775.
218 *Id.*
219 *Id.*
220 *Id.* These statements are problematic in that they create space to shortcut the analytical framework. A decision that evidence was not sufficiently corroborating requires

insufficient explanation in a case involving a challenge to proper procedures at disenrollment on the grounds that the applicant did not receive written notice. The decisional document had the following statement: "The contention, as stated, can neither be refuted nor supported by the documentation and testimony provided by the applicant. Based upon the presumption of regularity in governmental operations, the Board concludes [sic] that the contention does not provide a basis for relief."[221]

Under the final rule, a decision in which the "DRB determined . . . that the applicant did receive such written notice in a timely manner, and the reason for this determination was the presumption of regularity, a statement of the reasons for this determination must consist of more than a citation to the presumption of regularity."[222] Read that last part again: "more than a citation to the presumption of regularity." The regulations did not provide an example of what explanation would be sufficient but made clear that a statement of the presumption, on its face without explanation, is insufficient. Even in a case involving an issue more procedural than substantive, the boards are directed to justify the presumption.

In a case involving a contention that "specific procedures were not followed, and the DRB concludes that there was no error requiring a change in discharge," the DRB can rely on the presumption for that determination.[223] Whether there was a record of proper procedure or a lack of sufficient evidence to support or refute the lack of proper procedure, "the DRB could rely upon the presumption of regularity as the reason for its findings and conclusion."[224] The sectional analysis calls into question the substantive validity of this approach: "Whether such reliance would be correct in any case would be a matter of substantive law beyond the scope of the Stipulation or decisional document principles."[225]

In additional guidance not related to a particular example, the sectional analysis noted that "whether to use the presumption . . . is a substantive matter" outside the scope of the stipula-

explanation as to why the evidence was insufficient, but according to the regulation, "a statement" of the insufficiency is enough. Similarly, DRBs may determine a lack of credibility but the regulations leave unsaid the requirement to explain the basis for that determination.

221 *Id.*

222 *Id.*

223 *Id.*

224 *Id.*

225 *Id.*

tion and the "decisional document principles."[226] In other words, the regulations do not endorse the presumption but merely identify what is required in explaining its use. Even so, the DoD noted that in an undefined "appropriate case, the DRB may conclude that there is no error with respect to a specific procedure, base that conclusion on a finding that relevant documents are in proper order, and cite the presumption of regularity for its findings and conclusion."[227] Note that this use of the presumption rings most true to its common law roots, a purely procedural question.

Furthermore, decisional documents are required to identify the DRB's conclusions, including whether the presumption of regularity was the basis for the decision and whether the evidence was "a legally sufficient basis for the denial," and if so, what evidence supported that conclusion.[228] The guidance further explained that "[i]f the DRB decided the case on the basis of the presumption of regularity despite the applicant's presentation of evidence to the contrary, . . . the DRB would have to explain why it did not find the applicant's evidence sufficient to overcome the presumption."[229] If the presumption of regularity is used to reject a complaint, "the response to the complaint must set forth the reasons why the evidence submitted by the complainant was not sufficient to overcome the presumption."[230] Again, this requirement for explanation and reasoning sounds like the analytical framework used by courts in the general and VA mailing presumptions, even though here again the regulations seem to assume that no one meets the rebuttal standard.

Despite the robust engagement in evaluating examples and providing guidance for engaging with the presumption of regularity, none of the "Model Statements" addressed the presumption of regularity, leaving the DRBs with no examples of how to effectively provide an explanation in decisions relying on the presumption of regularity. Even so, there is no dearth of guidance identifying the requirement for explanation.

As part of the 1982 revised rule, the presumption of regularity was again relocated, this time to 32 C.F.R. § 70.8(b)(12)(vi) but with no change to the language and remaining within "procedures."[231] The

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226 *Id.*
227 *Id.*
228 *Id.*
229 *Id.*
230 *Id.* at 37780.
231 *Id.* at 37790.

revised rule expanded on how the presumption may be used in denying discharge upgrade requests based on issues of propriety and equity. The rule directed the DRBs to make a finding of fact when the reason for denial "is based in whole or in part on a determination as to the occurrence or nonoccurrence of an event or circumstance."[232] For each of these findings, the DRB "shall list the specific source of the information relied upon," unless the fact is included in the service record.[233] "[T]he specific source of information . . . . may include the presumption of regularity in appropriate cases."[234]

Consistent with the overall theme of "more explanation needed," the regulation further explained how to use the presumption of regularity in situations involving contradictory evidence in deciding issues of propriety or equity. "[T]he decisional document shall set forth the conflicting evidence and explain why the information relied upon was more persuasive than the information that was rejected."[235] When the board uses the presumption of regularity "as the basis for rejecting such information, the decisional document shall set forth the basis for relying on the presumption of regularity and explain why the contradictory evidence was insufficient to overcome the presumption."[236] The boards are further directed that "a statement that the applicant failed to provide sufficient corroborating evidence, or that the DRB did not find the applicant's testimony to be sufficiently credible" satisfies the explanation requirement.[237] The explanation requirement remains in the current rule.[238]

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232 32 C.F.R. § 70.8(e)(3)(ii)(B)(1)–(2), (e)(6)(ii)(B) (2026). Although organized by issues of propriety and issues of equity, the presumption of regularity language is the same.

233 *Id.* § 70.8(e)(3)(ii)(B)(1), (e)(6)(ii)(B)(1).

234 *Id.* § 70.8(e)(3)(ii)(B)(1), (e)(6)(ii)(B)(1).

235 *Id.* § 70.8(e)(3)(ii)(B)(2), (e)(6)(ii)(B)(2).

236 *Id.* § 70.8(e)(3)(ii)(B)(2).

237 *Id.* The requirement for explanation is consistent with the general presumption in federal case law. *See, e.g.*, Conley v. United States, 5 F.4th 781, 791 (7th Cir. 2021) ("The presumption of regularity is an analytic tool, not an excuse to rubber-stamp any and all executive action as lawful absent clear evidence to the contrary.").

Consistent with the discussion of the presumption of regularity, 32 C.F.R. § 70.10 addresses "decisional documents and index entries" for the DRBs. § 70.10. These regulations direct boards to "set forth the reasons why the evidence submitted by the complainant was not sufficient to overcome the presumption" in cases where the board denies an upgrade request "on the basis of the presumption of regularity." *Id.* § 70.10(d)(1)(iv)(C). These regulations further explain that, in connection with § 70.8 "with respect to explaining use of the presumption of regularity," the requirement to explain governs only decisions issued on or after November 27, 1982. *Id.* § 70.10(d)(1)(v)(F). Decisions prior to that date that rely on the presumption and are challenged as lacking explanation require "corrective action . . . only if a reasonable person familiar with the discharge review process cannot understand the basis for relying on the presumption." *Id.*

238 There were two 1983 amendments to part 70. *See* Discharge Review Boards (DRBs) Procedures and Standards, 48 Fed. Reg. 9855, 9855 (Mar. 9, 1983) (to be codified

Despite the requirement for explanation, DRB decisions typically do not provide explanation for how and why the presumption of regularity supports a denial. The AFDRB's approach to applying the presumption is particularly dismissive of applicants' requests for relief and engages no framework with which to justify the presumption's applicability or its force. For example, in a case involving a request for relief based on in-service racial discrimination and post-traumatic stress disorder (PTSD) due to that racial discrimination, the AFDRB invoked the presumption in a series of unsubstantiated and even contradictory sentences.[239] First, the Board "determined that there is no evidence in the available records to support the Applicant's request for an upgrade."[240] This statement is flat-out wrong based on the facts discussed in other parts of the decision. The applicant provided VA records of PTSD and a statement "that the flight chief continuously insulted them with racist remarks, which were witnessed by multiple people, both civilian and military."[241] Surely, VA medical records and statements were at least supporting evidence that deserved engagement rather than erasure.

Second, the Board reinforced its non-investigative nature and explained the presumption of regularity as holding "that commanders, supervisors, and other officials acted fairly and in good faith in the absence of evidence to the contrary."[242] Here, the applicant provided evidence to support his position that the commander acted in a racially discriminatory manner, but the Board glossed over that evidence by overstating the presumption of regularity as an assumption that the commander "acted fairly and in good faith."[243] The evidence proffered at least merited consideration as potentially rebutting the presumption but the Board did not even consider the evidence, nor did it explain why

at 32 C.F.R. pt. 70); Discharge Review Boards (DRBs) Procedures and Standards, 48 Fed. Reg. 35644, 35644 (Aug. 5, 1983) (to be codified at 32 C.F.R. pt. 70). Amendments to 32 C.F.R. § 70.8(e)(3)(ii)(B)(2), (e)(6)(ii)(B)(2) retained the language from the 1983 reissued final rule but reordered the clause "set forth the basis for relying on the presumption of regularity." *Id.* § 70.8(e)(3)(ii)(B)(2), (e)(6)(ii)(B)(2). Instead of including the clause as part of the first sentence of the subsection, the clause was moved to the second sentence following the opening clause, "If the presumption of regularity is cited as the basis for rejecting such information." *Id.*

239 Air Force Discharge Review Board Decisional Document, Case No. FD-2024-00033 (Air Force Rev. Bds. Agency Aug. 29, 2024), https://boards.law.af.mil/AF/DRB/CY2024/FD-2024-00033%2000_FD202400033.pdf [https://perma.cc/4D2X-3H99].

240 *Id.*

241 *Id.*

242 *Id.*

243 *See id.*

the evidence did not rise to the level of rebutting the presumption. Here, the Board avoided engaging with the evidence given the lack of an analytical framework.[244]

Third, the Board noted that it "will only grant relief if sufficient evidence shows the discharge was improper or inequitable."[245] The Board referenced multiple statements of racial discrimination, including the applicant's statement "*that their discharge 'was the result of actions taken by my flight chief* [*which were*] *racist.'*"[246] Again, the Board did not address why the veteran-applicant's evidence of a discharge fueled by racial discrimination was not sufficient. Especially in a case involving racial discrimination where it is unlikely that military records documenting the discrimination exist, a veteran-applicant's statements of racism are often the only available evidence. Yet, those statements were essentially erased by the Board's lack of engagement with an analytical framework.

Finally, the Board determined that "the Applicant failed to establish a clear connection between their mental health condition and how it would mitigate their misconduct."[247] Though the Board does not mention the presumption, this sentence appears in the paragraph invoking the presumption.[248] By acknowledging the mental health condition, this sentence contradicts the Board's previous statements regarding the lack of evidence. Furthermore, the statement acknowledging the mental health condition contradicts a later statement that "[*t*]*here was no evidence of PTSD or any other major mental health diagnosis*."[249] Instead of treating the applicant's lay statement and VA medical diagnosis as evidence, the Board focused on the lack of mental health care in the service treatment records.[250] And then used that "lack of evidence" as a basis for the presumption of regularity as a justification for denying relief without ever providing any of the required explanation.[251]

Even in a rare case of successfully overcoming the DRB presumption, the boards' decisions typically do not engage an ana-

244 *See id.*
245 *Id.*
246 *Id.*
247 *Id.*
248 *Id.*
249 *Id.*
250 *See id.*
251 *See id.*

lytical framework that reflects why and how the evidence in the case overcame the presumption and how or why the shifted burden was not satisfied. For example, in a case involving "administrative error," the NDRB stated the presumption, noted that it "complete[d] a thorough review of the circumstances," and acknowledged the evidence provided by the applicant.[252] The evidence in this case was "the CO'S endorsement of administrative discharge as well as the Applicant's official separation orders. Both documents reflect the Applicant's characterization of service as honorable."[253] The Board further noted that it "did not find any information within the official record to refute the Applicant's claim and considered the evidence provided as substantial and credible. Therefore it outweighs the government's presumption of regularity."[254] Though this result is favorable for the veteran, it further entrenches the lack of an analytical framework and gives future applicants no sense of how to similarly overcome the presumption. The decision merely stated the existence of "evidence" without details or assessment, the lack of information to refute the applicant's claim, and then baldly stated that the evidence outweighs the presumption.[255] Especially given that there are hundreds if not thousands of decisions that use the lack of evidence to deny relief, the lack of explanation here is not just irregular—it is egregious.

D. Irregularity No. 4: The DRBs' Branch-Specific Regulations Conflict with the DoD-Level C.F.R. and DoD Instruction

The way the DRBs use the presumption is further complicated by the branch-specific regulations because they do not fully engage with nor reflect DoD's regulations. In implementing the C.F.R., the DoD Instruction (DoDI) governing the DRBs matches the C.F.R. language in several ways. First, the presumption can be a "specific source of information" used "in appropriate cases" to meet the requirement for the DRBs to "list reasons for its conclusion."[256] Second, the DoDI restates the regulatory requirement to explain "why the contradictory evidence was insufficient to

252 Naval Discharge Review Board (NDRB) Discharge Review_Decisional Document, No. ND24-9960 (Dep't of the Navy Mar. 11, 2025), https://boards.law.af.mil/NAVY_DRB_2024_Navy.htm [https://perma.cc/SNB4-92QS] (choose "ND24-9960.rtf"; then open the downloaded file).

253 *Id.*

254 *Id.*

255 *See id.*

256 DoDI 1332.28, *supra* note 34, enclosure 3, paras. E3.5.3.2.2.1 (propriety), E3.5.6.2 (equity).

overcome the presumption," by identifying "a statement that the applicant failed to provide sufficient corroborating evidence" or the board determined that the applicant's testimony was not "sufficiently credible."[257] Third, the DoDI includes the C.F.R. language directing the DRBs to "set forth the basis for relying on the presumption of regularity" in decisions in which the boards rely on the presumption to reject conflicting evidence.[258]

At the branch level, however, the requirement for explanation is missing. In conflict with the DoD-level regulations' extensive discussion of the need for explanation in decisional documents, the branch-specific regulations do not require explanation. This inconsistency creates a gap and raises questions as to the legitimacy of the DRB decisions that may comply with the branch-specific guidance but do not comply with the higher-level regulations. For example, the presumption of regularity in the NDRB regulations for "Decisional issues" in 32 C.F.R. § 724.806 closely tracks the DoD-wide regulations governing "Decisional issues" in 32 C.F.R. § 70.8(e) and the matching DoDI with one significant difference.[259] In the Navy-specific regulation explaining the NDRB's responsibilities in making a finding of fact based on contradictory evidence, the text omits the requirement to "set forth the basis for relying on the presumption of regularity."[260] This inconsistency is significant because it strips away the NDRB's responsibility—a DoD-level responsibility under 32 C.F.R. § 70.8(e) and DoDI 1332.28—to justify the applicability of the presumption as an initial step to using the presumption to deny relief on propriety or equity grounds. The requirement to "set forth the basis for relying on the presumption" is not only missing, but its absence is not explained nor acknowledged.[261]

Adding to the confusion, much of the guidance in the Navy's Discharge Review Manual, an internal guidance document that exists outside the C.F.R., restates the language in the DoD-wide regulations. For example, the manual restates the general principle of the presumption,[262] mirroring the language in 32 C.F.R. §§ 70.8 and 724, and restates the guidance for decisional documents.[263] Significantly, the manual mirrors current 32 C.F.R.

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257 *Id.* enclosure 3, paras. E3.5.3.2.2.2 (propriety), E3.5.6.2.2.2 (equity).

258 *Id.*

259 32 C.F.R. §§ 70.8(e), 724.806 (2026).

260 *Id.* §§ 70.8(e)(3)(ii)(B)(2), 724.806(c)(2)(ii)(B).

261 *Id.* § 70.8(e)(3)(ii)(B)(2); *see id.* § 724.806(c)(2)(ii)(A)–(B).

262 DEP'T OF THE NAVY, SECNAV M-5420.1, DISCHARGE REVIEW BOARD MANUAL 20 (2020).

263 *Id.* at 22–28 (referencing section 224 "Decisional Issues").

§ 70.8 language to include the requirement to explain the basis for the presumption of regularity in fact-finding based on contradictory evidence: "If the presumption of regularity is cited as the basis for rejecting [conflicting evidence], the decisional document shall set forth the basis for relying on the presumption of regularity and explain why the contradictory evidence was insufficient to overcome the presumption."[264]

The manual includes the requirement to justify application of the presumption of regularity despite the lack of a requirement in the NDRB-specific regulations.[265] The manual does not, however, acknowledge the inconsistent guidance for how to engage the presumption in a decision. The manual explains that the NDRB "shall be guided by the applicable statutes, regulations, manuals and directives," among other things.[266] Thus, the Navy-specific guidance is inconsistent within itself as well as inconsistent with the higher-level DoD regulations.

The current AFDRB regulations address the presumption of regularity in two subsections, and like the Navy, do not fully implement the higher-level regulations. First, like the NDRB, 32 C.F.R. § 865.109 restates the presumption of regularity in the regulation governing "Procedures for hearings" in the same language as 32 C.F.R. § 70.8(b)(12)(vi).[267] Second, and again similar to the NDRB, 32 C.F.R. § 865.112 governing "Decisional issues" references the presumption of regularity in terms of findings of facts and omits 32 C.F.R. § 70.8's requirement to "set forth the basis for relying on the presumption of regularity."[268]

In addition to the inconsistencies in requiring explanation for decisions involving the presumption, Air Force Instruction 36-2023 expands the presumption of regularity in subpart "3.2.4. Consideration by the Board."[269] The presumption of regularity is stated in the context of recognizing that the AFDRB "is not an investigative body."[270] The instruction goes on:

> The presumption of regularity dictates that, absent evidence to the contrary, commanders, supervisors, and other officials involved with an action acted fairly and in good faith. The applicant bears the bur-

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264 *Id.* at 24 sec. 224(c)(2)(b)2), 27 sec. 224 (f)(2)(b)2).

265 *See id.* The manual includes 32 C.F.R. § 723 in the references but that is the part governing the Board for Correction of Naval Records, not the NDRB. *Id.* at vii.

266 *Id.* at 1 sec. 103.

267 32 C.F.R. §§ 70.8(b)(12)(vi), 865.109(h) (2026).

268 *Id.* § 70.8(e)(3)(ii)(B)(2), (e)(6)(ii)(B)(2); *id.* § 865.112(f)(2)(ii), (i)(2)(ii).

269 DEP'T OF THE AIR FORCE, DAFI 36-2023, para. 3.2.4. (2022) [hereinafter DAFI 36-2023].

270 *Id.*

> den of providing evidence to overcome this presumption, and the board will only grant relief if it determines there is sufficient evidence to conclude the applicant's discharge was not proper or equitable in accordance with Enclosure 4 of DoDI 1332.28.[271]

This statement of the presumption goes well beyond the presumption as stated in 32 C.F.R. § 70.8 by characterizing officials' actions as "fair[] and in good faith."[272] The other language in the statement further reinforces the power of the presumption: "dictates" makes it sound mandatory in all cases; "absent evidence to the contrary" mischaracterizes the requirement for substantial credible evidence to overcome the presumption; "applicant bears the burden" ignores the board's duty to consider all the evidence; "only" suggests the bar is very high for getting a discharge upgrade; and "sufficient evidence" is inconsistent with "substantial credible evidence."[273]

There is no explanation for this broader statement of the presumption, but these terms are reinforced and further expanded by the language on the AFDRB website: "The Board **is not an investigative body** and **presumes regularity** in the conduct of governmental affairs. This means that, absent evidence to the contrary, the Board presumes that military and civilian personnel involved in a member's discharge carried out their duties correctly, lawfully, and in good faith."[274] The website language does at least hint at the concept of explanation in stating, "[f]ollowing the vote on each case, the presiding officer approves results and a decisional document is issued, which explains the Board's rationale."[275]

This website-only statement of the presumption goes even further by adding "lawfully" to the characterization of official action. But again, there is no explanation for the extension of the presumption beyond 32 C.F.R. § 70.8. As Gavoor and Platt argue, the "historical origins of the presumption" indicate a limited ap-

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271 *Id.*

272 *Id.*; *see also* Gavoor & Platt, *In Search of*, *supra* note 57, at 750 ("The presumption of regularity is similar to, but distinct from, the presumption of good faith, although the presumption of good faith is also partially supported by *Chemical Foundation*." (footnotes omitted)).

273 DAFI 36-2023, *supra* note 269, para. 3.2.4. And the instruction itself is mandatory as stated at the top of the first page, "COMPLIANCE WITH THIS PUBLICATION IS MANDATORY." *Id.* at 1; 32 C.F.R. § 70.8(b)(12)(vi) (2026).

274 *Air Force Discharge Review Board (AFDRB)*, A.F. REV. BDS. AGENCY: INFO. WEBSITE & APPLICATION PORTAL, https://afrba-portal.cce.af.mil/#board-info/drb [https://perma.cc/8HXE-EG3F] (last visited Jan. 30, 2026).

275 *Id.* The AFDRB is unique in mentioning the presumption; the NDRB and ADRB websites do not mention it. *See* Council of Rev. Bds., *supra* note 33.

plicability "to technical matters."[276] Staying true to that origin and the direct line of authority to the governing regulations, there is no legitimate basis for treating the presumption as a substantive tool. And yet, the boards continue to do just that under the branch-specific guidance.

E. Irregularity No. 5: The DRBs Treat the Absence of Evidence as Substantive Confirmation that the Original Discharge was Correct

The DRBs often treat missing information as substantive "support" for an original decision, erroneously extending the presumption beyond "conduct of governmental affairs."[277] In doing so, the boards erroneously equate procedural propriety with substantive correctness. This approach reflects and reinforces the rubber-stamp approach in direct conflict with the requirement for full, fair, and impartial consideration.

For example, in a case involving no documentation about the discharge, the AFDRB relied on the lack of documents to deny the upgrade.[278] The veteran-applicant asked for a discharge upgrade based on post-service conduct.[279] The AFDRB denied relief, stating, "[u]pon review of the Applicant's service record, the Board was not able to find any documentation regarding the discharge."[280] Even though the Board had no information about the discharge, the Board did find evidence of nonjudicial punishments in the veteran's service record.[281] Given that evidence, the Board relied on the presumption of regularity to deny relief.[282] "Since the Board relies on the presumption of regularity, and the Applicant did not submit any evidence to substantiate an inequity or impropriety, it concluded the discharge . . . was appropriate."[283]

Here, the presumption essentially erased the evidence the veteran-applicant presented—his post-service self-improvement with education and skills. The veteran-applicant provided "two letters of reference and [a] certificate" but the Board found that

276 Gavoor & Platt, *In Search of*, *supra* note 57, at 766.

277 *See* 32 C.F.R. § 70.8(b)(9)(iii), (b)(12)(vi).

278 Air Force Discharge Review Board Decisional Document, No. FD-2024-00484 (Air Force Discharge Rev. Bd. Dec. 13, 2024), https://boards.law.af.mil/AF/DRB/CY2024/FD-2024-00484%20FD202400484.pdf [https://perma.cc/TL6J-3GDM].

279 *Id.*

280 *Id.*

281 *Id.*

282 *Id.*

283 *Id.*

evidence insufficient to "represent a substantial investment in the community" without explaining the basis for that determination.[284] The Board seemed to recognize that the letters and certificate were evidence, but still concluded that "the Applicant did not submit any evidence to substantiate an inequity or impropriety."[285] Then, on the basis of that absence of evidence, the Board defaulted to the presumption of regularity to deny relief.[286] This approach goes too far. The Board used the presumption to both erase the post-service conduct evidence and treat the so-called absence of evidence as substantive confirmation of the original discharge. In the absence of discharge documents, the presumption can be used to assume the discharge process was procedurally proper, but that propriety does not equate to substantive confirmation of the discharge characterization. Here, the Board relied on the presumption rather than engaging in a full, fair, and impartial review of the evidence.[287] Especially where the veteran-applicant asked the DRB to consider post-service conduct, the procedural propriety of the discharge—which occurred before the post-service conduct—is not relevant to the question of equity.

In another example from the AFDRB, the Board acknowledged an incomplete "discharge package," and stated that the incomplete package "limited the board's ability to conduct a comprehensive review."[288] Rather than recognize an opportunity for further records collection before making a decision, the Board then used the incompleteness to deny relief on the presumption of regularity.[289] In the absence of a complete package, "the presumption of regularity applies, meaning it is assumed that the discharge process was conducted properly, with due consideration of all relevant factors by the applicant's commander and chain of command. While the character letters were noted, they alone did not substantiate a basis for overturning the discharge."[290] Perhaps even more egregious, the AFDRB "recommended the applicant submit . . . additional documents for further consideration," yet still made a decision on the incomplete

284 *Id.*
285 *Id.*
286 *Id.*
287 *Id.*
288 Air Force Discharge Review Board Decisional Document, No. FD-2024-00522 (Air Force Discharge Rev. Bd. Jan. 27, 2025), https://boards.law.af.mil/AF/DRB/CY2024/FD-2024-00522%2000%20FD202400522.pdf [https://perma.cc/6UDQ-XWGA].
289 *Id.*
290 *Id.*

record rather than waiting for a full package.[291] While it may be consistent with the presumption to presume "proper conduct" of the discharge process in the absence of discharge documents, the Board took the presumption too far into "correct on the merits" territory rather than the more accurate limited view of "proper conduct."

While these cases involving incomplete records might be exactly the type of cases anticipated by the original 1977 DRB presumption, the way the presumption is used today goes beyond merely presuming a commanding officer followed proper procedures or "conducted" the discharge properly to determining that the original discharge decision was correct on the merits. A determination that a discharge was conducted properly does not equate to the correctness of the discharge characterization, yet that is precisely the result. For example, in an NDRB decision, the Board:

> presumed regularity in governmental affairs in that the Separation Authority and Staff Judge Advocate review of the discharge package ensured that the Applicant was afforded all of his administrative rights pursuant to the separation process. The Applicant did not submit any documentation to rebut any presumption of regularity in governmental affairs . . . .[292]

And the Board denied relief.[293] Although the presumption that the separation authority and staff judge advocate reviewed the discharge package addressed an administrative task, completion of that task does not mean the discharge characterization was correct, proper, or just. In fact, invoking the presumption this way demonstrated the power of the presumption in treating completion of a ministerial task as equivalent to a correct outcome.[294]

Using the absence of evidence to substantively confirm original discharge decisions conflicts with the origin of the presumption as stated in *Chemical Foundation*: "The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that

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291 *Id.*

292 Naval Discharge Review Board (NDRB) Discharge Review Decisional Document, No. ND24-9682 (Dep't of the Navy Nov. 4, 2024) [hereinafter Decisional Document No. ND24-9682], https://boards.law.af.mil/NAVY_DRB_2024_Navy.htm [https://perma.cc/SNB4-92QS] (choose "ND24-9682.rtf"; then open the downloaded file).

293 *Id.*

294 *See id.*

they have properly discharged their official duties."[295] Nowhere in that case is there even a suggestion that properly discharging duties equates to "correct" decisions.[296] Even so, the DRB presumption is regularly used as a substantive justification for decisions rather than a tool to check for "regular conduct."

Though the language of the DRB presumption is limited to "the conduct of governmental affairs," as stated in the regulatory guidance,[297] the presumption often goes beyond that limited scope to validate original decisions. The lack of explanation in DRB decisions may be consistent with the branch-specific regulations (that are in conflict with the higher-level regulations), but not even the branch-specific regulations support the idea that the presumption of regularity can be used as substantive confirmation of the original discharge decision.

F. Irregularity No. 6: The DRB Presumption is Reinforced by Judicial Super Deference to Military Decisions

While the general presumption is powerful, the DRB presumption is even more powerful given that courts are heavily deferential to military decisions. Courts typically do not review DRB decisions for a variety of reasons including veteran-applicants' lack of awareness of judicial relief as an option and how to pursue it, and "very few lawyers practice this type of law, with even fewer practicing pro bono or at a cost that veterans can afford."[298] When courts review military personnel decisions, they recognize "the validity of official military acts."[299] Federal courts have noted that "[s]trong policies compel the court to allow the widest possible latitude to the armed services in their admin-

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295 *See* United States v. Chem. Found., Inc., 272 U.S. 1, 14–15 (1926) (citations omitted). *See generally* Decisional Document No. ND24-9682 (denying relief to the applicant because there was no evidence to rebut the presumption of regularity).

296 *See generally Chem. Found.*, 272 U.S. 1 (discussing how the presumption of regularity presumes proper discharge of official duties).

297 32 C.F.R. § 70.8(b)(12)(vi) (2026).

298 KUZMA ET AL., *supra* note 3, at 76.

299 *See, e.g.*, Armstrong v. United States, 205 Ct. Cl. 754, 762 (1974) (presuming the Air Force Selection Board properly performed its function in a military pay case).

This super deference to military decisions extends beyond discharge decisions. *See, e.g.*, *The Presumption of Regularity*, *supra* note 67, at 2442 ("Eager to leave the day-to-day operation of the draft to more expeditious and expert draft boards, courts presumed that boards had followed the intricate web of guidelines and procedures. . . . Because contrary evidence was so difficult to gather, this presumption that the order of call requirements had been followed verged on a presumption that the orders were valid." (citing Frank H. Easterbrook, Comment, *Due Process in Selective Service Appeals*, 39 U. CHI. L. REV. 331, 332 & n.6 (1972))).

istration of personnel matters."[300] This extreme deference makes judicial review a mostly illusory avenue of relief for veterans seeking a discharge upgrade.

The general presumption "narrows judicial scrutiny and widens executive discretion over decisionmaking processes and outcomes" but the DRB presumption narrows judicial scrutiny even further.[301] For example, in a case involving a discharge upgrade request that was denied by both the NDRB and the Board for Correction of Naval Records, the court explained the presumption of regularity as requiring "'cogent and clearly convincing evidence' . . . [to] 'overcome the presumption that military administrators discharge their duties correctly, lawfully, and in good faith.'"[302] This is "a particularly deferential standard of review."[303] The court even identified the extra deference in this case: the court, in the military context, is "unusually deferential" to "avoid destabiliz[ing] military command."[304] Driven by the fear of destabilizing military commands, judicial review reinforces, without fully evaluating, the already powerful presumption.[305] Furthermore, in ruling against the veteran plaintiff, the court explained that it did not consider "whether [the Secretary's] deci-

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300 Adkins v. United States, 68 F.3d 1317, 1323 (Fed. Cir. 1995) (quoting Sanders v. United States, 594 F.2d 804, 813 (Ct. Cl. 1979)). Judicial review of discharge upgrade decisions is "clustered in the Court of Federal Claims and the Federal District Court for the District of Columbia, because those courts have special jurisdiction over certain types of claims or over the military review boards, respectively." KUZMA ET AL., *supra* note 3, at 76. For further discussion on judicial review of discharge upgrade decisions, see *id.* at 76–98.

301 *See The Presumption of Regularity*, *supra* note 67, at 2432.

302 Bogus v. Spencer, No. 1:18-cv-00030-RCL, 2019 WL 4169212, at *2, *4 (D.D.C. Sep. 9, 2019) (quoting Mueller v. England, 404 F. Supp. 2d 51, 55 (D.D.C. 2005)).

303 *Id.* at *6 (quoting Piersall v. Winter, 435 F.3d 319, 325 (D.C. Cir. 2006)).

304 *Id.* at *4 (quoting Mueller v. Winter, 485 F.3d 1191, 1198 (D.C. Cir. 2007)).

305 *But see* Rutledge v. Del Toro, No. 23-cv-1583, 2024 WL 3225958, at *1 (D.D.C. June 28, 2024). In this case involving a request to restore lost designations, the court remanded based on a lack of explanation in the Board for Correction of Naval Records decision. *See id.* at *1–2, *12. The court identified multiple instances of inadequate reasoning, noting that the Board "denied the petition in a two-page opinion which concluded, without much elaboration, that Rutledge had not presented sufficient evidence to rebut the ordinary presumption of regularity in military disciplinary matters," *id.* at *1, *17–18, "the Board did not adequately explain the bases for its decision," *id.* at *2, and "the Board swiftly dispensed with [the arguments]," *id.* at *1, *6. Though not a discharge upgrade case, the way the court recognized limits on the presumption is instructive. The court acknowledged the "highly deferential standard of review" and noted, "[e]ven under this highly deferential standard of review, the Board still must adequately explain its decision." *Id.* at *7. The court also recognized a limit to the high deference: "Although [the] BCNR decisions rightly receive substantial deference, the Court cannot defer into a void." *Id.*

sion was correct," but "only whether the Secretary's decision-making process was deficient."[306]

This extra deference to military decisions may be traced to a case that pre-dates the 1982 (and current) version of the DRB presumption. In *Sanders v. United States*, the Court of Claims described the presumption of regularity as a "strong, but rebuttable, presumption that administrators of the military, like other public officers, discharge their duties correctly, lawfully, and in good faith."[307] The court cited to seven previous Court of Claims decisions to trace this version of the presumption back to 1967.[308] The court explained, "[s]trong policies compel the court to allow the widest possible latitude to the armed services in their administration of personnel matters."[309] The court further explained just how wide that latitude extends. Because "Congress entrusted primary responsibility for the record-correction function to the service Secretaries acting through correction boards,"[310] even if judges disagreed "about whether or not a specific situation was unjust, [judges] will not substitute [their] judgment for the board's when reasonable minds could reach differing conclusions."[311]

This "widest-possible-latitude" approach strips away any chance of reviewing a DRB's use of the presumption of regularity to deny relief. Given the extreme deference, judicial decisions typically do not engage in an analysis of whether the boards' decisions complied with the regulations, leaving unaddressed the broader question of whether the presumption of regularity was appropriately analyzed or explained. This extreme judicial deference contrasts with CAVC cases that recognize reviewing "[w]hether clear evidence exists to rebut the presumption is a

306 *Bogus*, 2019 WL 4169212, at *6 (quoting Kreis v. Sec'y of the Air Force, 866 F.2d 1508, 1512 (D.C. Cir. 1989)).

307 Sanders v. United States, 594 F.2d 804, 813 (Ct. Cl. 1979). Though outside the scope of this Article, this idea—or assumption—that military administrators are like "other public officers" is likely false, or at least questionable, given the military's unique chain of command structure that is integral to military culture and operations in support of "good order and discipline." *See, e.g.*, Stacey-Rae Simcox, *Thirty Years of Veterans Law: Welcome to the Wild West*, 67 KAN. L. REV. 513, 562 (2019) (referring to "the good order and discipline so necessary to the military's culture"); Jeremy S. Weber, *Whatever Happened to Military Good Order and Discipline?*, 66 CLEV. ST. L. REV. 123, 128 (2017) ("Modern military regulations repeatedly stress to commanders the central importance of maintaining good order and discipline.").

308 *See Sanders*, 594 F.2d at 813.

309 *Id.*

310 *Id.* at 813–14.

311 *Id.* at 814.

question of law that the Court considers de novo."[312] While veteran-claimants seeking disability compensation benefits may be entitled to de novo review in a case involving the presumption of regularity, no such entitlement exists for veteran-applicants seeking judicial review of discharge upgrade decisions.

In a series of successful class action lawsuits filed by Yale Law School's Veterans Legal Services Clinic against the Navy,[313] Air Force,[314] and Army,[315] the court recognized weaknesses in the DRBs' decisional documents, as documented in detail in the complaints.[316] The settlement agreements, however, did not mandate any changes to how the boards use the presumption of regularity.[317] Thus, even with the positive results in these cases, the presumption remains a powerful tool for the boards to deny relief. And, as demonstrated throughout this Article, the NDRB and AFDRB continue to use the presumption as a "reason" to deny relief without explanation.[318]

In the DRB realm, the presumption of regularity can be—and often is—applied in every single case. That alone is significant, problematic, and irregular. Given the presumption's dominance in decisions and its dominance as a "reason" for denying upgrade requests, the presumption demands examination. In taking up this examination, this Article previously identified six irregularities of the DRB presumption. With those irregularities in mind, the Article now seeks a path toward a more legitimate, fair, and

312 Crumlich v. Wilkie, 31 Vet. App. 194, 205 (2019).

313 Ruling and Order Approving Class Action Settlement, Manker v. Del Toro, No. 3:18-cv-00372 (D. Conn. Feb. 15, 2022) [hereinafter Manker Class Action].

314 Ruling and Order Approving Class Action Settlement, Johnson v. Kendall, No. 3:21-cv-01214 (D. Conn. June 11, 2024) [hereinafter Johnson Class Action].

315 Kennedy v. Whitley, 539 F. Supp. 3d 261, 261 (D. Conn. 2021).

316 For example, in *Manker v. Del Toro*, the complaint challenged the way the NDRB relied on the presumption of regularity, noting the DoDI 1332.28 requirement for explanation in decisions. Manker Complaint, *supra* note 9, ¶¶ 15, 17, 19. The complaint alleged that the "NDRB invoked a presumption of governmental regularity . . . to dismiss Mr. Manker's claims that the military improperly investigated and adjudicated his drug use. The NDRB did not explain why the evidence submitted by Mr. Manker failed to rebut the presumption of regularity." *Id.* ¶ 92. The complaint further noted how the NDRB described the presumption in a letter to Mr. Manker: "[T]he NDRB will assume the government acted properly and fairly in releasing or discharging you." *Id.* ¶ 94 (internal quotation marks omitted); *see also id.* ¶ 209 ("[T]he NDRB's application of the presumption of regularity in government affairs is arbitrary and capricious, in violation of the [APA], 5 U.S.C. § 706(2)(A).").

317 *See Kennedy*, 539 F. Supp. 3d at 266–68; Manker Class Action, *supra* note 315, at 8–10; Johnson Class Action, *supra* note 315, at 4–5.

318 *See supra* Sections IV.C, IV.E (discussing examples of NDRB and AFDRB decisions relying on the presumption without explanation).

regular DRB presumption. Given the number of irregularities and the depth of regulatory history, my goal here is to set the groundwork for further research on how to resolve the irregularities. This Article begins exploring potential solutions and provides direction for moving forward.

V. MOVING TOWARD FULL, FAIR, AND IMPARTIAL REVIEW: REDEFINING THE PARAMETERS OF THE DRB PRESUMPTION OF REGULARITY

This Article identifies four parameters for resolving or at least mitigating the DRB presumption's irregularities: limiting the scope of the DRB presumption, establishing and mandating an analytical framework, resolving inconsistencies among regulations, and suggesting an oversight mechanism for decisions involving the presumption of regularity. Though ideally these parameters would work in combination, each could make an impact on its own, and the order in which they are discussed here is not intended to be sequential.

These parameters are heavily informed by the general and VA mailing presumptions. The VA mailing presumption is particularly instructive here because it focuses on conduct or ministerial tasks rather than underlying substance. In assessing whether a letter or notice was mailed in accordance with procedural regularities, the CAVC avoids conflating the question of whether the information in the letter was correct. In this way, the VA mailing presumption provides a strong model for the DRBs. Of course, other similarities between the CAVC and DRBs are also helpful here: both the court and the boards have a limited population of claimants/applicants and cases (veterans and veterans-specific issues), and both the court and the boards regularly engage with pro se plaintiffs or applicants, including pro se applicant-turned-plaintiffs later represented on appeal.[319] Finally, the clarity of the CAVC's analytical framework is helpful in guiding the analysis and creating space for checking the decisionmaker. The clear analytical framework may be particularly helpful to the non-law-trained board members by giving them a method for engaging in reasoning.

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319 *See* U.S. CT. OF APPEALS FOR VETERANS CLAIMS, FISCAL YEAR 2023 ANNUAL REPORT 1 (2023), https://www.uscourts.cavc.gov/documents/FY2023AnnualReport.pdf [https://perma.cc/8KDQ-EG6D] (reporting 15% pro se appeals and 56% pro se petitions); Wherry, *Denied by Dysfunctional Design*, *supra* note 24, at 1061 ("Most discharge upgrade applications are submitted by veteran-applicants without legal representation . . . .").

A. Limit the Presumption's Applicability to Propriety Grounds

The DRB presumption should be defined as limited to propriety grounds consistent with the language of the presumption as applicable to the "conduct of governmental affairs." The DRB presumption should not apply to equity and clemency grounds because those go beyond conduct to the merits of decisions.[320] Though the DoD-level regulations and branch-specific guidance include the phrase "conduct of governmental affairs" in the statement of the presumption, that limited scope is often ignored in the DRB decisions—thus, the need for a concrete, limited scope.

A limited-scope definition is consistent with the presumption's origin as applicable to ministerial acts and the DRBs' governing regulations and instructions that refer to "conduct of governmental affairs."[321] The limited scope is also in line with the general and VA mailing presumptions. Similar to Gavoor and Platt's call for a "*Defined and Balanced*"[322] general presumption, and their suggestion that "[t]he best version of a doctrinal (or statutory) presumption of regularity is a limited one: a limited presumption that a senior governmental official performed ministerial tasks,"[323] the DRB presumption should be limited to ministerial acts and balanced to afford some but not unlimited deference to military commanders while creating space for "full, fair, and impartial consideration[]."[324]

A limited-scope DRB presumption should define "conduct of governmental affairs," including a specific statement that conduct does not include substance. For example, in the DRB context, conduct includes following the procedural steps for a discharge (e.g., completing the relevant paperwork, signatures on discharge documents), but conduct does not include the actual discharge characterization decision that resulted from the procedural steps. Though the government may be entitled to a presumption that a procedure was proper or that a signature on a document is valid, those procedural regularities are distinct from a review of the discharge decision itself. To maintain this distinction, the presumption of regularity should not extend beyond propriety challenges and specifically should not apply to the merits of a discharge characterization decision.

320 *See* 32 C.F.R. § 70.8(b)(12)(vi) (2026).
321 *Id.*
322 Gavoor & Platt, *In Search of*, *supra* note 57, at 757.
323 *Id.* at 763.
324 32 C.F.R. § 70.9(a); DoDI 1332.28, *supra* note 34, enclosure 4, para. E4.1.

Upgrade requests on equity or clemency grounds should not be subject to the presumption of regularity because a presumption of regularity "in the conduct of governmental affairs" does not equate to fairness of a decision nor erase the opportunity for second chances. These substantive and policy-based questions are beyond the scope of the presumption and require the DRBs to engage in robust analysis applying the legal standards and governing guidance for equity and clemency. The fact that the boards are directed to consider many types of evidence and factors in equity and clemency decisions further reinforces the inapplicability of the presumption of regularity in these contexts.[325] To truly give "full, fair, and impartial consideration," the boards must evaluate the substance of the discharge on equity and clemency grounds and not rely on procedural regularities as a substitute for substantive correctness.[326]

Though this approach to limit the presumption to propriety grounds would potentially create a further backlog in cases or delay decisions due to the DRBs needing more time to engage in the decision-making process, that is a worthwhile tradeoff—or at least is not a good reason to avoid change given that there is already an unreasonable length of time between filing an application and receiving a decision.[327] While the boards may have to work harder without the efficient denials based on the presumption, working harder is a means to the goal of providing better decisions. This approach may also reduce the number of cases appealed to the boards of corrections or courts if relief is granted at the DRB.

Moreover, a limited DRB presumption would also better reflect the purpose of the DRBs. If the DRBs exist merely to rubber-stamp the original decisions, there would be no reason to have boards "of review." Given that the DRBs have statutory authority to upgrade a discharge on equity or propriety grounds, and on clemency grounds by policy guidance, the DRBs' purpose is not limited to reviewing procedural irregularities. Procedural

325 *See* 32 C.F.R. § 70.9(c)(i)(A)–(O) (listing fifteen "[q]uality of service" factors and four "[c]apability to serve" factors); Wilkie Memo, *supra* note 38, para. 7 (identifying eighteen factors).

326 32 C.F.R. § 70.9(a); DoDI 1332.28, *supra* note 34, enclosure 4, para. E4.1.

327 Posting of Jessica L. Wherry, jwherry@ubalt.edu, to veteransclinics@lists.wm.edu (Feb. 17–18, 2025) (on file with author) (interpreting "an analyst has not been assigned yet. . . . to mean no one has even looked at the case in 3+ years." "Every time we reach out for status updates, the number of days before cases are being boarded goes up. Last time I checked in, it was 1000+ days. (?!?!)." "Army DRB petitions are now at the 3-year mark.").

irregularities are difficult to establish—especially for a pro se veteran-applicant years removed from the discharge process. The lack of proof for a procedural irregularity should not eliminate the DRBs' requirement to review the substance of a discharge on equity grounds. The requirement to provide "full, fair, and impartial consideration" should not be erased by the presumption. Instead, the presumption as limited to questions of propriety could support the boards' efforts to focus on the substantive issues presented by discharge upgrade applications.

B. Establish a Required Analytical Framework for the Presumption

Just as the general presumption is "not . . . a legal fiction wholly beyond judicial review or impervious to rebuttal,"[328] the DRB presumption can be rebutted and thus requires engagement with an analytical framework. In line with limiting the presumption's scope, this Article calls for an analytical framework within which to apply the presumption, borrowing from the CAVC case law (case law that is consistent with, but more developed than, the general presumption case law). Unlike the VA mailing presumption, which is rooted in statutory and regulatory requirements for the process of notice to veteran-claimants and their representatives but has a judge-made analytical framework, the DRB presumption is rooted in a detailed regulatory scheme within the broader context of multiple layers of deference. The deference in the DRB context has led to a lack of an analytical framework, and that gap can be resolved by adopting the CAVC approach.

The well-established CAVC analytical framework provides a ready-made and tested approach: (1) Predicate; (2) Rebuttal; (3) Burden-Shifting.[329] Adapting this three-step analytical framework to the DRB presumption could look like this:

Step One: Does the presumption of regularity apply in this case? Asked another way, was there an official duty at issue?

Step Two: Is there evidence to overcome the presumption? (Without judging the validity or weight of the evidence, determine whether there is any evidence proffered.) Given the evidence, is the presumption rebutted? Why or why not?

If there is no evidence proffered or if the presumption is not rebutted based on the evidence and that lack of rebuttal is explained by the DRB, the presumption stands.

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328 Gavoor & Platt, *In Search of*, *supra* note 57, at 761.

329 *See* discussion *supra* Section III.B.2.

If the presumption is rebutted, Step Three: What evidence does the DRB have to show the propriety despite the rebuttal evidence? How and why does this evidence overcome the presumption's rebuttal?

The DRBs could implement this approach immediately, even without any other regulatory change, because the framework is consistent with the governing DoD-level C.F.R. and the general presumption.[330] In fact, the DRBs have already adopted analytical structures without specific regulatory guidance. For example, in decisions involving mental health conditions governed by the DoD's "liberal consideration" policy,[331] the DRBs have incorporated the policy guidance's factor-based approach into their decisions.[332] According to the policy guidance, there are four factors, or questions, in assessing a discharge upgrade request involving relief related to a mental health condition:

(1) "Did the veteran have a condition or experience that may excuse or mitigate the discharge?

(2) Did that condition exist/experience occur during military service?

(3) Does that condition or experience actually excuse or mitigate the discharge?

(4) Does that condition or experience outweigh the discharge?"[333]

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330 *See* 32 C.F.R. § 70.8(e)(3)(ii)(B)(2). The requirement for explanation is consistent with the general presumption in federal case law. *See, e.g.*, Conley v. United States, 5 F.4th 781, 791 (7th Cir. 2021) ("The presumption of regularity is an analytic tool, not an excuse to rubber-stamp any and all executive action as lawful absent clear evidence to the contrary.").

331 Memorandum from Chuck Hagel, Sec'y of Def., to Sec'ys of the Mil. Dep'ts (Sep. 3, 2014), https://www.secnav.navy.mil/mra/bcnr/Documents/HagelMemo.pdf [https://perma.cc/T772-XGQE]; Memorandum from Brad Carson, Acting Principal Deputy Under Sec'y of Def. for Pers. & Readiness, to Sec'ys of the Mil. Dep'ts (Feb. 24, 2016), https://ctveteranslegal.org/wp-content/uploads/2017/10/carson.pdf [https://perma.cc/9YJ9-8433]; Memorandum from A.M. Kurta, Acting Under Sec'y of Def. for Pers. & Readiness, to Sec'ys of the Mil. Dep'ts (Aug. 25, 2017) [hereinafter Kurta Memo], https://www.secnav.navy.mil/mra/CORB/Documents/SECNAVCORB-Policy-Letter-2017-3-Clarifying-Guidance-to-Military-Discharge-Review-Boards.pdf [https://perma.cc/J4JT-TPZW] (supplementing the Hagel Memo).

The liberal consideration policy is outside the scope of this Article, but I anticipate a next project addressing the mutual exclusivity of liberal consideration and the presumption of regularity.

332 *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-25-107354, MILITARY DISCHARGE: ACTIONS NEEDED TO HELP ENSURE CONSISTENT AND TIMELY UPGRADE DECISIONS 45–50 (2025).

333 Kurta Memo, *supra* note 331, attach. at 1, para. 2(a)–(d). These factors are known among veterans advocates as "the Kurta factors."

This analytical framework has become part of DRB decisional documents, to various degrees among the DRBs, without any regulatory guidance at the DoD or branch level. For example, NDRB decisions include a table with the four questions along the left and answers to the questions on the right. This approach provides clarity and forces the Board to engage in an analysis of each question.[334] AFDRB decisions also engage with the Kurta factors, but in a more narrative format.[335] Despite the different approaches, the boards have demonstrated an ability to incorporate an analytical framework, indicating feasibility to do so with the presumption of regularity. Though regulatory change is not required to incorporate an analytical framework, I still recommend regulatory change to ensure universal implementation of an analytical framework for the presumption of regularity.

Additionally, and within the analytical framework, there should be guidance for what it takes to rebut the presumption. This is an area that needs more research to determine what evidence rebuts the DRB presumption given the unique features of the discharge upgrade context, including lack of access to or non-existence of military records, length of time since discharge, pro se status of veteran-applicants, and availability of evidence to veteran-applicants. Even without a clear definition for what counts as rebutting the presumption in the case law engaging the general presumption and VA mailing presumption, this aspect of developing the analytical framework should not be overlooked.

Looking to the CAVC for guidance, it may be reasonable to determine that a veteran-applicant's statement alone may not be enough to overcome a presumption of regularity on propriety grounds. But that should be scrutinized to determine what is required beyond a veteran-applicant's statement and to try to identify other types or categories of evidence that would be accessible to a veteran-applicant. If the presumption of regularity continues to potentially apply to equity and clemency grounds, the standard for rebuttal evidence should be relatively low and a veteran-applicant's statement alone should be enough to overcome the presumption. That low standard is consistent with all the policy

334 The table alone is not a solution, but the question-and-answer approach does reflect the ability to incorporate an analytical framework.

335 *See, e.g.*, Air Force Discharge Review Board Decisional Document, No. FD-2022-00082 (Air Force Discharge Rev. Bd. June 21, 2022), https://boards.law.af.mil/AF_DRB_CY2022.htm [https://perma.cc/F4NN-PBRR] (choose "02a_AFDRB Decisional Rationale – FD-2022-00082.rtf"; then open the downloaded file) (including the four Kurta questions with answers).

guidance directing the boards to give "full, fair, and impartial consideration[]," to give second chances, and to view post-discharge evidence.[336] Given the strength of the government's position, allowing more rebuttal evidence will not eliminate the power of the presumption, but it would force the DRBs to engage more deeply with the facts in deciding that the presumption justified denial of relief.[337]

Although courts usually give extreme deference to the boards,[338] there has been some judicial recognition of the lack of analytical engagement in board decisions and examples for how to approach the analysis. In a rare case that fully engages with review of a board decision, *Jenkins v. Speer* offers some guidance for more effective engagement with the presumption. In reviewing a repeatedly denied discharge upgrade request, the court noted that "[d]istrict court review of agency decisions is . . . typically narrow and deferential," and acknowledged the even more deferential standard for the boards.[339] The court noted that the board's "actions 'must be supported by reasoned decisionmaking.'"[340] Within this context of the extreme—but not total—deference to military decisions, the court reviewed the Board's reliance on the presumption of regularity, recognizing that the burden was on the veteran-applicant.[341]

Ultimately, the court determined that the Board failed to fully engage with the evidence the veteran provided.[342] The court provided a series of benchmarks which can be taken forward to create parameters for DRB decisions. First, the court explained that the presumption "requires a court to treat the Government's records as accurate; it does not compel a determination that the

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336 *See, e.g.*, Kurta Memo, *supra* note 331, attach. at 2, para. 7 ("The veteran's testimony alone, oral or written, may establish the existence of a condition or experience, that the condition or experience existed during or was aggravated by military service, and that the condition or experience excuses or mitigates the discharge."); 32 C.F.R. § 70.9(a) (2026); DODI 1332.28, *supra* note 34, enclosure 4, para. E4.1.

337 Defining the evidentiary requirements for rebutting the presumption is beyond the scope of this Article.

338 *See supra* Section IV.F.

339 Jenkins v. Speer, 258 F. Supp. 3d 115, 124 (D.D.C. 2017) ("The ABCMR, as a military board, is further entitled to 'an unusually deferential application of the "arbitrary and capricious" standard.'" (quoting Kreis v. Sec'y of the Air Force, 886 F.2d 1508, 1514 (D.C. Cir. 1989))). Though the court reviewed a corrections board decision, the analytical approach to the presumption is just as relevant to the DRBs.

340 *Id.* (quoting Haselwander v. McHugh, 774 F.3d 990, 996 (D.C. Cir. 2014)).

341 *Id.*

342 *Id.* at 136.

record establishes what it is offered to prove."[343] Here, a presumption that the veteran and his captain signed a discharge form "does not compel a determination that the advice referred to in the form actually occurred."[344] The court noted that the Board went too far in treating the signatures as confirmation of a substantive event.[345] Significantly, the court explained the unfairness of requiring a plaintiff to prove a negative: "[I]t was unreasonable to expect a plaintiff who claimed that he was not counseled to produce a counseling-related form that his supervisor allegedly did not prepare."[346]

Furthermore, the court explained that the Board entirely ignored evidence the veteran offered as rebuttal evidence, a cover letter from his captain and his own statements. The court analyzed the cover letter to point out its weaknesses, noting that it "did not include legal advice on any of the ten mandatory topics. Instead, it focused entirely on the possible advantages of the chapter 10 discharge."[347] Without engaging in the disadvantages to the veteran, the court determined the letter was "one-sided" and fell "short of the threshold for providing objective advice on the merits of the chapter 10 discharge."[348] The court further explained that the veteran's declaration was ignored.[349] In total, ignoring the evidence led the court to determine the Board's decision was arbitrary. The court explained that the Board was obligated to "weigh" the evidence rather than rely on the presumption of regularity alone.[350] This detailed discussion of each piece of evidence and how to consider it in terms of rebutting the presumption provides a starting point to developing a template for implementing a robust analytical framework. Especially in regard to proving a negative and weighing a veteran's statement, the court's guidance suggests how the DRBs can fully and fairly consider each piece of evidence in step two of the proposed analytical framework.

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343 *Id.* at 128 (quoting Latif v. Obama, 666 F.3d 746, 750 (D.C. Cir. 2011)).
344 *Id.*
345 *See id.*
346 *Id.*
347 *Id.*
348 *Id.*
349 *See id.* at 129.
350 *See id.* at 130.

C. Resolve Inconsistencies Among the C.F.R. and Other Governing Documents

Given the various inconsistencies identified in the previous discussion, DoD should, in collaboration with the branches, undertake a comprehensive revision of the regulations governing the DRBs to identify all the inconsistencies and then revise toward a consistent approach.[351] Such an approach reflects the DoD-level regulations' requirement for "uniformity among the Military Departments in the rights afforded applicants in discharge reviews."[352] Consistency is key here as the regulatory variations among the branches can lead to inconsistencies in veteran-applicants' rights to "full, fair, and impartial consideration[]."[353] For example, the branch-level guidance should be revised to require explanation in decisions involving the presumption of regularity consistent with the requirement for explanation as detailed in the DoD regulations.

A holistic effort to compare the DoD regulations with each of the branches' regulations could identify all the inconsistencies, discover opportunities for reconciliation, and potentially uncover needs for additional rulemaking. While there may be room for some variation among the branches in how they approach the presumption, any variation should be consistent with the higher-level regulations. Depending on other potential changes, including limiting the presumption's scope and establishing an analytical framework, this holistic review and revision might be more effective as a later, rather than first, step.

D. Use the Discharge Appeals Review Board as an Interim Review Mechanism and Resource Creator

With a limited-scope DRB presumption that is consistent with the governing regulations and other guidance, and a well-established analytical framework for the presumption, oversight for at least an initial period would be useful in ensuring full implementation of the changes. Of course, the records correction boards and courts are possible avenues of oversight, but there is an opportunity to use the Discharge Appeals Review Board

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351 No doubt this would be a significant undertaking but worth the effort. Generative AI could be used to identify inconsistencies among the various governing documents.

352 32 C.F.R. § 70.4(b)(2) (2026); *see also* DoDI 1332.28, *supra* note 34, enclosure 4, para. E4.1.2 (mirroring the C.F.R. language).

353 32 C.F.R. § 70.9(a); DODI 1332.28, *supra* note 34, enclosure 4, para. E4.1.

(DARB) to oversee the DRBs and potentially eliminate the need for appeals to the records correction boards and courts.

The DARB was established by statute to provide "a final review" of a discharge upgrade request.[354] The DARB's jurisdiction is limited to cases involving discharge or dismissal on or after December 20, 2019, and exhaustion of all administrative remedies.[355] Applications to the DARB must be submitted within 365 days of the records correction board decision.[356] The DARB's limited function is "*de novo* review" of board decisions.[357] In Fiscal Years 2022, 2023, and 2024, the DARB received a combined total of forty-five applications, but only one was reviewable by the DARB.[358] Given what seems to be a lack of work for the DARB, the nineteen-person staff could take on an oversight role, reviewing all DRB decisions relying on the presumption of regularity for compliance with an established analytical framework.[359]

The DARB could identify best practices over a period of review and issue recommendations to the DRBs to better implement and engage with the required analytical framework for the presumption of regularity. The DARB could develop templates and examples based on its review, as well as catalog the types of evidence sufficient and insufficient to rebut the presumption. These resources would be useful to the boards, veteran-applicants, and veterans advocates. Given the DARB's limited scope by statute, some level of statutory amendment or rulemaking may be required for this to work.

VI. CONCLUSION

This Article takes a critical look at the DRB presumption with an eye toward resolving regulatory inconsistencies and increasing the robustness of the DRB decisional documents. There is no perfect definition for the DRB presumption, but there is room to redefine it as narrowly applicable to propriety issues in

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354 10 U.S.C. § 1553a(a).

355 32 C.F.R. § 73.5(a)(1), (3).

356 *Id.* § 73.5(c)(2).

357 *Id.* § 73.6(b)(2).

358 *See* Jessica Lynn Wherry, *16th Annual Veterans Legal Assistance Conference & Training*, VETERANS L. PROF BLOG (Apr. 11, 2025), https://www.veteranslawprofblog.com/2025/04/16th-annual-veterans-legal-assistance-conference-training-by-jessica-lynn-wherry-university-of-balti/ [https://perma.cc/SVV5-M8PZ]; *DoD Discharge Appeal Review Board (DARB)*, *supra* note 53 (choose "FY22 DARB Annual Report.xlsx," "FY23 DARB Annual Report v1.xlsx," and "FY24 DARB Annual Report.xlsx"; then open the downloaded files). As of March 29, 2026, the DARB had not yet posted the data for FY2025. *See id.*

359 *See* Wherry, *supra* note 358.

line with the historical origin of the presumption, develop an analytical framework consistent with the regulatory requirements for explanation, and develop parameters for evidentiary standards within the unique features of discharge upgrades. These changes, consistent with the history of the presumption, allow space for tailoring. Just as the VA mailing presumption is consistent with the general presumption yet has its own unique parameters in terms of what triggers the presumption and what evidence is sufficient to rebut, the DRB presumption can adapt to similarly reconcile with the general presumption while maintaining context-specific principles and limitations.

A narrowed DRB presumption applied and analyzed within a robust analytical framework will do much to improve the discharge upgrade process—both for the veteran-applicants to receive a true "full, fair, and impartial" review, and for the DRB board members as they could have a clear path for analysis. Just as the DRBs have adapted to incorporate the Kurta factors framework resulting in increased decisional clarity, the DRBs can further increase decisional clarity by adopting an analytical framework for the presumption of regularity.

A refined DRB presumption with a required analytical framework would decrease opportunities for historical bias and deference to original decisions. Without the presumption applying to "any review," board members would have no choice but to more fully engage in the decision-making process and thereby move closer to the required "full, fair, and impartial" review as well as better meet the regulatory requirements for explanation. Jettisoning old boilerplate language would create space for engaging in the analytical framework. There is still room for the efficiency of boilerplate in creating a template that takes the board through the presumption analysis step by step, starting with an explanation and justification for how and why the presumption applies in the first place.

The stakes are high for many veteran-applicants seeking a discharge upgrade. Historically and today, the presumption of regularity plays a significant role in denying relief to countless veteran-applicants. Informed by the general and VA mailing presumptions, this Article examines the DRB presumption to uncover its irregularities. With these irregularities exposed, there are opportunities to confront and resolve them toward a balanced entitlement to "full, fair, and impartial" review—something every veteran-applicant deserves.

Muted by the Machine: Expanding FTC Authority to Address Algorithmic Review Suppression

Aubrey Adams

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Muted by the Machine: Expanding FTC Authority to Address Algorithmic Review Suppression

Aubrey Adams∗

As digital platforms increasingly shape consumer decision-making, the integrity of online reviews has become central to fair market competition. In 2024, the Federal Trade Commission (FTC) issued a final rule prohibiting deceptive practices involving consumer reviews, including traditional forms of review suppression. Yet the rule fails to address a more subtle threat: algorithmic review suppression.

This Note argues that algorithmic review suppression, where platforms use automated systems to downrank or obscure negative reviews, creates a misleading impression of product quality while evading existing regulation. Unlike traditional suppression, these practices operate invisibly under the guise of content curation, distorting consumer perception and influencing purchasing behavior.

The FTC's current framework leaves a critical gap. Its definition of review suppression does not include algorithmic practices, and its scope is limited to entities that sell products or services, excluding influential review-hosting platforms. As platforms like TikTok, Amazon, and Yelp shape consumer perception, this narrow approach undermines the rule's effectiveness.

To address this gap, this Note proposes three reforms: (1) expanding the definition of review suppression to include algorithmic manipulation, (2) requiring transparency in how platforms rank and display reviews, and (3) adopting a burden-shifting framework that requires platforms to demonstrate neutrality. Ensuring transparency and fairness in algorithmic review systems is essential to preserving consumer trust in the modern digital marketplace.

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I. INTRODUCTION

In July 2023, ByteDance, the parent company of the globally popular social media platform TikTok, launched its own book publishing imprint.[1] In recent years, TikTok has emerged as an influential platform in the literary world, boosting book sales through its "BookTok" community. BookTok is a community built on reader-made videos of book reviews, reactions, and recommendations.[2] These videos serve as "visual trailers" of books and "attract millions of views."[3] One marketing and publicity manager from Simon & Schuster compared this effect to other internet trends like 2014's viral ALS ice-bucket challenge, saying "these TikTok trends become a challenge in the same way, and you don't want to miss out on the zeitgeist, so you get the book that everyone's talking about."[4]

Authors who once dreamed of catching the attention of influential critics or securing prominent bookstore displays suddenly found their fates determined by teenagers and young adults passionately reviewing novels in short videos. These short videos draw attention to and turn certain titles into trends. These trends shape bestseller lists worldwide.[5] And those trends are dependent on TikTok's algorithm that determines what content

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1 Nancy K. Herther, *TikTok's Move into Publishing: Part 1–Social Media Enters a New Era*, CHARLESTON HUB (Jan. 24, 2024), https://www.charleston-hub.com/2024/01/tiktoks-move-into-publishing-part-1-social-media-enters-a-new-era/ [https://perma.cc/7G58-Z5HL].

2 *See* Alison Flood, *The Rise of BookTok: Meet the Teen Influencers Pushing Books up the Charts*, THE GUARDIAN (June 25, 2021, at 07:00 ET), https://www.theguardian.com/books/2021/jun/25/the-rise-of-booktok-meet-the-teen-influencers-pushing-books-up-the-charts [https://perma.cc/LL47-ZFY4].

3 *Id.*

4 *Id.*; *The ALS ICE Bucket Challenge: How It Started*, ALS ASS'N, https://www.als.org/ibc-how-it-started [https://perma.cc/E5K7-XYZM] (last visited Mar. 8, 2026).

5 David Barnett, *'I Can't Stress How Much BookTok Sells': Teen Literary Influencers Swaying Publishers*, THE GUARDIAN (Aug. 6, 2023, at 02:00 ET), https://www.theguardian.com/books/2023/aug/06/i-cant-stress-how-much-booktok-sells-teen-literary-influencers-swaying-publishers [https://perma.cc/S3Z2-CQM5]. One example of an author who has greatly benefited from the rise of BookTok is Colleen Hoover. *See* Alexandra Alter, *How Colleen Hoover Rose to Rule the Best-Seller List*, N.Y. TIMES (June 21, 2023), https://www.nytimes.com/2022/10/09/books/colleen-hoover.html [https://perma.cc/49LQ-BTJJ] (highlighting that the hashtag #colleenhoover has more than 2.4 billion views, which has led to a massive surge in book sales).

In 2022 alone, Colleen Hoover sold 14.3 million books, a 661% increase from the 1.88 million copies she sold before going viral the previous year. Marta Biino, *TikTok Helped Colleen Hoover Sell 14.3 Million Copies of Her Books in 2022, New Data Shows. Here Are 3 Other Key Takeaways About BookTok's Impact on Sales*, BUS. INSIDER (Feb. 22, 2023, at 09:16 ET), https://www.businessinsider.com/tiktok-book-sales-2022-booktok-romance-colleen-hoover-2023-2 [https://perma.cc/ANA8-HJMC].

users see.[6] While TikTok has never fully disclosed how its algorithm works, we do know that it uses a machine learning model that considers factors such as a user's engagement and a video's popularity.[7] Because exposure is so vital to a book's success on BookTok, TikTok's algorithm can single-handedly determine which books will be successful and which will not.[8] This power has made the platform an essential marketing tool for authors and publishers, who now rely on partnerships with popular BookTok influencers to promote their titles.[9]

Now, with the launch of its own publishing imprint, 8th Note Press, TikTok is not only a trendsetter but also a direct stakeholder in the very products it promotes, blurring the lines between organic content discovery and targeted advertising.[10] The start of 8th Note Press introduces a conflict of interest; as both a platform and publisher, TikTok can use its algorithm to boost the books it publishes, presenting them as authentic user-endorsed recommendations without disclosing the financial motives behind these placements.[11]

Just over a year after ByteDance's announcement, the Federal Trade Commission (FTC) issued a final rule relating to specific unfair or deceptive acts or practices involving consumer reviews or testimonials.[12] The Trade Regulation Rule on the Use of Consumer Reviews and Testimonials became effective as of Octo-

6 Sammi Burke, *Understanding TikTok's Algorithm: Here's How to Go Viral*, BACKSTAGE (Sep. 25, 2024), https://www.backstage.com/magazine/article/tik-tok-algorithm-explained-75091/ [https://perma.cc/6QT9-X3DC].

7 *See* Ben Smith, *How TikTok Reads Your Mind*, N.Y. TIMES (Dec. 5, 2021), https://www.nytimes.com/2021/12/05/business/media/tiktok-algorithm.html [https://perma.cc/L67D-UJKV].

8 Ava Barnaby, *The Impact of BookTok*, ROCK & ART: CULTURAL OUTREACH (July 26, 2023), https://www.rockandart.org/the-impact-of-booktok/ [https://perma.cc/EZX4-2LUC].

9 *See* Marta Biino, *'It's Huge, Beyond Anything in My Career': Publishing Industry Insiders Explain How TikTok Has Sent Book Sales Surging and How They're Trying to Tap into the BookTok Phenomenon*, BUS. INSIDER (Mar. 1, 2022, at 10:17 PT), https://www.businessinsider.com/how-authors-and-publishers-are-using-tiktok-to-sell-books-2022-2?r=US&IR=T [https://perma.cc/MPS2-PKMT].

10 *See* Alexandra Alter, *TikTok's Owner Already Publishes Digital Books. Now It Is Moving into Print.*, N.Y. TIMES (Oct. 16, 2024), https://www.nytimes.com/2024/10/16/books/tiktok-bytedance-8th-note-press-print.html [https://perma.cc/U3QE-RFSD].

11 *See id.*

12 Press Release, Fed. Trade Comm'n, Federal Trade Commission Announces Final Rule Banning Fake Reviews and Testimonials (Aug. 14, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/08/federal-trade-commission-announces-final-rule-banning-fake-reviews-testimonials [https://perma.cc/QRC4-STT7].

ber 21, 2024.[13] Notably, § 465.7(b) of this rule specifically addresses review suppression, saying:

> It is an unfair or deceptive act or practice and a violation . . . [f]or a business to materially misrepresent, expressly or by implication, that the consumer reviews of one or more of the products or services it sells displayed in a portion of its website or platform dedicated in whole or in part to receiving and displaying consumer reviews represent most or all the reviews submitted to the website or platform when reviews are being suppressed (*i.e.*, not displayable) based upon their ratings or their negative sentiment.[14]

This rule clearly prohibits traditional review suppression—when a business or platform manually removes, hides, or discourages negative reviews to create a misleadingly positive impression of a product or service, such as deleting reviews, refusing to publish certain ratings, intimidating consumers into retracting negative feedback, or using contractual clauses to prevent criticism.[15] However, this rule fails to address the subtle manipulation known as *algorithmic review suppression*. Algorithmic review suppression involves using complex algorithms to automatically downrank, shadow-ban, or deprioritize negative reviews, thereby creating an artificially positive impression of a product or service under the guise of content curation or engagement optimization.[16] Unlike traditional methods of suppression, such as manual deletion or explicit threats, algorithmic suppression is virtually invisible to consumers and regulators alike.

The current language of the rule does not address algorithmic suppression, creating a loophole where platforms can suppress negative reviews and promote positive ones under the guise of "content curation."[17] This loophole allows companies like ByteDance to artificially boost positive influencer content while downranking negative influencer content under the guise of content curation, leaving vulnerable consumers misled as to the actual quality of the products promoted on the platform. This con-

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13 *The Consumer Reviews and Testimonials Rule: Questions and Answers*, FED. TRADE COMM'N (Nov. 2024), https://www.ftc.gov/business-guidance/resources/consumer-reviews-testimonials-rule-questions-answers [https://perma.cc/9D2Z-CFFQ].

14 16 C.F.R. § 465.7(b) (2025).

15 *See* Ellie Guyon, *Is Review Suppression Hurting Your Business? What You Need to Know.*, WIDEWAIL (Dec. 17, 2024), https://www.widewail.com/blog/is-review-suppression-hurting-your-business-what-you-need-to-know [https://perma.cc/N5ZK-X847].

16 DANIELLE DRAPER & SABINE NESCHKE, BIPARTISAN POL'Y CTR., THE PROS AND CONS OF SOCIAL MEDIA ALGORITHMS 2 (2023), https://bipartisanpolicy.org/wp-content/uploads/2023/10/BPC_Tech-Algorithm-Tradeoffs_R01.pdf [https://perma.cc/3KTW-AV8B].

17 *See id.*

cern speaks to a larger and more systemic issue: platforms that curate user-generated reviews and recommendations, regardless of whether they sell the products in question, can quietly manipulate public perception through algorithmic ranking systems. To address the problem of algorithmic review suppression, this Note proposes three key solutions: (1) clear, expanded definitions of business and suppression that encompass algorithmic suppression for all review-hosting platforms, (2) a transparency requirement obligating platforms to disclose how their algorithms affect review visibility, and (3) a burden-shifting framework in legal disputes requiring platforms to demonstrate that their algorithms operate neutrally.

First, the FTC must update its regulations to expand its list of defined terms and explicitly define review suppression such that all forms of suppression are recognized as deceptive trade practices under § 465.7. The definition should encompass any algorithm or other automated system that alters the visibility or impact of negative reviews, whether by downranking, deprioritizing, or shadow-banning them. This change would ensure that businesses cannot hide behind claims of content curation when they manipulate review visibility. Further, § 465.7 only regulates "business[es]," which § 465.1(a) defines as individuals, partnerships, corporations, "or any other commercial entity that sells products or services."[18] This narrow language potentially excludes platforms like Amazon and Yelp in their hosting capacity, which still have significant influence on consumer purchasing decisions. To best serve the purposes of § 465.7, the FTC needs to expand the definition of business to include *all* review-hosting platforms, not just those with potential conflicts of interest.

Second, the FTC must impose transparency requirements on platforms that control consumer purchasing decisions. Platforms should be required to disclose their algorithms and ranking systems. This includes both *operational transparency*—where platforms must explain how their algorithms work—and *impact transparency*—where platforms must disclose the effects their algorithms have on review visibility and consumer behavior. In addition, the FTC should require review-hosting platforms to submit an annual algorithmic impact statement, akin to an environmental impact report. This statement would summarize findings from internal audits about how the platform's ranking system affects the visibility of different types of reviews. These

18 16 C.F.R. §§ 465.1(a), 465.7(b).

reports could be made accessible to consumers via a centralized public database, similar to what is proposed in the Algorithmic Accountability Act of 2023.[19]

Lastly, the FTC must establish a burden-shifting framework for legal disputes regarding review suppression. Currently, consumers bear an almost impossible burden when attempting to prove their negative reviews were suppressed intentionally, given their limited access to platform data and the opaque nature of algorithms. To address this imbalance, in cases where consumers suspect that their negative reviews have been suppressed, the burden of proof should be shifted to the platform. Platforms should be required to prove that their review-ranking algorithms are neutral and not designed to deceive consumers. This approach is similar to the burden-shifting principle used in other consumer protection laws like the Fair Credit Reporting Act, where agencies are required to prove the accuracy of disputed information.[20]

Part II of this Note provides essential background, exploring how algorithms function to influence consumer decision-making and outlining the evolution and scope of the FTC's current consumer review regulations, particularly the final rule codified by 16 C.F.R. § 465. Building upon this foundation, Part III analyzes the problem of algorithmic review suppression and the shortcomings of the current regulatory framework, illustrating how certain platforms exploit regulatory ambiguities. Part IV then sets forth targeted, actionable reforms designed to effectively close these identified regulatory loopholes. Recognizing, however, that these proposed reforms might encounter objections related to platform autonomy, commercial secrecy, and First Amendment protections, Part V explores alternative regulatory approaches that could balance consumer protection with legitimate platform interests. Finally, Part VI concludes with a concise summary of the identified problems and reaffirms the necessity and efficacy of the recommended solutions in strengthening consumer protections.

II. BACKGROUND

The FTC has long been tasked with policing unfair methods of competition through its statutory authority provided by 15 U.S.C. § 45.[21] Historically, this statute enabled the FTC to address overtly deceptive and unfair business practices, providing a

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19 Algorithmic Accountability Act of 2023, S. 2892, 118th Cong. § 3(b) (2023).

20 15 U.S.C. § 1681i(a)(1)(A).

21 *Id.* § 45(a)(1) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.").

foundational framework for consumer protection.[22] However, as consumer interactions increasingly moved online, new forms of deception emerged, prompting additional legislative responses.

Prior to the introduction of the new rule, 16 C.F.R. § 465, consumer review protections were primarily governed by the Consumer Review Fairness Act of 2016 (CRFA), codified under 15 U.S.C. § 45b.[23] The CRFA specifically targeted the suppression of consumer reviews through contractual restrictions.[24] Previously, businesses routinely leveraged standardized contracts—particularly online terms and conditions—to silence negative feedback.[25] Commonly referred to as "gag clauses," these terms threatened consumers with lawsuits or monetary penalties if they posted critical reviews, effectively stifling legitimate consumer complaints and creating an artificially positive public image of products or services.[26]

The enactment of the CRFA marked an important legislative achievement, explicitly outlawing such punitive contractual practices.[27] However, while the CRFA addressed direct suppression through contract clauses, it did not anticipate the more subtle and increasingly prevalent forms of review suppression enabled by technological advancements, such as algorithmic filtering and manipulation.

The limitations of the existing framework were highlighted by the FTC's case against Fashion Nova, a high-profile fast-fashion brand widely popularized through social media and celebrity endorsements.[28] Between 2015 and 2019, Fashion Nova systematically suppressed negative product reviews, leveraging automated tools designed to showcase positive feedback while ef-

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22 *See id.* § 45(a)(2) ("The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.").

23 *Id.* § 45b (prohibiting the use of form contracts that restrict consumers from or penalize them for providing truthful reviews and feedback about a company's goods or services).

24 *Id.*

25 *Consumer Review Fairness Act: What Businesses Need to Know*, FED. TRADE COMM'N (Feb. 2017), https://www.ftc.gov/business-guidance/resources/consumer-review-fairness-act-what-businesses-need-know [https://perma.cc/PK67-A6A9] ("Some companies put contract provisions in place, including in their online terms and conditions, that allowed them to sue or penalize consumers for posting negative reviews.").

26 Michael R. Gibson & Rossi F. Maddalena, *How Can They Say That? More Importantly, How Can I Erase That?*, HIGGS FLETCHER & MACK, LLP (Apr. 5, 2017), https://higgslaw.com/protecting-your-brand/ [https://perma.cc/DSE6-BVK4].

27 15 U.S.C. § 45b.

28 *See* Decision and Order, Fashion Nova, LLC, No. C-4759 (F.T.C. Mar. 18, 2022).

fectively burying negative ratings.[29] Specifically, the FTC alleged that Fashion Nova withheld hundreds of thousands of reviews rated lower than four stars from public view by using a third-party product review management system.[30] This system automatically published favorable four- and five-star reviews while queuing negative reviews indefinitely, thus misleading consumers into believing products were universally well-received.[31]

In drafting the updated regulation (16 C.F.R. § 465), public comments underscored the need for strengthened protections. One commenter, "SUPERGUEST," emphasized that "[t]he removal of reviews that are critical, but accurate of the service or good creates an illusion and ultimately defrauds the consumer of their choice."[32] Similarly, another commenter named "Hippensteel" expressed profound frustration, noting they were "[d]isgusted by businesses who filter or control their reviews."[33] Furthermore, a joint comment submitted by twenty-three state attorneys general articulated the risk of consumer deception, noting, "when a merchant only posts positive consumer reviews, consumers may mistakenly believe these reflect most or all feedback, significantly skewing their purchasing decisions."[34] These collective concerns illuminated a critical regulatory blind spot: the sophisticated, automated suppression methods emerging in digital marketplaces. Recognizing the need for clearer, modernized standards to protect consumers effectively, the FTC introduced the new regulation. However, as this Note contends, significant gaps remain, stressing the urgency of further regulatory reform to adequately address the complexities of algorithmic review suppression in the digital age.

While 16 C.F.R. § 465 addressed many of these concerns, it neglects to address the unique issues raised by algorithms specifically. Social media platforms utilize algorithms to keep users engaged as long and as frequently as possible, deriving profit

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29 *See* Complaint, Fashion Nova, LLC, No. C-4759 (F.T.C. Jan. 25, 2022).

30 *Id.*

31 *Id.*

32 Fed. Trade Comm'n, *Comment from SUPERGUEST: FTC-2023-0047-0001*, REGULATIONS.GOV (Sep. 8, 2023), https://www.regulations.gov/comment/FTC-2023-0047-0046 [https://perma.cc/K6GD-GVTT].

33 Fed. Trade Comm'n, *Comment from Hippensteel, Chris: FTC-2023-0047-0001*, REGULATIONS.GOV (Aug. 2, 2023), https://www.regulations.gov/comment/FTC-2023-0047-0006 [https://perma.cc/6729-B2R8].

34 D.C. OFF. OF THE ATT'Y GEN., OFF. OF THE ATT'Y GEN. STATE OF ILL. & OFF. OF ATT'Y GEN. COMMONWEALTH OF PA., REVIEWS AND TESTIMONIALS NPRM, R311003; TRADE REGULATIONS RULE ON THE USE OF CONSUMER REVIEWS AND TESTIMONIALS (2023).

from prolonged user activity on their platforms.[35] "Engaging," in this context, means interacting with content by viewing, liking, commenting, sharing, and saving posts.[36] To sustain user engagement, social media platforms aim to curate interesting and relatable feeds tailored to individual preferences.[37] Predicting user interests accurately becomes essential, driven by the vast amounts of data generated from user interactions, including clicks, views, shares, posts, and even subtle indicators of interest such as lingering on particular content before scrolling.[38] Although these enormous datasets are highly valuable, they are typically unstructured, meaning that the information is not organized into neat, easily analyzable categories.[39] Manual evaluation of such extensive and complex data would be prohibitively costly, slow, and ineffective for platforms. Consequently, platforms rely increasingly on sophisticated algorithms to parse through the immense volumes of data, discern patterns of user preferences, and curate feeds that keep users continually engaged.[40]

Algorithms that are designed to enhance user experience by showing personalized and relevant content may subtly, or explicitly, prioritize content favorable to the platform's commercial interests, potentially suppressing critical or negative user-generated content or reviews that could harm those interests.[41] Without regulatory oversight, these platforms operate with minimal transparency, leaving consumers unaware that the reviews or recommendations they see might be commercially influenced.

Although 16 C.F.R. § 465 is still relatively new, it has already begun to appear in litigation. In January 2025, California attorney, James R. Stout, filed a lawsuit against a TikTok user, alleging that she and others coordinated a wave of fake, retaliatory reviews on platforms like Yelp and Google.[42] Stout relied on § 465.2 of the FTC's new consumer review rule to argue that these reviews were not only false but also violated federal stand-

35 Sang Ah Kim, *Social Media Algorithms: Why You See What You See*, 2 GEO. L. TECH. REV. 147, 147 (2017).

36 *Id.* at 147–48.

37 *Id.*

38 *See id.* at 148–49.

39 *Id.*

40 *Id.*

41 *See generally* Myojung Chung, *When Knowing More Means Doing Less: Algorithmic Knowledge and Digital (Dis)engagement Among Young Adults*, HARV. KENNEDY SCH. MISINFORMATION REV., Oct. 2025, at 1, 1 (highlighting how algorithms can suppress contrasting views and how low algorithmic literacy can exacerbate this issue).

42 *See* Stout Law Firm v. LaurenSays5, No. 8:25-cv-00126-FWS-ADS, 2025 WL 1421301, at *1 (C.D. Cal. Apr. 24, 2025).

ards for honest consumer feedback.[43] While the case centers on traditional fake reviews rather than algorithmic suppression, it demonstrates the need for revised definitions. Specifically, § 465.2, like § 465.7, applies only to "businesses" as narrowly defined by § 465.1(a), meaning entities that sell products or services. As a result, platforms like Yelp or Google, which merely host reviews but do not sell the reviewed products or services, fall outside the rule's scope, leaving consumers and business owners like Stout vulnerable to the harms that § 465 intends to mitigate. More broadly, the case shows how little precedent exists around how the rule should apply to more complex digital scenarios. Without further clarification or definitional guidance, courts may be hesitant to extend the rule's protections into newer, harder-to-detect forms of manipulation like algorithmic review suppression.

III. ANALYSIS

The practical consequences of algorithmic review suppression can be best understood by examining its impact across different platforms, particularly those that play a significant role in consumer decision-making and online marketplaces. Three of the most influential platforms—Amazon, Yelp, and TikTok—demonstrate both the complexity and pervasiveness of algorithm-driven content prioritization and suppression.

A. Amazon

As one of the world's largest online marketplaces, Amazon operates a complex and opaque algorithmic review system.[44] The Amazon Vine program is a prominent example of curated review content. Vine is an invitation-only system where select reviewers, identified as "Vine Voices," are provided with free products in exchange for their honest reviews.[45] Amazon claims these reviews are included among regular consumer reviews with a label "Vine Customer Review of Free Product" to distinguish them for transparency.[46] However, critics argue that Vine reviews have slight positive bias and are often prioritized or made more visible than

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43 *See* Devon Belcher, *Irvine Attorney Uses New FTC Regulations to Sue TikTok-er for Fake Reviews*, DAILY J.: CAL LAWYER (Jan. 27, 2025), https://www.dailyjournal.com/articles/383047-irvine-attorney-uses-new-ftc-regulations-to-sue-tiktok-er-for-fake-reviews [https://perma.cc/8DMR-85NV].

44 *See* Jason Snyder, *Inside Amazon's Retail Ad Service: The Price of Privacy*, FORBES (Jan. 16, 2025, at 22:08 ET), https://www.forbes.com/sites/jasonsnyder/2025/01/11/inside-amazons-retail-ad-service-the-price-of-privacy/ [https://perma.cc/7GLR-P2VM].

45 *All About Amazon Vine*, AMAZON, https://www.amazon.com/vine/about [https://perma.cc/4JZ4-S5UF] (last visited Mar. 9, 2026).

46 *Id.*

organic reviews, which may skew consumer perceptions of a product's true quality.[47]

This issue is compounded by Amazon's proprietary search and product-ranking algorithms, known as the A9 and A10 algorithms. These algorithms determine the placement and visibility of products within Amazon's search results, significantly influencing consumer purchasing decisions.[48] Although the exact workings of these algorithms are closely guarded trade secrets, product visibility is heavily influenced by consumer reviews, including star ratings, review frequency, recency, and consumer engagement.[49] However, the weighting of positive reviews versus critical ones is unknown, prompting speculation among sellers that the algorithm may subtly promote products with higher ratings or more favorable reviews. This is exacerbated by the lack of transparency and the absence of public standards for review display and prioritization. Some authors have expressed frustration with Amazon's "Top Reviews" filter, noting that older and more favorable reviews tend to dominate, while recent critical reviews are buried.[50] This opaque approach to review display can mislead consumers by providing an incomplete and potentially skewed impression of product quality.

Although Amazon's dual role as both a seller of its own private-label products and as a host platform for third-party sellers creates clear financial conflicts of interest, these practices also highlight a broader regulatory gap. Even when conflicts of interest are absent, consumers can still suffer harm if the visibility of authentic, critical reviews is artificially suppressed.

47 *Amazon Vine: An Analysis of 30 Million Reviews Shows Vine Better than Incentivized*, REVIEWMETA (Nov. 21, 2016), https://reviewmeta.com/blog/amazon-vine-study/ [https://perma.cc/AAM7-ZWLV] (finding that "[o]n average, the regular reviews rated the products 4.24 stars, while the Vine reviews rated the same products 4.39 stars"); *see also* Sabrina Imbler, *Can You Trust Amazon Vine Reviews?*, N.Y. TIMES: WIRECUTTER (June 25, 2018), https://www.nytimes.com/wirecutter/blog/amazon-vine-reviews/ [https://perma.cc/4LLW-JFNW] (explaining that even a slight bump caused by positive bias in ratings can push a product "from a middling 50th percentile rating to the coveted 90th percentile").

48 *See* Tina Eaton, *The Amazon Algorithm Teardown: 12 Things We Know About Amazon Ranking*, PLYTIX (June 2019), https://www.plytix.com/blog/amazon-algorithm-teardown [https://perma.cc/L4FV-DE34].

49 *See id.*

50 *See* Comment, Thalstead (Mar. 17, 2022, at 11:51 PT), *on Amazon's "Top Reviews" Algorithm*, KBOARDS (Apr. 1, 2022), https://www.kboards.com/threads/amazon%E2%80%99s-%E2%80%9Ctop-reviews%E2%80%9D-algorithm.335942/ [https://perma.cc/T78E-NZQ6].

B. Yelp

Yelp uses a proprietary algorithm to classify reviews as either "recommended" or "non-recommended."[51] According to Yelp, this filtering system exists to spotlight reviews it deems most reliable, informative, and representative of a genuine customer experience, thus ostensibly aiding users in making more informed decisions.[52] However, the exact workings and criteria underpinning Yelp's recommendation algorithm remain closely guarded trade secrets, leading to persistent criticism regarding the system's opacity and perceived inconsistencies.[53] Many businesses have raised concerns that legitimate, though critical, reviews are inexplicably suppressed or demoted to the "non-recommended" section, significantly reducing their visibility to consumers.[54] Such businesses have argued further that their decision to advertise or not advertise with Yelp may influence the algorithm's treatment of reviews—a claim Yelp firmly denies but one that nonetheless demonstrates the lack of transparency and user confidence in its rating ecosystem.[55]

This lack of transparency creates meaningful consumer protection concerns, even though Yelp itself does not sell or directly promote reviewed products or services. Users rely heavily on Yelp's curated review content to guide their decisions, and if the reasoning behind which reviews are displayed remains hidden, consumers are denied critical information necessary for accurate evaluations. Yelp's algorithmic opacity thus limits users' ability

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51 Yao Yao et al., *Yelp's Review Filtering Algorithm*, 1 SMU DATA SCI. REV. 1, 1 (2018).

52 *See id.*; *Recommended Reviews*, YELP: SUPPORT CTR., https://www.yelp-support.com/Recommended_Reviews [https://perma.cc/7HAK-NTL8] (last visited Feb. 24, 2026).

53 *See* Yao et al., *supra* note 51, at 5; *see also* Judyann Sonido, *Why Yelp Is Hiding So Many Legitimate Online Reviews in Its 'Non-Recommended' Section*, THRIVE INTERNET MKTG. AGENCY (July 7, 2024), https://thriveagency.com/news/why-yelp-is-hiding-so-many-legitimate-online-reviews-in-its-non-recommended-section/ [https://perma.cc/ZC2F-M4S4] (explaining why good reviews are being hidden on Yelp and providing tips on how to unfilter those reviews).

54 *See, e.g.*, Christine Roher, *Here's Why You Should Click on 'Not Recommended' Reviews on Yelp*, NBC L.A. (May 10, 2019, at 5:03 PT), https://www.nbclosangeles.com/news/national-international/yelp-reviews-not-recommended-hurts-business/163109/ [https://perma.cc/QS93-SDVV].

55 In 2018, a Long Beach veterinary hospital filed a class-action lawsuit in the Central District of California, accusing Yelp of manipulating reviews and business ratings "through an extortion scheme that offers to remove a business' negative reviews or relocate them to the bottom of a listing page where fewer visitors will see them, if the business purchases a monthly advertising subscription." Kim Zetter, *Yelp Accused of Extortion*, WIRED (Feb. 24, 2018, at 19:07 PT), https://www.wired.com/2010/02/yelp-sued-for-alleged-extortion/ [https://perma.cc/9DYR-4HCW]. Yelp publicly responded to the accusation calling it "demonstrably false." *Id.*

to fully and fairly assess a business's true reputation. Moreover, because users cannot independently verify the neutrality or fairness of Yelp's algorithmic review curation, the platform's trustworthiness is diminished, undermining its credibility and value as an unbiased review aggregator.

Yelp's practices vividly illustrate why the FTC's current regulatory language restricting its application strictly to businesses that sell or directly promote reviewed products or services is insufficient. Platforms like Yelp, though not selling products directly, nevertheless exert substantial influence over market decisions through their control over which reviews consumers ultimately see. Algorithmic review suppression, even in the absence of direct financial conflicts of interest, produces real consumer harm by obscuring relevant and genuine critical feedback.

C. TikTok

TikTok, originally a platform dedicated primarily to short-form video content and social sharing, has rapidly evolved into a powerful commercial marketplace with users and influencers posting videos of them reviewing and promoting different products. This transformation has brought new concerns about potential review suppression and algorithmic manipulation.[56] TikTok's opaque algorithm, famous for its ability to curate hyper-personalized user feeds, could subtly or overtly prioritize favorable video reviews related to products in which ByteDance holds a financial stake, while simultaneously downranking critical or negative content.

However, concerns about algorithmic suppression on TikTok extend far beyond direct financial conflicts of interest. The lack of transparency surrounding TikTok's recommendation and content-ranking algorithm has drawn widespread scrutiny and criticism from users, creators, and researchers alike.[57] Academic studies have documented significant biases within TikTok's recommendation system, highlighting the algorithm's tendency to disproportionately suppress content from creators of color and marginalized communities.[58] This systemic bias, even if uninten-

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56 *See* Alter, *supra* note 10.

57 *See, e.g.*, Oliver Haug, *TikTok Is Spreading Anti-LGBTQ+ Content, According to New Report*, THEM (May 20, 2021), https://www.them.us/story/tiktok-spreading-anti-lgbtq-content-report [https://perma.cc/9HKX-B9DX]; *see also* Melany Amarikwa, *Social Media Platforms' Reckoning: The Harmful Impact of TikTok's Algorithm on People of Color*, 29 RICH. J.L. & TECH. 69, 70 (2023) (noting instances of both active and passive discrimination against people of color).

58 Amarikwa, *supra* note 57, at 126–30.

tional, reveals the broader harm caused by opaque and undisclosed algorithmic practices. By limiting visibility and audience reach for certain creators, TikTok's algorithm impacts not just consumer decisions, but also the equitable distribution of opportunities and exposure for creators and sellers. Whether the suppression is intentional or an unintended side effect of opaque ranking systems, the result is the same: consumers are misled, marginalized voices are excluded, and public trust in online reviews is eroded.

TikTok's practices thus highlight the critical shortcomings of the FTC's current regulatory approach, which restricts its application primarily to explicit misrepresentations of reviews for products or services sold by the business itself.[59] Given TikTok's influential role in shaping consumer preferences—even without directly selling products—its opaque algorithmic curation still creates significant consumer harm. Users rely on the visibility and perceived authenticity of content and reviews surfaced by TikTok's algorithm to guide their purchasing decisions. When critical voices are suppressed or disproportionately hidden from view, consumers receive a skewed perception of product quality, authenticity, and popularity, potentially leading them to uninformed or misled decisions.

IV. SOLUTIONS

A. Clear Definitions

The establishment of clear, precise definitions within FTC regulations has become increasingly essential, especially following recent judicial developments limiting regulatory agencies' interpretive authority. The landmark Supreme Court decision in *Loper Bright Enterprises v. Raimondo* notably restricted courts from deferring to agencies' interpretations of ambiguous statutory language, significantly impacting the longstanding *Chevron* deference established in *Chevron, U.S.A., Inc. v. NRDC, Inc.*[60] Under *Chevron*, courts historically granted substantial latitude to regulatory agencies like the FTC, deferring to their interpretation of ambiguous statutory provisions provided those interpretations were reasonable.[61] However, the *Loper Bright* ruling effec-

59 16 C.F.R. § 465.7(b) (2025).

60 *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 413 (2024) ("[C]ourts need not and . . . may not defer to an agency interpretation of the law simply because a statute is ambiguous."); Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

61 *Chevron*, 467 U.S. at 864–66.

tively ended this practice, stating explicitly that courts may no longer defer to an agency's statutory interpretation simply due to ambiguity in the language of the statute.[62]

This judicial shift heightens the need for explicit definitions within FTC regulations, particularly concerning terms such as "businesses" and "review suppression." Under the new judicial standard, the FTC cannot assume courts will defer to its interpretation of what constitutes "suppression" under § 465.7. It must explicitly define such terms in the rule itself to preserve enforceability. The FTC must amend its rule to explicitly define review suppression as a deceptive trade practice. This definition should include any algorithmic or automated system that downranks, deprioritizes, shadow-bans, or otherwise manipulates the visibility of consumer reviews in a way that materially misleads the public. It should also cover indirect suppression mechanisms, such as the use of engagement-based ranking systems that disproportionately promote positive content while quietly obscuring critical reviews. This language would ensure that businesses cannot shield themselves behind the pretense of neutral content curation when they are actively shaping consumer perception through selective review manipulation.

Equally important, the FTC must expand its definition of "business" under § 465.1(a). As currently written, the rule only applies to commercial entities that "sell products or services," which potentially excludes major platforms like Yelp and Amazon when they act as third-party hosts.[63] These platforms exert immense influence over consumer purchasing decisions through their control of review visibility, even when they are not selling the products themselves. To close this loophole, the FTC must broaden the scope of § 465.1(a) to include review-hosting platforms, not just product sellers. This definitional expansion is essential to bring platforms like Amazon (in its hosting capacity), Yelp, and TikTok under the rule's jurisdiction, reflecting the reality of today's digital marketplaces, where these platforms play a central role in shaping consumer perception and behavior.

Vague or ambiguous definitions create uncertainty and leave enforcement actions vulnerable to challenges in court, thereby weakening the FTC's regulatory effectiveness. The FTC must now ensure that all regulatory terms are defined with precision and

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62 *Loper Bright*, 603 U.S. at 412.

63 16 C.F.R. § 465.1(a) (currently defining a business as "an individual who sells products or services, a partnership that sells products or services, a corporation that sells products or services, or any other commercial entity that sells products or services").

clarity, minimizing room for interpretive ambiguity that could be leveraged by businesses to evade compliance or enforcement.

B. Transparency Requirement

Transparency in algorithmic practices is crucial to addressing algorithmic review suppression. The European Union's Digital Services Act (DSA) of 2022 provides a robust example of regulatory frameworks demanding transparency.[64] Under the DSA, platforms are required to disclose clear information regarding how their ranking algorithms function.[65] These transparency requirements include details on criteria used for ranking content such as Yelp, Amazon, or TikTok reviews, offering users insight into why certain content appears prominently in their feeds or search results and thereby empowering users to make more informed decisions.[66]

In contrast, the United States has taken only preliminary steps toward transparency, most notably through the introduction of the Algorithmic Accountability Act in 2023.[67] This proposed bill would require companies to conduct detailed impact assessments of their artificial intelligence and automated decision systems, evaluating factors like bias, fairness, privacy, and effectiveness.[68] The FTC would be tasked with creating regulations to guide these assessments and maintain a public database, giving consumers insight into how these technologies are used. If enacted, this framework could expose how algorithmic tools shape or suppress consumer feedback, increasing both accountability and fairness in the digital marketplace. However, since its proposal, the bill has stalled, further emphasizing the need to revitalize legislative momentum.[69]

However, meaningful transparency requires more than broad disclosures; it is grounded in a framework that distinguishes the different ways algorithms affect users. The frame-

64 Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and Amending Directive 2000/31/EC, 2022 O.J. (L 277) 1, 41 (EU).

65 *Id.* at 59.

66 Sebastian Kuclar Stiković, *The EU's Digital Services Act and Its Impact on Online Platforms* 38 (Stanford–Vienna Transatlantic Tech. L.F. Working Paper No. 85, 2024), https://law.stanford.edu/publications/no-85-the-eus-digital-services-act-and-its-impact-on-online-platforms/ [https://perma.cc/9Q7R-K37A].

67 Algorithmic Accountability Act of 2023, S. 2892, 118th Cong. (2023–24).

68 *Id.* at § 3(b).

69 *See S. 2892 – Algorithmic Accountability Act of 2023: All Actions S. 2892 – 118th Congress (2023–24)*, CONGRESS.GOV, https://www.congress.gov/bill/118th-congress/senate-bill/2892/all-actions [https://perma.cc/67D9-65CX] (last visited Mar. 12, 2026).

work breaks transparency down into three distinct categories: existence transparency, operational transparency, and impact transparency.[70] Existence transparency informs users about the presence of an algorithmic system influencing their experience.[71] Operational transparency details the mechanics behind algorithmic processes, clarifying criteria and decision-making methods.[72] Impact transparency, arguably the most important, illustrates how algorithms directly influence user decisions and interactions.[73] Research focusing on Yelp users, primarily conducted within the United States, has identified notable deficiencies in impact transparency, revealing that even when users know algorithms exist and somewhat understand their operations, they remain unaware of the profound ways these algorithms shape their decisions and perceptions.[74]

Moreover, increased transparency results in increased consumer trust and, therefore, more purchases. A study conducted by the European Commission demonstrates that clearly communicating ranking criteria significantly increases consumer trust and behavioral engagement.[75] Specifically, when informed that search rankings are based on criteria such as popularity, consumer engagement with products increased dramatically, irrespective of their position in search results.[76] Additionally, related research highlights that transparency about user reviews significantly boosts consumer confidence, with nearly 86% of users reporting increased trust when clearly informed about the nature of the reviews presented.[77]

Transparency also resonates deeply with American consumers. Recent surveys demonstrate a strong national preference for

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70 *See* Motahhare Eslami et al., *User Attitudes Towards Algorithmic Opacity and Transparency in Online Reviewing Platforms*, *in* PROCEEDINGS OF THE 2019 CHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS, Paper 494, at 1–2 (2019).

71 *See id.* at 3.

72 *See id.*

73 *See id.* at 5.

74 *See id.*

75 *See* Francisco Lupiáñez-Villanueva et al., Consumers, Health, Agric. & Food Exec. Agency, *Behavioural Study on The Transparency of Online Platforms: Executive Summary*, at 5 (2018), https://commission.europa.eu/system/files/2018-04/transparency_in_platforms_-_executive-summary_en.pdf [https://perma.cc/G9DM-L2PC].

76 *Id.* ("Compared to having no information on the criteria for ranking search results, when consumers are informed that the ranking is based on a specific criterion such as popularity, the probability of selecting the product is 115% higher, irrespective of its ranking position and visual prominence on the screen.").

77 *#BrandsGetReal: Social Media & the Evolution of Transparency*, SPROUT SOCIAL, https://sproutsocial.com/insights/data/social-media-transparency/ [https://perma.cc/W8FR-LC3G] (last visited Feb. 16, 2026).

transparent business practices, particularly in digital and social media environments. Approximately 86% of Americans believe that business transparency is more important than ever, significantly influencing consumer loyalty and brand trust.[78] When businesses exhibit transparent behavior, approximately 90% of consumers report higher loyalty, even after negative experiences.[79] Conversely, businesses that fail to meet transparency expectations risk significant consumer attrition, with 86% of consumers ready to take their business elsewhere when transparency standards fall short.[80]

C. Burden Shifting

Addressing algorithmic review suppression also requires a restructuring of the evidentiary burden in enforcement and dispute resolution. Specifically, the FTC should adopt a burden-shifting framework that places the responsibility on platforms—not consumers—to demonstrate the fairness and neutrality of their review-ranking algorithms. Given the complexity of digital platforms' ranking systems and proprietary nature of these algorithms, consumers face significant challenges in demonstrating unfair review suppression. Expecting consumers to detect—let alone prove—that their content was algorithmically suppressed is not only unrealistic; it creates a de facto shield for platforms to operate without accountability. Adopting a burden-shifting approach would hold platforms accountable, requiring them to demonstrate that their algorithms operate neutrally and without bias.

The principle of burden shifting is well-established within other areas of U.S. consumer protection law. The Fair Credit Reporting Act, for example, requires credit reporting agencies to verify the accuracy of disputed information upon consumer challenge, placing the evidentiary responsibility on businesses rather than consumers.[81] This statutory design reflects a recognition that consumers often lack access to the underlying data and internal processes of large institutions, enabling consumers to challenge inaccuracies without bearing an undue evidentiary burden. International precedents further validate the efficacy of burden shifting. For instance, Indonesia's consumer protection frame-

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78 *See id.*

79 *See id.*

80 *See id.*

81 *See* 15 U.S.C. § 1681i(a)(1)(A) ("[I]f the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency is disputed by the consumer . . . the agency shall . . . conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate.").

work employs reversed burden-of-proof principles in resolving consumer disputes, recognizing consumers' inherent disadvantage in proving wrongdoing by business actors.[82]

Applying similar burden-shifting frameworks to algorithmic suppression cases within the United States would enhance consumer protection. Platforms would bear the responsibility of proving their ranking algorithms are unbiased, objective, and transparent. This shift deters platforms from engaging in unfair manipulations by making them directly accountable for their algorithmic practices.

Moreover, this evidentiary structure would simplify enforcement efforts by the FTC. Instead of requiring regulators to prove that a given algorithm suppressed reviews with deceptive intent, a task complicated by algorithmic opacity and limited access to internal code, the agency could instead request affirmative documentation or explanation from the platform. If a platform cannot demonstrate that its systems operate in a manner that is neutral, consistent, and minimally harmful to consumers, then it would be presumed to be in violation of § 5 of the FTC Act or a revised § 465.7.[83] This not only enhances the enforceability of the rule but also creates a compliance culture in which platforms must proactively maintain transparency standards rather than defensively react to allegations of misconduct.

V. COUNTER ARGUMENTS & ALTERNATIVES

While transparency is often seen as essential for building consumer trust and enabling effective regulatory oversight, it could also lead to unintended consequences. Scholars have identified three primary reasons for caution in enforcing transparency: (1) corporate secrecy aimed at preventing malicious actors from gaming the system, (2) the limited technical literacy of general users, and (3) the inherent difficulty in understanding complex algorithms—even for the developers who design them.[84]

Revealing too much about how algorithms operate can provide malicious users with tools to manipulate or exploit these

82 *See* Misnar Syam, Yussy Adelina Mannas & Rembrandt, *Application of the Shifting Burden of Proof Principle in Settlement of Consumer Disputes at the District Court in West Sumatra*, 10 INT'L J. OF INNOVATION, CREATIVITY & CHANGE 228, 228 (2019).

83 *See* 15 U.S.C. § 45(a)(1) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.").

84 *See* Jenna Burrell, *How the Machine 'Thinks': Understanding Opacity in Machine Learning Algorithms*, 3 BIG DATA & SOC'Y, June 2016, at 1, 1–2.

systems.[85] For instance, Yelp maintains that its proprietary review recommendation algorithm is intentionally opaque to deter bad actors from exploiting it.[86] It emphasizes that transparency in certain elements of algorithmic decision-making would compromise the system's effectiveness.[87] Further, this opacity exists "to maintain competitive advantage and/or to keep a few steps ahead of adversaries."[88] This rationale extends to burden-shifting concerns; platforms might resist burden-shifting requirements that would compel them to reveal their review sorting methodologies, citing the risk of revealing trade secrets or enabling review manipulation.

Similarly, operational transparency—knowing how an algorithm works—can be less helpful than intended if it fails to convey meaningful or actionable insights to non-expert users. In such cases, "transparency" may become a barrier rather than a bridge to understanding.[89] Too much transparency can overwhelm users, particularly when the information provided is technical or abstract. Users presented with overly technical algorithmic explanations can become confused or frustrated, ultimately eroding trust instead of enhancing it.[90]

Moreover, the complexity of algorithmic processes makes it difficult to provide transparency that is both accurate and comprehensible. Algorithms often evolve through machine learning, adapting in ways that even their designers cannot fully predict or explain.[91] This black-box nature of algorithmic decision-making

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85 *See id.* at 3.

86 Zach Anderson, *Getting Customer Reviews Through Yelp Filters*, LINKEDIN (Sep. 1, 2016), https://www.linkedin.com/pulse/getting-customer-reviews-through-yelp-filters-zach-anderson/ [https://perma.cc/4L4Y-KYB2] ("*We're purposely not elaborate about all the variables that go into defining an 'established' user because it's a Catch-22: The more descriptive we are about what makes an established user, the less effective our software is at fighting shills and malicious content.*" (citation omitted)).

87 *Id.*

88 Burrell, *supra* note 84, at 3.

89 Motahhare Eslami et al., *Communicating Algorithmic Process in Online Behavioral Advertising*, *in* PROCEEDINGS OF THE 2018 CHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS, Paper 432, at 1, 2 (2018).

90 René F. Kizilcec, *How Much Information? Effects of Transparency on Trust in an Algorithmic Interface*, *in* PROCEEDINGS OF THE 2016 CHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS, at 2390, 2390 (2016) ("The consequences of increased algorithm awareness through more transparent interface design are not well understood, especially in real world situations where the stakes are high. Transparency may . . . erode users' trust in a system by changing beliefs about its trustworthiness.").

91 Erica Stanford, *Autonomous AI: Who Is Responsible When AI Acts Autonomously and Things Go Wrong?*, GLOBAL LEGAL INSIGHTS (May 15, 2025), https://www.globallegalinsights.com/practice-areas/ai-machine-learning-and-big-data-

complicates efforts to provide detailed transparency without sacrificing simplicity and user comprehension. As such, calls for transparency must balance the benefits of disclosure with the risks of confusion, misuse, and intellectual property concerns.

Another significant counterargument concerns platform autonomy and the potential for mandated transparency or regulation to infringe upon First Amendment rights. In recent legal battles, platforms have successfully argued that their content curation practices are protected forms of editorial judgment under the First Amendment.

In 2024, the Supreme Court held that algorithms used by social media platforms constitute protected speech activity.[92] In *Moody v. NetChoice*, Florida and Texas enacted laws requiring platforms to explain and justify decisions about controlling third-party content.[93] Social media platforms challenged the law as a violation of their First Amendment protections.[94] The Court held that such requirements infringed on platforms' editorial freedom, suggesting that government mandates about algorithmic transparency could be similarly problematic under constitutional scrutiny.[95] This precedent raises concerns for regulators, like the FTC, when creating rules that might compel platforms to disclose or defend their algorithms. If algorithms are viewed as forms of expression or editorial discretion, regulations like 16 C.F.R. § 465 could face constitutional challenges.

Courts' treatment of algorithmic liability under other laws may also inform future interpretations of FTC regulations. For example, § 230 of the Communications Decency Act historically provided broad immunity to platforms for content posted by third-party users.[96] However, recent case law signals a shift away from blanket protections for algorithmic curation. In *Gonzalez v. Google LLC*, the Supreme Court declined to decide whether Google's algorithmic recommendations were protected under § 230, leaving the question open for future litigation.[97] This ambiguity was addressed more directly in *Anderson v. TikTok, Inc.*[98] In *Anderson*, a mother of a 10-year-old who died after participat-

laws-and-regulations/autonomous-ai-who-is-responsible-when-ai-acts-autonomously-and-things-go-wrong/ [https://perma.cc/BNJ5-HZQ5].

92 Moody v. NetChoice, LLC, 603 U.S. 707, 716, 734 (2024).

93 *Id.* at 717.

94 *Id.*

95 *Id.* at 739–40.

96 47 U.S.C. § 230(c)(1).

97 598 U.S. 617, 622 (2023).

98 116 F.4th 180, 183 (3d Cir. 2024).

ing in a dangerous challenge on TikTok sued TikTok, alleging its algorithm promoted the video that led to her daughter's death.[99] The Third Circuit held that TikTok's algorithm was not shielded by § 230 and allowed the plaintiff's claims to proceed.[100] The court emphasized that algorithms reflect editorial choices made by platforms, citing *Moody* to support the notion that algorithmic decisions are forms of corporate speech.[101]

These rulings reflect a shifting legal landscape. On one hand, platforms claim First Amendment protections to shield algorithmic practices from regulation. On the other, courts are beginning to recognize the societal harms of unchecked algorithmic influence and are narrowing the scope of immunity traditionally afforded under § 230.

VI. CONCLUSION

Platforms are increasingly using algorithms to shape how reviews appear, creating a modern form of review suppression that is difficult to detect and even harder to regulate. This kind of algorithmic suppression raises serious concerns about transparency, accountability, and fairness in the digital marketplace, especially when driven by financial incentives.

The FTC's 2024 final rule, 16 C.F.R. § 465, is a meaningful step forward in addressing traditional review suppression practices. It rightly prohibits businesses from misrepresenting consumer feedback by hiding or removing negative reviews. But the rule does not go far enough. It does not account for algorithmic practices that can subtly bury critical feedback under the guise of curation, ranking, or engagement optimization. Nor does it clearly apply to platforms like Yelp, Amazon (when hosting third-party sellers), or TikTok, where the lines between hosting, curating, and selling blur.

This Note calls for the FTC to expand and clarify the rule in three ways. First, the rule needs an explicit definition of review suppression that includes algorithmic review suppression practices like downranking, shadow-banning, or deprioritizing reviews based on sentiment. Second, platforms should be subject to reasonable transparency requirements, including disclosures about how their review-ranking systems work and affect what users see. Third, the burden of proof in disputes should not fall

99 *Id.* at 181.
100 *Id.* at 184.
101 *Id.*

on the consumer, who has limited access to internal systems and data. Instead, platforms should be responsible for demonstrating that their algorithms operate in a fair and neutral manner.

These proposed solutions draw on existing models. Transparency frameworks in the EU's Digital Services Act and the proposed U.S. Algorithmic Accountability Act show that algorithmic oversight is both possible and necessary. Similarly, the burden-shifting framework used in the Fair Credit Reporting Act recognizes that consumers should not be expected to navigate opaque systems alone. These models provide strong foundations for building a regulatory structure that fits the reality of today's digital platforms. While concerns around trade secrets, complexity, and First Amendment protections are real, they do not outweigh the need for baseline transparency and accountability, especially when platforms are shaping public perception and influencing consumer behavior.

Ultimately, regulating algorithmic review suppression is not just about closing a loophole; it is about ensuring consumers can trust the information they rely on every day. As algorithms play an increasingly central role in shaping what we see, the FTC has a responsibility to ensure that those systems are not used to mislead the public. Clear definitions, transparency requirements, and a fair burden-shifting structure are critical next steps to make that possible.

The NFL's Collision with Antitrust Law: A Strategy for Defending the National Football League's Joint Agreements with Streaming Providers

Jack Mays

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The NFL's Collision with Antitrust Law: A Strategy for Defending the National Football League's Joint Agreements with Streaming Providers

*Jack Mays**

The next frontier of sports broadcasting is here. Media consumption has shifted dramatically in recent years. Streaming services have become the preferred medium for television shows and movies, and sports broadcasts have expanded beyond traditional cable to streaming services. Given this reconfiguration of public behavior, the Sports Broadcasting Act (SBA)—a 1961 exemption to antitrust law—should be construed to allow the National Football League (NFL) to collectively negotiate with streaming providers like Amazon Prime Video, Peacock, and Netflix.

The SBA exempts joint agreements between professional sports leagues and broadcasters from antitrust scrutiny when those agreements involve the "sponsored telecasting" of games. This Note argues that the SBA should be read to encompass modern streaming platforms, thereby permitting the NFL to negotiate collective, league-wide deals with streaming services. The legislature intended to provide an expansive view of the SBA when procompetitive benefits, such as preserved on-field competitive balance, necessitate such a view.

This Note examines how the SBA's statutory language should apply to streaming services and modern technology by analyzing consumer behavior and today's sports media market. This Note explores why "sponsored telecasting" should be read to include subscription-based, internet-only delivery in 2026, a question prior articles have not squarely addressed. Finally, this Note provides recommendations for the NFL to continue working with streaming providers while protecting consumers from the growing costs associated with fragmented sports broadcasting.

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I. KICKOFF

A. The NFL as a Business

The business of sport is different from any other business.[1] Most businesses do not have raucous fans and dedication to their brand dating back generations.[2] In business, the goal of every for-profit organization is to outsmart, outearn, and outproduce competitors in every aspect. On the playing field, sports leagues require intense competition. That competition keeps fans interested and the more competition between member organizations, typically, the more profitable the league becomes.[3] In other words, "the quality of the product is the competition."[4] The National Football League (NFL) has mechanisms in place to ensure its teams remain competitive that are unique to sports leagues.[5] For example, the NFL employs (1) a salary cap to ensure the wealthiest teams do not spend too much money on talent relative to the poorer teams;[6] (2) revenue sharing;[7] and (3) a reverse-order draft that allows the least successful teams from the previous year to have the first choices of the league's newest talent.[8]

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1 Steve Jbara, *How Sports Ownership Differs from That of Other Businesses*, FORBES (June 3, 2022, at 8:30 ET), https://www.forbes.com/councils/forbesbusinesscouncil/2022/06/03/how-sports-ownership-differs-from-that-of-other-businesses/ [https://perma.cc/4TNV-NWLW].

2 I imagine children are less excited about getting a jersey with "JPMorgan Chase" sprawled across the front for a holiday gift than one representing their favorite football team.

3 United States v. NFL (*NFL I*), 116 F. Supp. 319, 323 (E.D. Pa. 1953), *superseded by statute*, 15 U.S.C. § 1291.

4 The brilliant Dr. Thomas Campbell, Professor, Doy and Dee Henley Distinguished Professor of Jurisprudence, Chapman University Dale E. Fowler School of Law, coined this phrase.

5 *NFL I*, 116 F. Supp. at 324 (describing the devices available to sports leagues looking to protect weaker teams); *The NFL and Sample Sizes: It's Not Just the Salary Cap That Creates Parity*, EXACT SPORTS, https://exactsports.com/the-nfl-and-sample-sizes-its-not-just-the-salary-cap-that-creates-parity/ [https://perma.cc/UP8C-UGKA] (last visited Mar. 11, 2026).

6 *See* Andrew Brandt, *Separating Fact from Fiction over How the NFL Salary Cap Works*, SPORTS ILLUSTRATED (May 17, 2023), https://www.si.com/nfl/2023/05/17/nfl-business-football-explaining-salary-cap [https://perma.cc/U4DD-P9B5].

7 Mark Mondello, *NFL – Its Unique Strategy and Dominating Valuation Proposition*, KROLL (Nov. 25, 2024), https://www.kroll.com/en/reports/valuation/valuation-insights-h2-2024/nfl-unique-strategy-dominating-valuation-proposition [https://perma.cc/9ZEJ-R2WT] ("[N]ational revenues are shared equally among all teams in the league, while local revenues remain under individual team control.").

8 *The Rules of the Draft*, NFL FOOTBALL OPERATIONS, https://operations.nfl.com/journey-to-the-nfl/the-nfl-draft/the-rules-of-the-draft/ [https://perma.cc/DD2D-ZRWH] (last visited Jan. 3, 2026).

The NFL is an unincorporated association with thirty-two member organizations.[9] For those member organizations, there is an enormous incentive to win on the field. For example, as of 2000, the New England Patriots had never won a Super Bowl and had limited success in the playoffs. The Patriots were valued at $464 million in 2000, tenth among all NFL organizations.[10] After winning six Super Bowls from 2001–2018, the New England Patriots were recently valued at $7.4 billion, the third highest valuation in the NFL.[11] Success on the field increases profits from attendance, merchandise, sponsorship, and more.[12]

At the same time, the NFL's member organizations must be careful not to compete too aggressively "in a business way."[13] Normally, businesses do not work with their competitors, nor do they refrain from negotiating business deals to surrender unfettered control to another organization. For most businesses, that would be considered an illegal restraint on trade and would be barred by Sherman Act § 1. Sherman Act § 1 prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States."[14] Courts have interpreted that section as prohibiting "only unreasonable restraints" of trade or commerce.[15]

Allowing each team in a sports league to operate independently would create enormous inequality. While the wealthiest teams would continue to be successful, the overall health of the league would suffer.[16] Unsuccessful team owners sell their teams—or (for the fans) worse, relocate the franchises to other cities.[17] Having and retaining sports teams has a well-

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9 Chris Deubert, *The Most Powerful Legal Organization in Sports That You Don't Know*, FORBES (Feb. 29, 2024, at 12:21 ET), https://www.forbes.com/sites/chrisdeubert/2024/02/29/the-most-powerful-legal-organization-in-sports-that-you-dont-know/ [https://perma.cc/5R2G-NYL5].

10 *NFL*, FORBES (June 6, 2013, at 14:24 ET), https://www.forbes.com/2001/09/17/nfl.html [https://perma.cc/EFQ9-GG4B].

11 Justin Teitelbaum, *The NFL's Most Valuable Teams 2024*, FORBES (June 13, 2025), https://www.forbes.com/sites/justinteitelbaum/2024/08/29/the-nfls-most-valuable-teams-2024/ [https://perma.cc/BE32-WBJC].

12 Kurt Badenhausen, *How NFL Teams and Owners Made $22 Billion Last Year*, SPORTICO (Aug. 28, 2025, at 8:00 PT), https://www.sportico.com/leagues/football/2024/how-nfl-teams-owners-make-money-1234795113/ [https://perma.cc/62D2-AD7W].

13 *NFL I*, 116 F. Supp. 319, 323 (E.D. Pa. 1953), *superseded by statute*, 15 U.S.C. § 1291.

14 15 U.S.C. § 1.

15 State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).

16 *NFL I*, 116 F. Supp. at 324.

17 *See* Thomas Neumann, *Coyotes, Athletics Inspire List of Every Pro Team To Move Since 2000*, ATHLON SPORTS (Apr. 18, 2024, at 16:33 ET), https://athlonsports.com/mlb/pro-sports-

documented history of providing economic and intangible benefits to the cities where the sports teams reside.[18] Therefore, the legislature and judiciary have provided sports leagues relief from federal antitrust laws to preserve their success and keep sports teams in the living rooms and the cities of fans who root for them.

B. Antitrust Law Overview

The Sherman Act was enacted in 1890 to address growing concerns over monopolistic practices and anticompetitive behavior from American corporations.[19] Sherman Act § 1 prohibits unreasonable restraints on trade,[20] while § 2 prohibits monopolization, attempted monopolization, and conspiracies to monopolize.[21] To determine if Sherman Act § 1 has been violated, courts look at the nature of the restraint and apply either the per se rule or the rule of reason test.[22] Under the per se rule, certain practices—such as price fixing or market allocation—are deemed inherently illegal, without the need for detailed market analyses.[23] Sports leagues are analyzed under the rule of reason test, not the per se rule.[24] Under the rule of reason test, courts assess the restraint's actual effect on competition by examining factors like market power, competitive harm, and potential procompetitive justifications.[25]

While the rule of reason test is often applied to all industries, Congress has decided that concerted action by certain in-

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franchise-relocation-every-pro-team-to-move-since-2000/ [https://perma.cc/TK5E-Q8QB] (listing teams that have relocated since the year 2000).

18 Arjun Sivakumar, *Owners Playing It Safe: A Law and Economics Explanation of Why Sports Franchises Relocate*, 10 WILLAMETTE SPORTS L.J. 1, 4–6 (2012); Mallory Newall, Johnny Sawyer & Bernard Mendez, *Americans Believe Sports Teams and Stadiums Are Positive for Cities*, IPSOS (Mar. 10, 2025), https://www.ipsos.com/en-us/americans-believe-sports-teams-and-stadiums-are-positive-cities [https://perma.cc/PX6F-9XDG].

19 RICHARD A. GIVENS, ANTITRUST: AN ECONOMIC APPROACH 1–1 to –2 (2017).

20 *See* Standard Oil Co. v. United States, 221 U.S. 1, 62 (1911); Sarah A. Padove, *Topps Gets Exclusive License, Leaving Upper Deck on the Bench: An Analysis of Major League Baseball's Antitrust Exemption in the Modern Era*, 22 MARQ. SPORTS L. REV. 235, 237 (2011) ("The focus of Section One is on agreements between two or more competitors that unreasonably restrain trade. In order to demonstrate a violation of Section One, the plaintiff must show evidence of '(1) concerted action that (2) unreasonably restrains (3) interstate commerce.'" (quoting Brittany Van Roo, Note, *One Trilogy That Should Go Without a Sequel: Why the Baseball Antitrust Exemption Should Be Repealed*, 21 MARQ. SPORTS L. REV. 381, 383 (2010))).

21 Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438, 447 (2009).

22 *See* Am. Needle, Inc. v. NFL, 560 U.S. 183, 203 (2010).

23 *See id.*

24 *See* O'Bannon v. NCAA, 802 F.3d 1049, 1062 (9th Cir. 2015).

25 *See Am. Needle*, 560 U.S. at 203.

dustries has positive effects that outweigh the concerns mitigated by the Sherman Act.[26]

C. The NFL's Relationship with Antitrust Law

The history of sports antitrust law began in 1922 when the Supreme Court held that Major League Baseball (MLB) was exempt from the Sherman Act.[27] In the first case of what has been dubbed the "Baseball Trilogy," the United States Supreme Court held that the MLB was free from antitrust regulation because it was not engaged in interstate commerce.[28] In 1953, the Supreme Court upheld the MLB's exemption in a short opinion, holding that it was up to the legislature to overrule its 1922 decision, not the court.[29] Finally, in 1972, fifty years after the Court decided *Federal Baseball Club*, the Court upheld the exemption once again.[30]

The judicially-created exemption, however, did not extend to the NFL.[31] The NFL was founded in 1920 and, for the first thirty-three years of its existence, did not run into any trouble with antitrust law.[32]

In 1951, however, the NFL altered its bylaws and required its teams to refrain from broadcasting games in certain scenarios.[33] In 1953, a federal district court in Pennsylvania ruled that the league's marketing territory restrictions were generally illegal under antitrust laws but acknowledged that some coordination was necessary for league stability.[34] The case focused on the

26 Antitrust laws do not apply to certain agreements among common carriers, provided they are approved by the Federal Maritime Commission and labor unions acting in their self-interest, to name a few. 46 U.S.C. § 40307; United Mine Workers v. Pennington, 381 U.S. 657, 661–62 (1965).

27 Fed. Baseball Club, Inc. v. Nat'l League of Pro. Baseball Clubs, 259 U.S. 200, 208 (1922); Padove, *supra* note 20, at 235.

28 *Fed. Baseball Club*, 259 U.S. at 208–09.

29 Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 356 (1953) ("The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by *legislation*." (emphasis added)).

30 Flood v. Kuhn, 407 U.S. 258, 285 (1972) ("And what the Court said in *Federal Baseball* in 1922 and what it said in *Toolson* in 1953, we say again here in 1972: the remedy, if any is indicated, is for congressional, and not judicial, action.").

31 *Id.* at 278–79.

32 *National Football League*, BRITANNICA (Jan. 3, 2026), https://www.britannica.com/topic/National-Football-League [https://perma.cc/BZ9K-U2FP].

33 *NFL I*, 116 F. Supp. 319, 321 (E.D. Pa. 1953), *superseded by statute*, 15 U.S.C. § 1291.

34 *Id.* at 323.

NFL's restrictive policies, particularly its "blackout rule," which prevented the broadcast of games in markets where a local team was playing at home.[35] The court partially granted the government's injunction but allowed the NFL to restrict television broadcasts of home games in a team's local market.[36] Most importantly, it prohibited the NFL from collectively negotiating television contracts in a way that restrained trade.[37] In 1961, the NFL again tested the limits.[38] This time, the NFL pooled the broadcast rights of its teams and granted CBS the exclusive right to televise every game the NFL played that season.[39] A federal district court in Pennsylvania again struck down this restraint.[40]

Instead of appealing the injunction, the NFL lobbied Congress, which in turn passed the Sports Broadcasting Act (SBA).[41]

The SBA reads:

> The antitrust laws, as defined in section 1 of the [Sherman Act], shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs.[42]

The NFL has used the exemption from the SBA to generate astronomical revenues by pooling the broadcasting rights of its thirty-two member organizations and negotiating as one collective body.[43] The NFL, as one entity, has the freedom to negotiate with a number of broadcast companies and can use the bids as a negotiating tool against one another.[44] The broadcast companies have competitors, but there is no comparison to live sports.[45]

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35 *Id.* at 321.

36 *Id.* at 330.

37 *Id.* at 327.

38 *See* United States v. NFL (*NFL II*), 196 F. Supp. 445, 446–47 (E.D. Pa. 1961), *superseded by statute*, 15 U.S.C. § 1291.

39 *Id.*

40 *Id.* at 447.

41 *In re* NFL's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1146 (9th Cir. 2019).

42 15 U.S.C. § 1291.

43 Teitelbaum, *supra* note 11; Mike Florio, *Report: NFL National Revenue Hits $13 Billion*, NBC SPORTS: PRO FOOTBALL TALK (July 8, 2024, at 19:57 PT), https://www.nbcsports.com/nfl/profootballtalk/rumor-mill/news/report-nfl-national-revenue-hits-13-billion [https://perma.cc/7Q3Q-NGAH].

44 Jenna Blochowicz, B*argaining for Exclusive Rights in Two-Sided Markets: The Case of the NFL and Broadcast Channels* 1 (Oct. 2023) (unpublished manuscript) (available at

While live sports have generally seen unparalleled success, the NFL has seen the largest revenue increase due to its immense popularity with fans.[46] Each year, the Super Bowl is seen by over 100 million people, and NFL games are consistently the most-watched television events every year.[47] In addition to its profitability, the NFL has also created opportunities through its success. The NFL has created jobs, advanced social justice initiatives, and provided its fans with an outlet for their passion and enthusiasm for the game, fostering a sense of community and shared experience.[48]

D. The Streaming Era

The NFL's success is in part due to its ability to adapt to changing circumstances. Recently, the NFL has started broadcasting its games on streaming providers.[49] In 2025, the NFL broadcast games on Amazon Prime Video, Peacock, and Netflix. In 2021, the NFL's agreement with Amazon marked the first time the NFL entered into an exclusive broadcasting deal with a streaming provider.[50] Amazon agreed to an eleven-year deal to broadcast *Thursday Night Football*, a standalone broadcast that

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https://www.econ.iastate.edu/files/inline-files/jobmarketpaper-blochowicz.pdf) [https://perma.cc/A846-C9JD] (explaining that the NFL negotiates collectively with multiple broadcasters and leverages its competing bids to improve contract terms).

45 Jacob Feldman, *Why the Biggest Tech Companies Are Suddenly Streaming Sports*, SPORTICO (May 28, 2024, at 05:55 PT), https://www.sportico.com/business/tech/2024/why-sports-streaming-economics-bundle-fracture-nfl-netflix-1234781987/ [https://perma.cc/6K3W-4NBF].

46 Badenhausen, *supra* note 12.

47 The Associated Press, *Super Bowl LIX Averages Record Audience of 127.7 Million Viewers*, NFL (Feb. 11, 2025, at 15:29 PT), https://www.nfl.com/news/super-bowl-lix-averages-record-audience-of-127-7-million-viewers [https://perma.cc/T6SG-VUSM]; Anthony Crupi, *NFL Owns 72 of TV's Top 100 as Politics Loosens Sports' Grip*, SPORTICO (Jan. 3, 2025, at 05:55 PT), https://www.sportico.com/business/media/2025/nfl-owns-73-of-top-100-broadcasts-election-undermine-sports-tv-dominance-1234822548/ [https://perma.cc/G5Q3-RC78].

48 *Ten Reasons Why People Love the NFL*, CORNELL UNIV.: THE BOOKSHELF, https://blogs.cornell.edu/learning/ten-reasons-why-people-love-the-nfl/ [https://perma.cc/JF7Y-454E] (last visited May 8, 2025); AM, *5 Reasons NFL Football Is World's Greatest Sport*, BLEACHER REPORT (June 7, 2018), https://bleacherreport.com/articles/1059863-five-reasons-nfl-is-worlds-greatest-sport [https://perma.cc/QL8T-3KAD]; *Inspire Change*, NFL, https://www.nfl.com/causes/inspire-change/ [https://perma.cc/4J6Y-9B78] (last visited May 8, 2025); *NFL Inspire Change Contributions Reach $300M as League Strengthens Efforts to Advance Social Justice*, NFL (May 18, 2023, at 11:01 PT), https://www.nfl.com/news/nfl-inspire-change-contributions-reach-300m-as-league-strengthens-efforts-to-adv [https://perma.cc/R8UA-C8FR].

49 For purposes of this Note, "streaming" refers to paid subscription services with streamable content, and services like Amazon Prime Video, Peacock, and Netflix are referred to as "streaming providers" or "streaming services."

50 Drew Nathanson, *The NFL-Amazon Agreement vs. Antitrust Legislation: The Future of the National Football League in OTT Services*, ENT. & SPORTS LAW., Spring 2023, at 80, 80.

airs every in-season Thursday night besides the final Thursday of the NFL season.[51] The NFL added Peacock to its menu of broadcasters in 2023 when it provided the NBCUniversal streaming provider the exclusive right to broadcast a playoff game.[52] The NFL also granted Peacock the exclusive right to broadcast the NFL's first-ever game in South America to kick off the 2024 regular season.[53] The NFL's most recent addition to its broadcasting partnerships is Netflix, which agreed to broadcast games on Christmas Day for three years.[54]

The NFL's extension into streaming has been spurred by a shift in viewing habits across the United States. Streaming services, also known as over-the-top (OTT) services, have become one of the most popular ways to consume entertainment.[55] By the end of 2024, Netflix had over 300 million subscribers, adding 19 million more in Q4 of 2024.[56] Amazon Prime Video has over 200 million monthly viewers, according to a letter to shareholders from its CEO.[57] Peacock lags behind with 41 million subscribers but saw a 5 million subscriber jump in Q1 of 2025.[58] Streaming accounted for 43% of total television consumption in December 2024 and there is no indication that streaming popularity is going to slow down.[59]

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51 Alex Sherman & Jabari Young, *NFL Finalizes New 11-Year Media Rights Deal, Amazon Gets Exclusive Thursday Night Rights*, CNBC: SPORT (Mar. 18, 2021, at 19:09 ET), https://www.cnbc.com/2021/03/18/nfl-media-rights-deal-2023-2033-amazon-gets-exclusive-thursday-night.html [https://perma.cc/U9KL-JR2Q].

52 Antonio Pequeño IV, *NFL Adding Peacock-Only Playoff Game in First-of-Its-Kind Streaming Deal*, FORBES (May 15, 2023, at 20:10 ET), https://www.forbes.com/sites/antoniopequenoiv/2023/05/15/nfl-adding-peacock-only-playoff-game-in-first-of-its-kind-streaming-deal/ [https://perma.cc/JZ9A-9PET].

53 *Comcast's Peacock and Amazon Prime Video to Stream Exclusive NFL Games*, REUTERS (Mar. 26, 2024, at 11:36 PT), https://www.reuters.com/sports/nfl/comcasts-peacock-amazon-prime-video-stream-exclusive-nfl-games-2024-03-26/ [https://perma.cc/MSM4-XZJB].

54 Nicole Sperling, *Netflix and the N.F.L. Sign a Three-Season Deal*, N.Y. TIMES (May 15, 2024), https://www.nytimes.com/2024/05/15/business/media/netflix-nfl-live.html [https://perma.cc/33NX-L44T].

55 Nathanson, *supra* note 50.

56 Nicole Sperling, *Netflix Adds 19 Million Subscribers in Latest Quarter*, N.Y. TIMES (Jan. 21, 2025), https://www.nytimes.com/2025/01/21/business/media/netflix-earnings.html [https://perma.cc/LK2Y-3SZM].

57 Andy Jassy, *CEO Andy Jassy's 2023 Letter to Shareholders*, AMAZON NEWS (Apr. 11, 2024), https://www.aboutamazon.com/news/company-news/amazon-ceo-andy-jassy-2023-letter-to-shareholders [https://perma.cc/8N3N-RTCD].

58 Jasmine Sheena, *Peacock Counts 41 Million Subscribers but Execs Warn that 'Challenges May Be Approaching,'* MARKETING BREW (Apr. 24, 2025), https://www.marketingbrew.com/stories/2025/04/24/peacock-counts-41-million-subscribers-but-execs-warn-that-challenges-may-be-approaching [https://perma.cc/H2FH-J5BB].

59 Wayne Friedman, *YouTube, Netflix, Prime Hit Viewing Records in December*, MEDIAPOST (Jan. 21, 2025), https://www.mediapost.com/publications/article/402715/

Meanwhile, the NFL has been fighting an arduous battle regarding another aspect of its telecasting business model for the past ten years: the *NFL Sunday Ticket* case.[60] Since 1994, the NFL has offered NFL Sunday Ticket, which became the subject of an antitrust lawsuit in 2015 by subscribers alleging inflated prices due to exclusive agreements with DirecTV.[61] Although a jury awarded $4.7 billion in damages, the verdict was overturned by a judge citing inadmissible expert evidence and a flawed calculation of damages, and as of May 2026 the plaintiffs are appealing.[62]

The NFL appears to be on a collision course headed straight at antitrust regulators or consumers looking to cash in on the NFL's efforts to partner with streaming providers.[63] Although there is no formal litigation pending against the NFL for its agreements with Amazon, Peacock, and Netflix, the NFL should be watching film and learning from past losses. Litigation against the NFL is likely to be felt by its fans and consumers of streaming services.[64] If the SBA applied to the NFL's relationships with streaming services, avoiding litigation could reduce the costs expended by the NFL and streaming providers, lowering the cost for fans.[65]

[https://perma.cc/4JGC-5T6Q]; Mireia Fernández, *Netflix, Prime Video or Disney+? Which Is the Most Popular Streaming Service*, SOFTONIC (July 1, 2025, at 22:28 PT), https://en.softonic.com/articles/video-streaming-stats-trends [https://perma.cc/D9KT-3RDC].

60 *In re* NFL's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1143–44 (9th Cir. 2019); Alex Baime, *Order in the Field: A Brief Overview of the NFL Sunday Ticket Antitrust Litigation*, VAND. L. SCH. (Nov. 16, 2025, at 10:27 PT), https://law.vanderbilt.edu/order-in-the-field-a-brief-overview-of-the-nfl-sunday-ticket-antitrust-litigation/ [https://perma.cc/D4UF-2M77].

61 *See* Alex Andrejev, *What to Know About 'NFL Sunday Ticket' Case that Could Cost the League Billions*, N.Y. TIMES: THE ATHLETIC (June 26, 2024), https://www.nytimes.com/athletic/5578029/2024/06/25/nfl-sunday-ticket-lawsuit-explained/ [https://perma.cc/CUZ5-DM3Q].

62 *See* Maia Spoto & Rachel Graf, *NFL Gets $4.7 Billion Sunday Ticket Jury Award Tossed Out*, BLOOMBERG LAW (Aug. 2, 2024, at 07:48 PT), https://news.bloomberglaw.com/antitrust/nfl-gets-4-7-billion-jury-award-tossed-in-sunday-ticket-dispute [https://perma.cc/3VR8-H6SU].

63 *See* Danielle Williams, *NFL Tackled by Antitrust Litigation: Route to Renegotiation of Streaming Deals*, PRINCETON LEGAL J.: F., https://legaljournal.princeton.edu/nfl-tackled-by-antitrust-litigation-route-to-renegotiation-of-streaming-deals/ [https://perma.cc/J7RJ-U59X] (last visited Apr. 3, 2026).

64 *Cf.* Paul G. Mahoney, *The First Thing We Do, Let's Pay All the Lawyers*, 66 U. CHI. L. REV. 922, 929 (1999) (noting that, in the product liability context, consumers bear the risk of injury and higher product cost from increased liability).

65 *See* Melissa De Witte, *There Are Unintended Consequences of Antitrust Regulation, Stanford Scholar's Research Reveals*, STAN. REP. (Sep. 27, 2023), https://news.stanford.edu/stories/2023/09/antitrust-regulation-can-backfire [https://perma.cc/Q4R4-KJ8D] (analyzing the substantial costs of antitrust actions that frequently fail to generate

The SBA applies to professional football, baseball, basketball, and hockey.[66] This Note explores the SBA as it pertains to football only, but there are themes that apply to all four leagues. Litigation is most likely to target the NFL because of its recent embrace of streaming services and exceptionally deep pockets.[67] However, the MLB created a telecast on Apple TV+[68] and the National Hockey League (NHL) uses ESPN+ to allow fans to access out-of-market games.[69]

Prior to this Note's publication, the Federal Communications Commission (FCC) and Department of Justice (DOJ) announced that they were investigating the NFL for its agreements with streaming providers.[70] This Note does not comment on those investigations. The investigations, however, indicate the pressure on the NFL and the importance of developing a legal strategy to protect its current broadcast model. It is undeniable that the recent shift to streaming services has created confusion and has made it more expensive for some consumers to watch sports. This Note recognizes that there is still a long way to go, and congressional action may be necessary to protect consumers from inflated pricing and unnecessary confusion. However, targeting the NFL's antitrust exemption as it relates to streaming providers is the wrong way to address the issue.

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corresponding benefits for consumers); *Lawsuit Costs Are Escalating, and U.S. Households Are Paying the Price*, U.S. CHAMBER OF COM. (Dec. 10, 2024), https://www.uschamber.com/lawsuits/lawsuit-costs-are-escalating-and-u-s-households-are-paying-the-price [https://perma.cc/4LWH-4XUV] (documenting that escalating litigation expenses are passed on to households through higher prices and reduced consumer welfare).

66 15 U.S.C. § 1291.

67 Lillian Rizzo, *Streaming Deals Are Key to Future of NFL Viewership, Fandom*, CNBC: SPORT (Sep. 11, 2024, at 12:22 ET), https://www.cnbc.com/2024/09/10/streaming-deals-are-key-to-future-of-nfl-viewership-fandom.html [https://perma.cc/49HP-WLKR]; Badenhausen, *supra* note 12.

68 *"Friday Night Baseball" Returns to Apple TV+ on March 28*, APPLE: NEWSROOM (Mar. 3, 2025), https://www.apple.com/newsroom/2025/03/friday-night-baseball-returns-to-apple-tv-plus-on-march-28/ [https://perma.cc/TR66-QMSD].

69 Andrea DiCristoforo, *The Walt Disney Company Announces 100 Exclusive National Hockey League Games Across ESPN, ESPN2, ESPN+, ABC and Hulu Beginning October 8*, ESPN PRESS ROOM (Aug. 29, 2024), https://espnpressroom.com/us/press-releases/2024/08/the-walt-disney-company-announces-100-exclusive-national-hockey-league-games-across-espn-espn2-espn-abc-and-hulu-beginning-october-8/ [https://perma.cc/TJJ8-3F4D].

70 Joe Flint, *NFL Makes Its Case to FCC During Regulatory Scrutiny*, WALL ST. J. (Apr. 22, 2026, at 00:01 ET), https://www.wsj.com/business/media/nfl-makes-its-case-to-fcc-during-regulatory-scrutiny-390674fa [https://perma.cc/3C7C-R2UW]; Jessica Toonkel & Dana Mattioli, *Justice Department Opens Investigation into NFL*, WALL ST. J. (Apr. 9, 2026, at 21:10 ET), https://www.wsj.com/sports/football/nfl-investigation-justice-department-8835a936 [https://perma.cc/2XJ4-RV3W].

The goal of this Note is not to defend the NFL and help it enhance its revenue. The goal of this Note is to (1) look at an issue that will almost certainly be the subject of litigation over the next decade; (2) take a second look at a position that has been accepted by several courts despite a reasonable counterpoint; and (3) make suggestions to help the NFL and streaming services avoid impending litigation, the cost of which will ultimately fall on the consumer.

II. SURVEYING THE FIELD

A. Supreme Court Precedent

The Supreme Court has not addressed the meaning of "sponsored telecasting" under the SBA. Although it has limited the SBA's scope in some contexts, the Court has yet to rule on whether the statute applies to subscription-based or streaming broadcasts. Instead, the Court's sports broadcasting jurisprudence has primarily developed under the Sherman Act, leaving unresolved how the SBA interacts with emerging forms of media distribution.

1. *NCAA v. Board of Regents*

NCAA v. Board of Regents of the University of Oklahoma held that the National Collegiate Athletic Association's (NCAA) centralized control over college football broadcasting violated the Sherman Act because it artificially limited output and fixed prices, thereby restricting consumer access to televised games.[71]

The case arose when the NCAA implemented a "television plan" that prohibited individual schools from negotiating their own broadcast deals, instead assigning a limited number of games to be nationally televised.[72] The University of Oklahoma and the University of Georgia challenged the plan, arguing it constituted an unreasonable restraint of trade under Sherman Act § 1.[73]

Applying the rule of reason test, the Court found that the plan restricted output, raised prices, and limited market competition.[74] Although the Court acknowledged that some coordination among competitors is necessary in sports, it concluded that

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71 468 U.S. 85, 88 (1984).

72 *See id.* at 91–94.

73 *Id.* at 88.

74 *Id.* at 104–06.

the NCAA's blanket control over broadcast rights lacked sufficient procompetitive justification.[75]

Importantly, the SBA does not apply to college football. The SBA's antitrust exemption covers only professional football, baseball, basketball, and hockey, excluding college athletics by design.[76] As a result, the NCAA could not invoke the SBA's protections to shield its television plan from antitrust scrutiny.

Board of Regents remains a cornerstone in sports antitrust jurisprudence. While it confirms that joint media arrangements in sports can be anticompetitive, it is distinguishable from the NFL's current streaming agreements. The NCAA's centralized control reduced the number of games available for public viewing.[77] Unlike the NCAA's plan, which capped output and reduced access, the NFL's joint agreements with streaming services increase distribution and consumer choice.[78]

2. *American Needle, Inc. v. NFL*

The Supreme Court in *American Needle, Inc. v. NFL* held that the NFL's exemption from antitrust law does not extend to exclusive licensing agreements made on behalf of its thirty-two teams because the teams are separate economic actors capable of concerted action under § 1 of the Sherman Act.[79]

The dispute arose when the NFL, through its marketing arm NFL Properties (NFLP), entered into an exclusive licensing agreement with Reebok to produce and sell team-branded apparel.[80] This arrangement foreclosed competition from other vendors, including *American Needle*, which had previously held non-exclusive licenses.[81] *American Needle* sued under § 1, arguing that the teams' collective licensing decision was an illegal restraint of trade.[82]

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75 *See id.* at 117.

76 15 U.S.C. § 1291.

77 *Bd. of Regents*, 468 U.S. at 105 ("The District Court found that if member institutions were free to sell television rights, many more games would be shown on television, and that the NCAA's output restriction has the effect of raising the price the networks pay for television rights.").

78 *See* Riley McAtee, *The Inflation of the NFL's Broadcast Calendar Isn't Slowing Down*, THE RINGER: NFL (Sep. 5, 2024, at 03:30 PT), https://www.theringer.com/2024/09/05/nfl/nfl-2024-season-broadcast-windows-expansion-philadelphia-eagles-green-bay-packers-brazil [https://perma.cc/5C5C-6L7P].

79 560 U.S. 183, 202–03 (2010).

80 *Id.* at 187.

81 *Id.*

82 *Id.*

The Supreme Court unanimously agreed. It rejected the NFL's claim that the teams constituted a single entity for antitrust purposes, holding that while they share some common interests, they remain "separate economic actors pursuing separate economic interests."[83] Because it could (and did) compete in the market for intellectual property, the NFL's collective decision to license exclusively through one vendor constituted concerted action, subject to antitrust scrutiny.[84]

American Needle expressly rejected the single-entity theory.[85] The NFL argued that its agreement to collectively bargain with merchandisers was essentially a merger and therefore the NFL was one legal entity that could not be subject to antitrust scrutiny.[86] The NFL relied on a Supreme Court case that held that entities, although separate in form, may actually be one single legal entity for antitrust purposes if they are "controlled by a single center of decisionmaking and they control a single aggregation of economic power."[87] The *American Needle* Court rejected this argument, finding that the correct inquiry is whether the business relationship joins separate decision makers pursuing separate interests.[88] The Court determined that because the individual NFL teams and the NFL itself do not share common objectives in a business way, such as competing with each other to attract fans, the single-entity theory was inapplicable.[89]

While *American Needle* reinforced that NFL teams may not freely collaborate in commercial markets without triggering antitrust review, the Court once again acknowledged the unique nature of sports leagues.[90] Some level of cooperation—particularly in areas necessary to produce the league's core product—is essen-

83 *Id.* at 197–99, 202–03 (quoting Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 769 (1984)).

84 *Id.* at 198, 200–01.

85 *Id.* at 204.

86 *Id.* at 197.

87 *Id.* at 184 (quoting *Copperweld*, 467 U.S. at 769). The Supreme Court held that a parent corporation and its wholly owned subsidiary could conspire with each other under Sherman Act § 1. *Copperweld*, 467 U.S. at 777. The Court determined it was necessary to create this exception to the Sherman Act because a parent and its subsidiary have a unity of economic interest and because subjecting a parent and its subsidiary to antitrust regulations would create an overly burdensome and unworkable restriction on business. *Id.* at 776.

88 *Am. Needle*, 560 U.S. at 195 (citing *Copperweld*, 467 U.S. at 769).

89 *Id.* at 196–97.

90 *Id.* at 202 ("The fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions.").

tial.[91] The Court made clear that not all collective actions are unlawful, so long as they are reasonably necessary to create the joint venture that is professional football. This distinction is crucial in evaluating the NFL's current streaming arrangements. Unlike the exclusive licensing at issue in *American Needle*, the NFL's collective sale of media rights to services like Amazon, Peacock, and Netflix does not foreclose the market. Competing networks and platforms remain free to bid on different packages. Moreover, centralized control over broadcasting rights may be reasonably necessary to present a cohesive, national football product—placing such agreements in a different antitrust posture than the vertical restraints in *American Needle*.[92]

Notably, the Court upheld the notion expressed in 1961 that "'the interest in maintaining a competitive balance' among 'athletic teams is legitimate and important.'"[93] By 2010, the NFL had an annual revenue of over $9 billion.[94] While the Court rejected the single-entity theory that would make the NFL's antitrust problems simpler, the Court's acknowledgment of the importance of competitive balance and the unique features of the NFL's business model indicate it would believe the rationale behind the SBA's enactment in 1961 still applies today.

B. Lower Court Cases Interpreting the SBA

Only *Shaw v. Dallas Cowboys Football Club, Ltd.,*[95] a Third Circuit case, and *Chicago Professional Sports Ltd. Partnership v. NBA*,[96] a district court case in Illinois, have explicitly addressed the question of whether "sponsored telecasting" applies to a broadcast that costs money for the consumer to access. While other lower courts have been faced with the question, those cases have failed to address it or simply accepted the arguments advanced in *Shaw* and *Chicago Professional Sports*. For the following reasons, the reasoning set forth in *Shaw* and *Chicago Professional Sports* is flawed.

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91 *See id.* at 202–03.

92 *See id.*

93 *Id.* at 204 (quoting NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 117 (1984)).

94 *League, Players Disagree on Interpretation of Revenue Figures*, NFL (Mar. 21, 2011, at 07:45 PT), https://www.nfl.com/news/league-players-disagree-on-interpretation-of-revenue-figures-09000d5d81edda24 [https://perma.cc/8XH5-P6MT].

95 172 F.3d 299, 300 (3d Cir. 1999).

96 808 F. Supp. 646, 647 (N.D. Ill. 1992).

1. *Shaw v. Dallas Cowboys Football Club*

Shaw held that the SBA's exemption to antitrust law does not apply to subscription satellite broadcasting because "sponsored telecasting" applies only to free, open-air telecasts.[97] Subsequent cases have either accepted these rulings or not decided the issue.[98] In light of the advent of streaming services and the transformation of consumer habits, the decision in *Shaw*, which has been followed by subsequent courts, requires reconsideration.[99]

In *Shaw*, the court addressed whether the NFL's sale of broadcast rights to satellite distributors fell within the SBA exemption.[100] The NFL argued that these sales were "residual" rights in "sponsored telecasting" and should be exempt from antitrust scrutiny.[101] However, the court rejected this claim, affirming the lower court's decision that "sponsored telecasting" applies only to commercially sponsored free broadcasts.[102] The court reasoned that the plain language of the SBA explicitly limits its scope to "sponsored telecasting," which refers only to free, open-air broadcasts supported by commercial sponsorship.[103] The court held that the phrase "sponsored telecasting" cannot be read to include an NFL-created subscription-based service known as NFL Sunday Ticket, as doing so would contradict the Act's text and intent.[104]

The appeals court in *Shaw* affirmed most of the analysis by the district court. Both courts took the view that the statute's plain language strictly applies to broadcasts that are freely available to the public and commercially sponsored.[105] The district court held that the NFL's attempt to categorize satellite broadcasts as "residual rights" in sponsored telecasts mischaracterized the nature of the transaction.[106] It found that while the NFL retains rights in its games, those rights are separate from and independent of "sponsored telecasting."[107] Ultimately, the appeals court affirmed the district court's holding that the

97 *See Shaw*, 172 F.3d at 300.

98 *See, e.g.*, *In re* NFL's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1147–48 (9th Cir. 2019).

99 *See, e.g.*, Friedman, *supra* note 59.

100 *Shaw*, 172 F.3d at 299–300.

101 *Id.* at 300.

102 *Id.*

103 *Id.* at 301.

104 *Id.* at 301–03.

105 *Id.* at 301–02.

106 Shaw v. Dall. Cowboys Football Club, Ltd., No. 97-5184, 1998 U.S. Dist. LEXIS 9896, at *6–7 (E.D. Pa. June 19, 1998), *aff'd*, 172 F.3d 299 (3d Cir. 1999).

107 *Id.*

NFL's sale of satellite broadcast rights did not fall within the SBA's exemption.[108]

2. *Chicago Professional Sports Ltd. Partnership v. NBA*

Chicago Professional Sports Ltd. Partnership v. NBA held that agreements with services like TNT and ESPN are not exempt from antitrust law because the broadcasts are not encompassed by the term "sponsored telecasting."[109] In *Chicago Professional Sports*, the National Basketball Association (NBA) argued that its restrictions on telecasts by "superstations"[110] were protected under the SBA's antitrust exemption.[111] Central to this dispute was whether TNT constituted "sponsored telecasting" under the SBA.[112] The analysis focused on the plain language reading of the SBA in light of its legislative history and judicial interpretation.[113]

The NBA contended that its Superstation Same Night Rule was exempt from antitrust scrutiny because the SBA allows leagues to pool and sell their broadcasting rights to networks for "sponsored telecasting."[114] The league pointed to TNT's advertising-supported model, the absence of per-event charges, and the network's widespread availability as factors supporting the characterization of TNT as a "sponsored telecast."[115]

The court, however, rejected the NBA's interpretation.[116] The court argued that in 1961, "sponsored telecasting" referred to free, over-the-air television supported solely by advertisers.[117] The court determined that TNT, as a cable network, is fundamentally different from over-the-air broadcasts. Unlike traditional broadcast networks, TNT generates a significant portion of its revenue from subscriber fees rather than solely from advertis-

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108 *Shaw*, 172 F.3d at 303.

109 808 F. Supp. 646, 648–49 (N.D. Ill. 1992).

110 A "superstation" is a television broadcast station that, while originally a local or regional channel, is distributed nationally via cable or satellite. Chad Whittle, *Ted Turner's Superstation WTBS: An Examination of Local News Coverage of America's First SuperStation in the* Atlanta Journal-Constitution*; 1970–1989*, 21 AM. COMMC'N J. 1, 3 (2019). It broadcasts content intended for a local market but becomes available across a much broader geographic area. *See id.*

111 *Chi. Pro. Sports*, 808 F. Supp. at 647–48.

112 *Id.* at 647.

113 *Id.* at 649–50.

114 *Id.* at 647–48.

115 *See id.* at 649–50.

116 *Id.* at 650.

117 *Id.*

ing sponsorship.[118] Thus, the district court concluded that TNT did not qualify as "sponsored telecasting" because it was a hybrid service requiring consumer payments.[119] The court determined that TNT's model did not align with the 1961 understanding of "sponsored telecasting."[120]

Other courts, and even the NFL's lawyers, have acquiesced to this interpretation of the statute.[121] This interpretation has doomed the NFL to an endless cycle of litigation over the scope of its authority to control its teams' broadcast rights.

C. The *NFL Sunday Ticket* Case and its Impact

Enter *NFL Sunday Ticket*. Since 1994, the NFL has offered NFL Sunday Ticket, a subscription-based sports package that allows fans to watch out-of-market football games on Sundays during the NFL season.[122] In 2015, a class of NFL Sunday Ticket subscribers complained that the NFL suppressed competition by entering into exclusive agreements with third parties and, absent the anticompetitive agreements, the class would have been able to access the games at lower prices.[123] The case survived one dismissal in 2017 when a U.S. district judge held that even if the NFL charged inflated prices, that was not sufficient to constitute an antitrust violation.[124] The case was later reinstated and culminated in a three-week trial where the jury found for the plaintiffs, awarding $4.7 billion in damages.[125] Once again, judicial intervention saved the NFL as Judge Gutierrez of the Ninth Circuit granted the NFL's motion for judgment as a matter of law

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118 *Id.*

119 *Id.* at 649–50.

120 *Id.* at 650.

121 *See* Kingray, Inc. v. NBA, 188 F. 2d 1177, 1183 (S.D. Cal. 2002) ("'Sponsored telecasting' under the SBA pertains only to network broadcast television and does not apply to non-exempt channels of distribution such as cable television, pay-per-view, and satellite television networks."); *In re* NFL's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1147–48 (9th Cir. 2019).

122 Andrejev, *supra* note 61.

123 *See* Complaint at 7–8, Ninth Inning Inc. v. NFL, Inc., No. 2:15-CV-05261 (C.D. Cal. July 13, 2015).

124 Joe Reedy, *Federal Judge Overturns $4.7 Billion Jury Verdict in 'Sunday Ticket' Lawsuit and Rules for NFL*, AP NEWS (Aug. 1, 2024, at 19:43 PT), https://apnews.com/article/nfl-sunday-ticket-trial-f91c35820a1e59b3419d5bb1b88f9a08 [https://perma.cc/D8MD-4MR5]. By 2017, *Ninth Inning* had been consolidated with other cases involving NFL Sunday Ticket into *In re NFL's Sunday Ticket Antitrust Litigation*. Order Granting Motion to Consolidate at *1, *In re* NFL's Sunday Ticket Antitrust Litig., No. ML 15-02668 (C.D. Cal. May 23, 2016), 2024 WL 6768841.

125 Spoto & Graf, *supra* note 62.

based on (1) inadmissible expert evidence and (2) erroneous calculation of damages.[126]

Judge Gutierrez ruled that the testimonies of two expert witnesses for the plaintiffs, Dr. Daniel Rascher and Dr. John Zona, had flawed methodologies.[127] He stated that their models and assumptions were not based on sound economic principles, and therefore, the jury's decision could not be supported by their testimony.[128] Judge Gutierrez found that the jury's damages award was based on an "irrational" calculation.[129] The jury had relied on its own "overcharge" figure of $191.26 per subscriber, which was not tied to the evidence presented during the trial.[130] The judge stated that the jury failed to obey the court's instruction and should not have created its own overcharge figure.[131]

Judge Gutierrez also criticized Rascher's and Zona's economic models for being unsubstantiated.[132] Rascher's model was compared to a college sports model, which lacked clear relevance to the NFL's market.[133] Zona's models assumed consumers would pay more with alternative distributors but lacked evidence to support that assumption.[134] Litigation is ongoing, but the jury's damages calculation appears unlikely to stand due to issues with the expert testimonies and damages calculation.

D. The Future of NFL Antitrust Litigation

In 2020, the Supreme Court denied certiorari in the *NFL Sunday Ticket* case.[135] Justice Kavanaugh, writing separately, clarified that the denial should not be viewed as agreement with the Ninth Circuit's legal analysis, which had allowed the case to proceed.[136] The Court denied certiorari because the appeal was made at the motion-to-dismiss stage and the Court is hesitant to

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126 Order Granting Defendants' Motion for Judgment as a Matter of Law at *7–8, *11, *In re* NFL "Sunday Ticket" Antitrust Litig., No. ML 15-02668 (C.D. Cal. Aug. 1, 2024), 2024 WL 3628118.

127 *Id.* at *6–8.

128 *Id.* ("But without Dr. Rascher's and Dr. Zona's testimonies, it is impossible for a jury to determine on a class-wide basis that Sunday Ticket subscribers would have indeed paid less in the absence of Defendants' anticompetitive conduct.").

129 *See id.* at *9–11.

130 *Id.*

131 *Id.* at *11.

132 *See id.* at *5–8.

133 *See id.* at *3–7.

134 *See id.* at *7–8.

135 NFL v. Ninth Inning, Inc., 141 S. Ct. 56, 56 (2020) (mem.) (Kavanaugh, J., statement respecting the denial of certiorari).

136 *Id.* at 57.

take interlocutory appeals.[137] Justice Kavanaugh's statement confirmed that the NFL is a joint venture and antitrust law allows the NFL's member organizations to coordinate with each other.[138]

Legal scholars predict that the NFL's agreements with streaming providers will invite litigation.[139] Following the large jury award and Judge Gutierrez's decision to reinstate the case, it is possible that the NFL could reach a settlement agreement as other sports leagues often do when faced with similar litigation.[140] Depending on the outcome of that case, a new group of plaintiffs could bring claims against the NFL asserting similar claims to the *NFL Sunday Ticket* plaintiffs. The NFL could avoid this and similar litigation if it can convince a potentially NFL-friendly Supreme Court that the SBA covers agreements with streaming providers. As the *NFL Sunday Ticket* litigation eventually ends—and the NFL continues to home in on streaming providers for future media rights deals—the likelihood of litigation increases and the NFL needs to have strategies to avoid costly litigation, the costs of which will ultimately fall on its consumers.

137 *Id.* at 56–57.

138 *Id.* at 57.

139 *See* Nathanson, *supra* note 50; Williams, *supra* note 63.

140 Similar cases involving the NHL and MLB were settled in their infancy back in 2015 and 2016. Courtney Jorstad, *NHL and Subscribers Reach Antitrust Class Action Settlement*, TOP CLASS ACTIONS (June 15, 2015), https://topclassactions.com/lawsuit-settlements/lawsuit-news/nhl-and-subscribers-reaches-antitrust-class-action-settlement/ [https://perma.cc/33AZ-DZXZ]; A.J. Perez, *MLB Settles Lawsuit, Enables Fans to Stream Games of Just One Team*, USA TODAY: SPORTS (Jan. 19, 2016, at 13:52 ET), https://www.usatoday.com/story/sports/mlb/2016/01/19/mlb-class-action-lawsuit-single-team-streaming-mlb-tv/79006936/ [https://perma.cc/X4NQ-8YRE]. Although it was reaffirmed twice, MLB's exemption from antitrust laws remains limited. The Curt Flood Act of 1998 removed employment-related aspects of the exemption but did not extend to other MLB practices. William F. Saldutti IV, *Blocking Home: Major League Baseball Settles Blackout Restriction Case; However, a Collision with Antitrust Laws Is Still Inevitable*, 24 JEFFREY S. MOORAD SPORTS L.J. 49, 52 (2017). The NHL settlement allowed fans to purchase single-team packages for at least 20% less than the cost of bundled game packages for five years. *See* Laumann v. NHL, 117 F. Supp. 3d 299, 309–10 (S.D.N.Y. 2015). Fans also received an additional discount for the 2015–2016 season. *NHL, Broadcasters Settle Lawsuit Over TV Blackouts*, REUTERS (June 11, 2015, at 11:52 PT), https://www.reuters.com/article/business/media-telecom/nhl-broadcasters-settle-lawsuit-over-tv-blackouts-idUSL1N0YX1ZW/ [https://perma.cc/7FK6-46P3]. This agreement provided fans with the option to buy games "a la carte" rather than paying for unwanted games. *Id.* The lawsuit involved Comcast, DirecTV, Madison Square Garden, the NHL, and several NHL teams. *Id.*

III. HOT ROUTES

A. Construction of the SBA

It is a fundamental rule that words should be interpreted according to their ordinary meaning.[141] However, if the statute is ambiguous, the statute should be construed "in light of the statutory purpose."[142] Here, the SBA exempts from the Sherman Act any "joint agreement by or among persons engaging in" professional football when that joint agreement involves selling or otherwise transferring the "rights of such league's member clubs in the *sponsored telecasting* of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs."[143] The term "sponsored telecasting" has been at the center of NFL antitrust litigation.[144]

"Sponsored telecast" is not a defined term in the statute and the two words are not used together in this way in another bill, statute, or case outside of the context of the SBA.[145] Therefore, the statutory construction of "sponsored telecast" hinges on the ordinary meaning of its individual words. "Sponsor," as defined by Merriam-Webster, in its verb form means "to be or stand sponsor for."[146] The noun forms of "sponsor" include (1) "one who assumes responsibility for some other person or thing," or (2) an entity that pays for or carries out a project, particularly one that funds a television program in exchange for advertising.[147] Oxford defines "sponsor" as providing financial support for an activity.[148] These definitions suggest that a "sponsored" telecast is one financially backed by an entity, typically in return for promotional opportunities. Cambridge reinforces this understanding while providing more specific scenarios where sponsorship occurs. Cambridge defines "sponsor" as (1) a business or organization that pays for someone to do something or for something to happen; (2) an entity that funds a sports event, concert, or sportsper-

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141 Burns v. Alcala, 420 U.S. 575, 580–81 (1975).

142 Mills Music, Inc. v. Snyder, 469 U.S. 153, 185 (1985).

143 15 U.S.C. § 1291 (emphasis added).

144 *See, e.g.*, Shaw v. Dall. Cowboys Football Club, Ltd., 172 F.3d 299, 299–300 (3d Cir. 1999).

145 Chi. Pro. Sports Ltd. P'ship v. NBA, 808 F. Supp. 646, 650 (N.D. Ill. 1992).

146 *Sponsor*, MERRIAM-WEBSTER (Jan. 2, 2026), https://www.merriam-webster.com/dictionary/sponsor [https://perma.cc/7EPN-QLSB].

147 *Id.*

148 *Sponsor*, OXFORD: ADVANCED AM. DICTIONARY, https://www.oxfordlearners dictionaries.com/us/definition/english/sponsor_2 [https://perma.cc/8QFD-4ADH] (last visited Mar. 4, 2026).

son in return for advertising; and (3) a supporter who provides money for someone participating in a fundraising event.[149] Each definition emphasizes financial backing rather than implying that a "sponsored telecast" must be free. There is no indication that there was a more universal definition for the term "sponsored" in 1961 when the Act was passed.

While there are a number of definitions of "sponsor," only one definition involves a television program. The most applicable definition should be the one used.[150] The NFL's agreement with streaming services involves television programs. Therefore, the most on-point definition of "sponsored" is a past participle adjective that describes something being funded by an entity in return for advertising.

"Telecast," according to Oxford, simply means a "broadcast on television."[151] If strictly interpreted, this definition could be read as excluding modern streaming methods. However, such an interpretation would be absurd, as technological advancements have changed how broadcasts are received. Courts generally avoid statutory constructions that lead to absurd results.[152] Arguing that the choice of the word "telecast" applies only to actual television broadcasts would inevitably lead to absurd results.

Using the plain meaning of the terms and the most likely meaning of both terms, "sponsored telecast" means a broadcast that an entity has paid to fund in exchange for advertising. Under the plain meaning of the statute, the agreements the NFL has with Amazon and Netflix fall within the confines of the statute due to their advertising-supported business models. Although two cases considering the issue have held otherwise, a different reading than the one advanced in this Note contradicts the plain language of the statute.

The court in *Shaw* found one definition clearly "more apt" than the others and that definition means that the only sort of

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149 *Sponsor*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/sponsor [https://perma.cc/9FEK-3ZTZ] (last visited May 8, 2025).

150 *See* Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund, 583 U.S. 416, 433–34 (2018) (choosing to avoid reading a definition "in a most improbable way"); Caminetti v. United States, 242 U.S. 470, 485 (1917) ("[T]he sole function of the courts is to enforce [a statute] according to its terms.").

151 *Telecast*, OXFORD: ADVANCED AM. DICTIONARY, https://www.oxfordlearnersdictionaries.com/us/definition/english/telecast_2 [https://perma.cc/7GNQ-M2FX] (last visited May 8, 2025).

152 *See* Donovan v. FirstCredit, Inc., 983 F.3d 246, 253 (6th Cir. 2020) (citing *In re* Corrin, 849 F.3d 653, 657 (6th Cir. 2017)).

telecasting covered is one where "a business enterprise . . . pays for radio or television programming in return for advertising time."[153] This is the correct reading. However, the *Shaw* court applied that reading incorrectly. The *Shaw* court claimed that meant that the statute was unambiguous, but that it unambiguously applied to free broadcasts only.[154] The district court seemed to say that only telecasts that were solely sponsored by advertising spending were covered by the rule, despite nothing in the plain language supporting that point.

Two hypotheticals illuminate the inaccuracy in the *Shaw* court's reasoning. In both hypotheticals, the NFL pools its teams' rights and negotiates with Amazon to broadcast games. In hypothetical one, Amazon receives money from advertisers and uses that money to broadcast an NFL game. In this scenario—according to *Shaw's* reasoning—the NFL had satisfied the requirements of the SBA. In hypothetical two, instead of using the money it received from advertisers, it uses the money it received from its streaming subscribers. Here, Amazon used money from its streaming subscribers causing it to run afoul of the SBA. This creates an absurd result, creating an unnecessary accounting burden that does not aid fans or the general public. Thus, a simpler reading is preferred. The simpler reading would dictate that a telecast sponsored by advertisers, whether in whole or in part, would fall under the SBA.

The *Shaw* court cites to the *Chicago Professional Sports* case, which takes a different view from *Shaw* regarding the meaning of "sponsored telecast." The court held that there is an equally likely chance that "sponsored telecast" refers only to free television as opposed to the meaning also including paid telecasts.[155] The court states that because antitrust exemptions should be read narrowly, the exemption only applies to free broadcasts.[156] Although antitrust exemptions are to be read narrowly, this does not insulate them from an analysis into legislative intent.[157] Under principles of statutory interpretation, words

153 Shaw v. Dall. Cowboys Football Club, Ltd., No. 97-5184, 1998 U.S. Dist. LEXIS 9896, at *8–9 (E.D. Pa. June 19, 1998) (second quotation quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 17411 (3d ed. 1992)), *aff'd*, 172 F.3d 299 (3d Cir. 1999).

154 *Id.* at *9–10.

155 Chi. Pro. Sports Ltd. P'ship v. NBA, 808 F. Supp. 646, 650 (N.D. Ill. 1992).

156 *Id.*

157 *See* Union Lab. Life Ins. v. Pireno, 458 U.S. 119, 126 (1982) (holding that exceptions to antitrust laws are narrowly construed). *But cf.* HollyFrontier Cheyenne Refin.,

should be given their ordinary meaning unless they are ambiguous.[158] If there was a "likely chance" the legislature intended to apply only to free telecasts, Congress could have explicitly used the terms "public" or "free" in the SBA to limit the exemption to free, over-the-air broadcasts.[159] Paid broadcasting was an option at the time[160] and, although it was not widely used, the legislature could have made it clearer in the statute. Its choice not to do so suggests an intention to allow for adaptability.

While some courts, such as *Shaw*, have construed "sponsored telecasting" narrowly, a plain reading does not restrict the SBA exemption to free broadcasts. Instead, the phrase means any telecast with advertising. Here, when examining the statutory language closely, the term "sponsored telecast" most reasonably aligns with the definition advanced in this section.[161] Conversely, the courts that have decided on the issue have taken the opposite view, and broadcasting has changed so much in light of evolving broadcasting technology that the phrase could reasonably be considered ambiguous.[162] Even if the phrase "sponsored telecasting" is considered ambiguous, the phrase would still apply to streaming providers. To resolve ambiguity from the plain language reading, this Note next looks at the context in which "sponsored telecasting" is written.

LLC v. Renewable Fuels Ass'n, 594 U.S. 382, 396 (2021) ("But this Court has made clear that statutory exceptions are to be read fairly, not narrowly . . . .").

158 United States v. Choctaw Nation, 179 U.S. 494, 531 (1900).

159 47 U.S.C. § 535 (referring to free television as a "[s]tate public television network"); N.Y. PUB. SERV. LAW § 215(2)(b) (LexisNexis 2026) (using the term "free broadcast television").

160 Allen N. Dixon III, Note, *Unauthorized Pay Television Reception Under Section 605 of the Communications Act*, 3 UC L. SF COMMC'NS & ENT. J. 719, 719 n.1 (1981) ("Subscription television was first authorized by the Federal Communications Commission (FCC) in 1961.").

161 *See, e.g.*, Sims v. Halliburton Co., No. 98-6300, 1999 U.S. App. LEXIS 15713, at *17 (10th Cir. July 14, 1999) ("Legislative intent is ascertained by looking at the precise wording of the Act and studying its history. Established rules of statutory construction are then applied to resolve any ambiguity." (quoting Holbert v. Echeverria, 744 P.2d 960, 964 (Okla. 1987))).

162 *See* Shaw v. Dall. Cowboys Football Club, Ltd., 172 F.3d 299, 301–02 (3d Cir. 1999); Chi. Pro. Sports Ltd. P'ship v. NBA, 808 F. Supp. 646, 650 (N.D. Ill. 1992).

B. Context of the SBA

1. The Statute as a Whole

To resolve ambiguity, the plain language is not the end of the inquiry.[163] Words must be read "in their context" and with a view to the overall statutory scheme in which they are written.[164] "It is 'axiomatic that all parts of a statute must be read together in order to achieve a consistent whole.'"[165] Because the SBA is not part of a statutory scheme, this Note will view the context of "sponsored telecast" within the context of the rest of the short statute and not in light of any statutory scheme as a whole.

The SBA is written in a way that requires a broad interpretation. The legislature chose expansive wording, which indicates an intention to have the statute read broadly. The Supreme Court has found that the use of expansive terms in a statute support a finding that statutes should be given wide scope.[166] Here, the statute uses the terms "any" and "all" throughout.[167] The terms "any" and "all" refer to joint agreements and the rights of the league's member clubs.[168]

The statute takes great care in carving out exceptions for certain aspects of the statute. For example, the statute clearly applies to professional sports and the only sports that are exempted are football, baseball, hockey, and basketball—a deliberate limitation when viewed in its historical context. In the 1950s and 1960s, tennis, boxing, golf, and college football were also prominent and had large fanbases, yet Congress chose not to extend the antitrust exemption to these popular sports.[169] This se-

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163 Great Am. Ins. Co. v. Lowry Dev., LLC, 576 F.3d 251, 255 (5th Cir. 2009) ("To decipher legislative intent, courts 'may look not only to the language used but also to its historical background, its subject matter, and the purposes and objects to be accomplished.'" (quoting Bailey v. Al-Mefty, 807 So.2d 1203, 1206 (Miss. 2001))).

164 King v. Burwell, 576 U.S. 473, 486 (2015) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000)).

165 Robbins v. Garrison Prop. & Cas. Ins. Co., 809 F.3d 583, 586 (11th Cir. 2015) (emphasis omitted) (quoting Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So.2d 452, 455 (Fla. 1992)).

166 Diamond v. Chakrabarty, 447 U.S. 303, 308 (1980) ("In choosing such expansive terms as 'manufacture' and 'composition of matter,' modified by the comprehensive 'any,' Congress plainly contemplated that the patent laws would be given wide scope.").

167 15 U.S.C. § 1291.

168 *Id.*

169 *See Sporting Highlights for 1961*, TOPEND SPORTS, https://www.topendsports.com/world/timeline/1961.htm [https://perma.cc/4WXM-4HKX] (last visited May 8, 2025) (tennis); Nick Parkinson, *From Rumble in the Jungle to Cardiff, the Biggest Attendances in Boxing History*, ESPN (Mar. 19, 2018, at 18:23 ET),

lective approach to sports coverage demonstrates that more precise language was available but not preferred.

The legislature could have provided the same limiting language that it used to exclude other sports to the type of telecast, the type of agreement, or the type of media rights. Instead, the type of agreement the SBA applies to is "any joint agreement"; the type of rights the SBA applies to are transfers of "all or any part of the rights"; and the type of telecast is simply a "sponsored telecast," which does not necessitate the telecast be free to consumers. When viewing the operative provisions of the SBA in context, it is clear that the exemption was intended to be read broadly. A broad reading of the SBA includes an exemption for joint agreements between the NFL and streaming providers. For example, Amazon runs paid advertisements and has an agreement with the NFL to broadcast the NFL's properties.[170] Therefore, the NFL-Amazon agreement would qualify as "any joint agreement" by which the league transfers "all or any part of the rights" of the NFL's member teams to telecast their games.

2. *In Pari Materia*

Additionally, to determine the intention of the SBA, the Act should be read in light of the MLB's antitrust exemption. The MLB was exempted from antitrust law by a 1922 Supreme Court decision.[171] The Supreme Court has read laws that pertain to a subject, or are *in pari materia*, to be construed "as if they were one law."[172] The rule of *in pari materia* is a canon that encompasses practical experience in statutory interpretation.[173] While the MLB antitrust exemption was provided by the Supreme

https://www.espn.com/boxing/story/_/id/22837621/from-rumble-jungle-cardiff-biggest-attendances-boxing-history [https://perma.cc/5UCC-LVV3] (boxing); *1950's PGA Significance in Golf History*, REINLAND GOLF CO.: FAMILY BLOG (July 5, 2024), https://reinlandgolfco.com/blogs/reinland-golf-co-family-blog/1950s-pga-significance-in-golf-history [https://perma.cc/B6SC-8VQR] (golf); Bill Becker, *N.C.A.A. REPORTS FOOTBALL BOOM; Attendance at College Grid Games Hits Record Gate Figures Move Up*, N.Y. TIMES (Jan. 9, 1963), https://www.nytimes.com/1963/01/09/archives/ncaa-reports-football-boom-attendance-at-college-grid-games-hits.html [https://perma.cc/ZHP3-7AUK] (college football).

170 Mollie Cahillane, *Amazon Sees Strong Ad Data for NFL Black Friday*, SPORTS BUS. J. (Dec. 6, 2024), https://www.sportsbusinessjournal.com/Articles/2024/12/06/amazon-nfl-black-friday-ad-performance/ [https://perma.cc/CR3C-4MQD].

171 Fed. Baseball Club, Inc. v. Nat'l League of Pro. Baseball Clubs, 259 U.S. 200, 208 (1922).

172 Erlenbaugh v. United States, 409 U.S. 239, 243 (1972) (quoting United States v. Freeman, 44 U.S. (3 How.) 556, 564 (1845)).

173 *Id.*

Court rather than through legislative action, the rule should still be applicable because the Supreme Court decision was settled law by the time the SBA was passed. Also, while addressing this issue, the legislature could have included in the statute a law overturning the 1922 decision. When laws are drafted on the same subject and relate to the same matter, they are read together.[174] Although *Erlenbaugh*—the landmark case on the *in pari materia* canon—held that two statutes could not be read together because while they both applied to a scheme involving organized criminal activity, the means they used to accomplish that goal were different.[175] Here, there is no such difference. The goal in both *Federal Baseball Club* and the SBA is to provide an exemption to antitrust law for sports leagues and therefore, the two should be read together.

The decision to not alter the Supreme Court's exemption to the MLB indicates that the legislature believed sports leagues should receive wide latitude when it comes to antitrust exemptions. The legislature has had over 100 years to overturn the *Federal Baseball Club* decision but has not done so. In 1961, it was directly faced with the issue of whether sports leagues should be given an antitrust exemption but failed to overturn the Supreme Court's decision to exempt the MLB entirely. Eight years prior to the enactment of the SBA, the Court had determined that the legislature's inaction was an acquiescence to the MLB's exemption.[176] While antitrust exemptions are normally intended to be construed narrowly,[177] Congress has demonstrated a willingness to create specific exemptions for sports leagues when it believes broader application serves important policy objectives. When viewing the statute in light of the legislature's acquiescence to the MLB's complete exemption from antitrust law, it is clear that the legislature intended to provide a broad exemption for sports leagues to collectively bargain when selling their members' rights for telecasts.

Viewing the exemption under the SBA within its context to the statute as a whole and the application of broader antitrust principles to sports leagues, the legislative intent was to provide a broad exemption to sports leagues when entering into agreements with broadcasters.

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174 *See id.* at 243–44.

175 *Id.* at 243–45.

176 Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 357 (1953).

177 Shaw v. Dall. Cowboys Football Club, Ltd., 172 F.3d 299, 301 (3d Cir. 1999).

3. The SBA's Application to Modern Technology

If streaming services were available at the time the SBA was enacted, the SBA would have covered those agreements. The Supreme Court has determined that a statute's application may change over time in light of technological advancements.[178] "Technology evolves quickly but statutes do not."[179] Changes in technology happen too quickly for the legislature to update their statutes and often, changes in technology create circumstances that the legislature could have never imagined when drafting the statute.[180] Relying strictly on Congress to update statutes is an unworkable solution because technology advances much faster than legislation gets passed.[181]

Today, basic cable channels are not "free." Even before the agreements with streaming providers, consumers were paying for live sports whether they wanted to or not.[182] While you can access television channels like CBS, NBC, and ABC for free with a digital television antenna, most options require you to purchase a basic cable package.[183] Basic cable packages cost between $20-30/month, less money than every streaming service the NFL currently partners with.[184] In 1961, televisions with antennas were the norm.[185] Today, most Americans will purchase a television

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178 Wis. Cent. Ltd. v. United States, 585 U.S. 274, 284 (2018) ("While every statute's *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world.").

179 Kyle J. Finnegan, Note, *The Technology Canon*, 112 GEO. L.J. 935, 935 (2024).

180 *Id.* at 938–39.

181 Thomas B. Norton, Note, *Watch What You *Bleeping* Want: Interpretation of Statutes Dealing with Advancing Technology in Light of the Ninth Circuit Case of* Disney Enterprises, Inc. v. VidAngel, Inc., 25 J. INTELL. PROP. L. 287, 308 (2018).

182 Josh Mathews, Comment, *Sports Broadcasting Blackouts: A Harbinger of Change in a Rapidly Evolving Media Landscape?*, 18 HOU. BUS. & TAX L.J. 202, 219 (2018) ("Armed with the power to raise prices and increase revenue, leagues effectively force all cable TV subscribers to pay for their product, regardless of if the consumer watches sports or not.").

183 Mike Strayer, *What Is Basic Cable and How Do I Get It?*, CABLETV.COM (Aug. 1, 2022), https://www.cabletv.com/reviews/what-is-basic-cable-and-how-to-get-it [https://perma.cc/S7E6-52AL].

184 Sarah Shriber, *Over-the-Air Audience Tracker Preview: Why Advertisers Should Watch TV Antenna Users*, CIVICSCIENCE (Apr. 16, 2024), https://civicscience.com/over-the-air-audience-tracker-preview-why-advertisers-should-watch-tv-antenna-users/ [https://perma.cc/U5K4-MKHZ].

185 *See Television: TV in the Antenna Age*, SFO MUSEUM, https://www.sfomuseum.org/exhibitions/television-tv-antenna-age [https://perma.cc/K7UZ-4HJ7] (last visited May 8, 2025).

and then purchase a cable package.[186] In that case, CBS and NBC do not come free with a television and, adopting the logic from *Shaw* and *Chicago Professional Sports*, an agreement with either of those networks would fall outside of SBA protection.

Additionally, in 1961, televisions were expensive to the point where most Americans did not have one in their home. The idea of "free" television was different than it is today. It makes sense why, in 1961, the legislature would choose to limit the exemption to sponsored telecasting to avoid extraneous costs to consumers. Today, streaming services are a regular part of Americans' viewing experience. In 1961, television was very different than it is today.[187] Americans have been "cutting the cord" for over a decade,[188] and the number of cable television subscribers has steadily declined over the last decade.[189] In order to meet people where they are, the NFL needs to provide access through streaming providers in addition to traditional broadcasts.

Additionally, consumers are used to having everything in the palm of their hand—literally.[190] Mobile streaming is a major aspect of the viewing experience and streaming providers provide the easiest access to mobile streaming.[191] In order to stream an out-of-market NFL game airing on CBS from a mobile device, a

186 *See Beyond Big Data: The Audience Watching over the Air*, NIELSEN (Jan. 2024), https://www.nielsen.com/insights/2024/beyond-big-data-the-audience-watching-over-the-air/ [https://perma.cc/7LU8-SE59].

187 Forbes Agency Council, *Online Streaming Is the Future of Sports Broadcasting: It's Not 'If' You'll Cut Cable, but 'When,'* FORBES (Apr. 14, 2017, at 9:27 ET), https://www.forbes.com/sites/forbesagencycouncil/2017/04/14/online-streaming-is-the-future-of-sports-broadcasting-its-not-if-youll-cut-cable-but-when/ [https://perma.cc/T2CE-74R6]; Gregory Bailey, Comment, *Streaming Is the Name of the Game: Why Sports Leagues Should Adapt to Consumers and Follow Ad Dollars Towards Live Streaming*, 26 JEFFREY S. MOORAD SPORTS L.J. 323, 332 (2019); Matthew Garrahan, *TV Networks Face Shaky Future in Changing Media Landscape*, FIN. TIMES (Aug. 27, 2015), https://www.ft.com/content/15f65100-4c9c-11e5-b558-8a9722977189 [https://perma.cc/EH5P-SFGW].

188 *See* Mathews, *supra* note 182, at 218.

189 *See Number of Cable TV Subscriptions*, IBISWORLD (Aug. 18, 2025), https://www.ibisworld.com/us/bed/number-of-cable-tv-subscriptions/4625/ [https://perma.cc/AB2U-59V7].

190 *See Mobile Video in the United States – Statistics & Facts*, STATISTA (Dec. 17, 2025), https://www.statista.com/topics/2725/mobile-video-in-the-united-states/ [https://perma.cc/ER8D-D7XS].

191 *See TV Viewing in November Interval Reaches Highest Level Since February, Streaming Nabs Largest Share of TV Ever in The Gauge™*, NIELSEN (Dec. 10, 2024), https://www.nielsen.com/news-center/2024/tv-viewing-in-november-interval-reaches-highest-level-since-february-streaming-nabs-largest-share-of-tv-ever-in-the-gauge/ [https://perma.cc/B93H-BBSS].

consumer must have a subscription to Paramount+,[192] and ESPN is in the process of creating a subscription service billed monthly that would supplant its current model which allows users to access most of its content with a cable subscription.[193] Streaming providers are better situated to provide mobile streaming, and excluding providers like Amazon or Netflix from the SBA exemption would prevent the NFL from reaching consumers through mobile streaming. Viewing the SBA under modern circumstances, the legislature would have included streaming services in its exemption.

C. Legislative History

The legislature's intent in enacting the statute was to provide sports leagues with an exemption to antitrust law when a league sells or transfers pooled television rights to a purchaser because the legislature recognized that the NFL was a unique product that benefits consumers in a unique way. Congress also intended to protect sports leagues from rival leagues; prevent the strongest teams from attaining insurmountable success over the weaker ones; and protect consumers.

1. Provide Sports Leagues with a Broad Carveout of Antitrust Law

Courts have consistently held that the principal inquiry in determining the effect of a statute is to determine the legislative intent.[194] If the statute's plain language is ambiguous, courts are permitted to view the statute in light of legislative history.[195] The legislature determined that the NFL should benefit from an antitrust exemption because it determined that the fans' rights to ac-

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192 *See NFL on CBS*, PARAMOUNT+, https://www.paramountplus.com/shows/nfl-on-cbs/ [https://perma.cc/DR4Y-7Y4R] (last visited May 8, 2025).

193 *See* Alex Sherman, *CNBC Sport: ESPN Braces for Brand Confusion with Upcoming Flagship Streaming Service*, CNBC: SPORT (Mar. 13, 2025, at 10:00 ET), https://www.cnbc.com/2025/03/13/cnbc-sport-espn-braces-for-brand-confusion-with-streaming-service.html [https://perma.cc/S8JZ-KSJ7].

194 *See* Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 23–24 (1979) (clarifying that the "central inquiry" in determining whether Congress intended to create a private right of action was whether Congress intended to create such a remedy); Hunt v. Superior Court, 987 P.2d 705, 717 (Cal. 1999) ("Our role in construing a statute is to ascertain the Legislature's intent so as to effectuate the purpose of the law." (citing People v. Snook, 947 P.2d 808, 810 (1997))).

195 *See* Busic v. United States, 446 U.S. 398, 404–05 (1980).

cess every game outweighed the antitrust concerns that are combatted by the Sherman Act.[196]

The Senate reports surrounding the passage of the SBA plainly state the purpose of the SBA was as follows:

> The purpose of the proposed legislation is to enable the member clubs of a professional football, baseball, basketball, or hockey league, to pool their separate rights in the sponsored telecasting of their games and to permit the league to sell the resulting package of pooled rights to a purchaser, such as a television network, without violating the antitrust laws.[197]

The Senate report makes no mention of the meaning of "sponsored" in its report on the SBA. The statute's sole purpose was to exempt joint agreements "under which a league sells or transfers pooled television rights of its member clubs to a purchaser."[198] The Senate Reports mention concerns about college football and expressly removes college football from the protection of the SBA.[199] Conversely, there is no mention of concerns about consumers paying for broadcasts.

Some argue the SBA was enacted solely to overturn Judge Grim's 1953 and 1961 decisions invalidating the NFL's pooled-rights sales to CBS, suggesting its scope is limited to reversing those rulings and applying only to sponsored network broadcasts.[200] However, that reading is overly narrow; if Congress intended such a limited effect, it would have written the statute more restrictively—naming only the NFL and explicitly limiting it to free, over-the-air broadcasts.

A more persuasive counterargument comes from the legislative record itself: House Reports and hearing transcripts note that the SBA applies only to the "sponsored telecasting of games" and explicitly state that the bill "does not apply to closed circuit

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196 *See* Stephen F. Ross, *An Antitrust Analysis of Sports League Contracts with Cable Networks*, 39 EMORY L.J. 463, 469 (1990) ("The legislative record established that such a package sale was necessary to ensure that all road games would be televised back to the NFL franchises' home areas. Thus, the House Judiciary Committee concluded that 'the public interest in viewing professional league sports warrants' an accommodation 'with minimal sacrifice of antitrust principles.'").

197 S. REP. NO. 87-1087, at 1 (1961), *as reprinted in* 1961 U.S.C.C.A.N. 3042, 3042.

198 *Id.* at 3.

199 *Id.*

200 *See, e.g.*, Shaw v. Dall. Cowboys Football Club, Ltd., No. 97-5184, 1998 U.S. Dist. LEXIS 9896, at *10 (E.D. Pa. June 19, 1998), *aff'd*, 172 F.3d 299 (3d Cir. 1999); U.S. Football League v. NFL, 842 F.2d 1335, 1347 (2d Cir. 1988) (citing S. REP. NO. 87-1087, at 1).

or subscription television."[201] At first glance, this language appears to exclude modern streaming services from the scope of the exemption. However, this view does not fully account for the significant changes in technology and consumer behavior since 1961.

While courts have not expressly adopted the "technology canon" of statutory interpretation, there is support for reading statutes with an eye toward how they apply to modern realities, particularly when the core purpose of the statute is at stake.[202] Today, most televised sports—including those accessible through traditional networks—are part of some form of subscription-based service, whether cable, digital bundles, or streaming platforms.[203] Excluding streaming agreements from the SBA exemption risks undermining the very objectives the statute was meant to achieve: ensuring public access to games and maintaining competitive balance within the league. Moreover, requiring individual NFL teams to negotiate their own streaming rights could lead to fragmented coverage, higher consumer costs, and a diminished ability for smaller-market teams to stay financially competitive—conditions that could invite the emergence of rival leagues. While the House Report made reference to subscription television as outside the statute's original scope, such comments should not override the broader legislative intent to preserve league-wide broadcasting arrangements that benefit fans and the sport as a whole.

The following quote from *NFL I* is telling: "The member clubs of the National Football League, like those of any professional athletic league, can exist only as long as the league exists. The League is *truly a unique business enterprise*, which is entitled to protect its very existency [sic] by agreeing to reasonable restrictions on its member clubs."[204] The drafters of the SBA intended for the NFL to have an exemption from antitrust law because sports leagues are such a unique property.[205] By passing this Act, the legislature determined that public policy favors giving sports leagues the option to pool television rights of their teams over the concerns that are safeguarded by federal anti-

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201 *Telecasting of Professional Sports Contests: Hearing on H.R. 8757 Before the Antitrust Subcomm. of the Comm. on the Judiciary*, 87th Cong. 2 (1961); H.R. REP. NO. 87-1178, at 5 (1961).

202 *See* Finnegan, *supra* note 179, at 939.

203 Strayer, *supra* note 183.

204 *NFL I*, 116 F. Supp. 319, 326 (E.D. Pa. 1953) (emphasis added), *superseded by statute*, 15 U.S.C. § 1291.

205 *Id.* at 323.

trust laws. The NFL is a unique property that requires unique protection from the Sherman Act.

Professional football has problems that no other business has.[206] The 1953 and 1961 injunctions (*NFL I* and *NFL II*) that spurred the enactment of the SBA admitted that professional football was different from any other business but did not have authority to rely on to treat it differently. In 1953, the Pennsylvania court granted an injunction but acknowledged that the injunction likely meant that the whole league would be doomed because without the weaker team's retaining their financial viability, the league would fall.[207] In 1961, the Eastern District of Pennsylvania was "obliged" to uphold the injunction.[208] The legislature acted swiftly. The 1961 decision came down on July 20, 1961, and the statute that provided an antitrust exemption to professional sports leagues was enacted on September 30, 1961.[209] The legislature identified a business in the NFL that was uniquely situated and required a unique exemption to antitrust law that would allow it to continue to reach NFL fans and retain its viability.

Today, how fans consume NFL properties has changed, but the NFL remains a unique product. It is unlikely that prohibiting the NFL from collectively negotiating its television rights deals with streaming providers would doom the less popular franchises given the current success and valuations of even the weakest teams.[210] However, the legislature's intent in 1961 was to provide an exemption that accounted for the NFL's unique business model and failing to interpret the exemption as applying to agreements with streaming providers would be contrary to legislative intent. Further, the other legislative intentions in enacting this statute would be at risk if the statute was read narrowly.

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206 *Id.* ("The ordinary businessman is not troubled by the knowledge that he is doing so well that his competitors are being driven out of business.").

207 *Id.*

208 *NFL II*, 196 F. Supp. 445, 447 (E.D. Pa. 1961), *superseded by statute*, 15 U.S.C. § 1291.

209 *Id.*; Act of Sep. 30, 1961, Pub. L. No. 87-331, 75 Stat. 732.

210 *See* Michael Ozanian, *CNBC's Official NFL Team Valuations 2024: Here's How the 32 Franchises Stack Up*, CNBC: SPORT (Nov. 15, 2024, at 11:37 ET), https://www.cnbc.com/2024/09/05/official-nfl-team-valuations-2024.html [https://perma.cc/4D9F-BNNB].

2. Protection from Rival Leagues

The legislature also intended to protect sports leagues from rival leagues. *NFL I* expressed concerns about the NFL and its ability to survive without horizontal agreements.[211] In 1973, the House of Representatives proposed legislation that would alter the protections for sports leagues. The legislation was not passed, but the House Report provides insight into the rationale for the passage of the SBA.[212] According to the 1973 House Report, the SBA was "specifically designed to establish parity between the National Football League and the American Football League."[213]

a. American Football League

When the SBA was passed in 1961, the NFL faced a formidable threat in the form of the American Football League (AFL). Following *NFL I*, the NFL's individual teams operated their own broadcasting rights and the league continued on.[214] The AFL was founded in 1959 by Lamar Hunt, an oil tycoon from Texas.[215] The AFL's business model was based in part on recruiting wealthy magnates who were unsuccessful in purchasing a team in the NFL to bring football teams to cities that did not have an NFL team.[216] The AFL operated in direct competition with the NFL and was able to gain traction. The AFL began play in 1960 and was able to negotiate a contract with ABC to broadcast its games from 1960–63.[217]

The SBA was passed immediately after the AFL was organized, in part because of the risk the AFL presented to the NFL's unique business model.[218] The AFL operated collectively and in

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211 *See NFL I*, 116 F. Supp. at 326 ("The member clubs of the National Football League, like those of any professional athletic league, can exist only as long as the league exists.").

212 *See* H.R. REP. NO. 93-483, at 2032, 2036–37, 2039 (1973), *as reprinted in* 1973 U.S.C.C.A.N. 2032, 2036–37, 2039.

213 *Id.* at 2036. The Senate Reports noted that:

> [I]f the 14 teams of the National Football League and the 8 teams of the American Football League are required to act separately in the sale of their television rights, only a handful of these teams will hereafter be able to secure coverage on the limited network facilities now available.

S. REP. NO. 87-1087, at 2 (1961), *as reprinted in* 1961 U.S.C.C.A.N. 3042, 3043.

214 *In re* NFL's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1154 (9th Cir. 2019); U.S. Football League v. NFL, 842 F.2d 1335, 1346 (2d Cir. 1988).

215 *U.S. Football League*, 842 F.2d at 1344.

216 *Id.*

217 *Id.*

218 *Sunday Ticket Antitrust Litig.*, 933 F.3d at 1145 ("While the NFL was precluded under *NFL I* from restricting the sale of telecasts, the AFL was not. As a result, the AFL

direct competition with the NFL. The AFL brought an antitrust suit against the NFL in 1962, alleging that the NFL was monopolizing professional football.[219] The leagues competed for top talent and viewership, which led to a "financial arms race" that was likely untenable in the long term.[220] The two leagues agreed to merge in 1966 and eventually received Congressional approval.[221] That same year, "Congress amended the Sports Broadcasting Act specifically to confer antitrust immunity on the NFL-AFL merger."[222]

b. United States Football League

The NFL, without any challengers and armed with protection from the SBA, enjoyed more success over the next decade and a half.[223] In 1983, the United States Football League (USFL) launched as a spring alternative to the NFL. Positioned as a complement rather than a direct competitor, the USFL initially avoided scheduling conflicts with the NFL and attracted notable talent, including future Hall of Famers, by offering competitive salaries and opportunities for immediate play.[224] However, under the influence of aggressive owners—most notably Donald Trump—the league shifted its strategy, moved toward a fall schedule, and filed an antitrust lawsuit against the NFL in 1986, alleging monopolistic control over television broadcasting rights and market access.[225] Although the USFL technically won the suit, the symbolic $1 in damages (tripled under antitrust law to

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'entered into league-wide television contracts,' and pooled its television rights and revenues in a broadcast contract with ABC." (citations omitted)).

219 Am. Football League v. NFL, 205 F. Supp. 60, 61 (D. Md. 1962).

220 Michael B. Gray, *Michael B. Gray of Colorado Explores the AFL-NFL Merger of 1970: Transforming the Landscape of Professional Football*, SEA ISLE NEWS (May 24, 2024), https://seaislenews.com/news/2024/may/24/michael-b-gray-of-colorado-explores-the-afl-nfl-me/ [https://perma.cc/8CH6-TRV9].

221 *General History – Chronology (1960 to 1979)*, PRO FOOTBALL HALL OF FAME (Mar. 13, 2026, at 13:36 ET), https://www.profootballhof.com/football-history/general-history-chronology-1960-to-1979/ [https://perma.cc/T3CJ-DDB5].

222 *U.S. Football League*, 842 F.2d at 1347 (citing Act of Nov. 8, 1966, Pub. L. No. 89-800, § 6(b)(1), 80 Stat. 1508, 1515).

223 *Sunday Ticket Antitrust Litig.*, 933 F.3d at 1146.

224 Ben Rolfe, *History of the USFL: What It Is, How It Started, and Its Demise*, PRO FOOTBALL & SPORTS NETWORK (June 3, 2021, at 11:45 ET), https://www.profootballnetwork.com/history-of-the-usfl/ [https://perma.cc/Y6RT-SDA5].

225 SMALL POTATOES: WHO KILLED THE USFL?, ESPN (ESPN 2009), https://www.espn.com/watch/film/68d3cf4b-3f8b-40d8-9048-bddba97cf1a8/small-potatoes-who-killed-the-usfl [https://perma.cc/F63A-YG5E].

$3) marked the league's practical defeat.[226] Following the lawsuit, the USFL ceased operations and never played another game.[227]

Since the first iteration of the USFL, rival leagues, including ones sharing the USFL's namesake, have tried to emerge and compete with the NFL, each with varying degrees of success.[228] Until a couple of years ago, due to the immense success of the NFL, NBA, NHL, and MLB, it was thought to be virtually impossible to directly compete for viewership and cachet with a major sports organization and win. However, recent developments in another sport—professional golf—indicate professional sports leagues' impenetrable armor may be cracking.

c. Rival Leagues Today

LIV Golf, backed by the Saudi Arabian government-owned Public Investment Fund (PIF), upended the structure of professional golf by paying players hundreds of millions of dollars to defect from the PGA Tour, the preeminent professional golf organization in the world.[229] This fragmentation has prevented fans from seeing top golfers compete in the same tournaments and has destabilized the sport's traditional competitive model.[230] The PIF's deep financial resources and strategic motives raise concerns that go far beyond golf, signaling the potential for similar disruption in other sports.[231] While such a threat may seem unlikely in leagues like the NFL, a sport like basketball could be vulnerable to a LIV-style challenge, where a new league backed by sovereign wealth could lure away talent and threaten the viability of existing organizations.[232]

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226 *U.S. Football League*, 842 F.2d at 1335.

227 James R. Copland, *What Do We Mean by a "Pro-Business" Court—and Should We Care?*, 67 CASE W. RSRV. L. REV. 743, 750 (2017).

228 Thomas Barrabi, *XFL, USFL, Other Pro Football Leagues That Took on the NFL*, FOX BUS. (Feb. 6, 2020, at 18:52 ET), https://www.foxbusiness.com/sports/xfl-usfl-aaf-nfl-pro-football-startups [https://perma.cc/L3NM-8D56].

229 Bob Harig, *How We Got Here: A Timeline of LIV Golf and How the PGA Tour Eventually Embraced Its Rival*, SPORTS ILLUSTRATED (Mar. 12, 2024), https://www.si.com/golf/news/timeline-liv-golf-how-pga-tour-adapted [https://perma.cc/MC82-EU3Z].

230 John A. Fortunato, *Debating Outcomes of the Antitrust Challenges Between the PGA Tour and the LIV Golf Tour*, 33 MARQ. SPORTS L. REV. 751, 753 (2023).

231 Joey D'Urso, *Saudi Arabia's Takeover of World Sport: Football, Golf, Boxing and Now Tennis?*, THE ATHLETIC (Mar. 10, 2024), https://www.nytimes.com/athletic/5237849/2024/02/02/saudi-arabia-sport-investments/ [https://perma.cc/DYT8-MNVY].

232 Reuters, *PIF Backing Proposed $5 Billion Basketball League*, ESPN (Feb. 7, 2025, at 21:00 ET), https://www.espn.com/espn/story/_/id/43741075/pif-backing-proposed-5-billion-basketball-league [https://perma.cc/GS56-4QDW].

This development reveals that the legislative intent behind providing sports leagues with a reprieve from antitrust law to protect them from rival leagues is as relevant today as it was in 1961.[233] Failing to extend the antitrust exemption to streaming providers would undermine legislative intent by providing additional avenues for rival leagues to gain a competitive advantage. The SBA was intended to prevent rival leagues from gaining a competitive advantage against sports leagues and thus, the SBA should be construed to apply to modern viewing experiences.

3. Establish Parity Among Member Organizations

Along with the concern that a rival league was better positioned to negotiate with broadcast companies than the NFL was, the legislature was also concerned with the league's competitive balance. In 1961, there was a concern that "the league's competitive balance on the field would eventually be destroyed if teams in major television markets continued to sell their broadcast rights individually."[234] The SBA was designed to ensure that the most successful teams were not able to outperform the weaker teams on the field and ultimately run them out of business.[235] At the time the SBA was passed, failing to provide an exemption for the NFL in procuring its television contracts could have led to the destruction of the entire league.[236] Allowing member teams to compete against each other for television deals would lead to the top teams securing the most lucrative deals and allow them to continue to build their wealth.[237] The weaker teams would then be forced to secure their broadcasting deals with what is left over, diminishing their leverage and lowering their profits.[238] In

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233 Chris Chen, Comment, *How American Sports Leagues Can Respond to the Rise of Sovereign Wealth Funds*, 11 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 305, 311–12 (2024).

234 *In re* NFL's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1145 (9th Cir. 2019) (quoting U.S. Football League v. NFL, 842 F.2d 1335, 1346 (2d Cir. 1988)).

235 H.R. REP. NO. 93-483, at 4 (1973), *as reprinted in* 1973 U.S.C.C.A.N. 2032, 2035.

236 *NFL I*, 116 F. Supp. 319, 323 (E.D. Pa. 1953) ("If this should happen not only would the weaker teams fail, but eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably."), *superseded by statute*, 15 U.S.C. § 1291.

237 S. REP. NO. 87-1087, at 2 (1961), *as reprinted in* 1961 U.S.C.C.A.N. 3042, 3043 ("In similar vein, the Commissioner of the American Football League testified that television revenues are such a significant part of the overall financial success of a professional football team that it is necessary to prevent too great disparity in the television income of the various clubs.").

238 *NFL I*, 116 F. Supp. at 323 ("The winning teams usually are the wealthier ones and unless restricted by artificial rules the rich get richer and the poor get poorer.").

that world, the worst teams would not have the financial ability to keep up with the best teams, and only the best teams would be able to survive.[239] This winner-take-all system works on the playing field but not in the boardroom. There must be less successful teams on the playing field because each game has a winner and a loser. For the league to survive, the under-performing teams need to have some way to retain their financial viability through a concerted effort from the league's governing body.

Television rights make up a majority of the NFL's revenue and without the exemption, the weakest teams would lose a bulk of the revenue that has allowed them to sign players, pay their coaches, and upgrade their stadiums.[240] While there is a significantly smaller risk today than there was in 1961 that the league would eventually collapse and this exemption may no longer be necessary to preserve the league itself, courts must still interpret the statute according to its intent.[241] As streaming becomes the primary option for consumers, the NFL will rely on that revenue more and more.

Parity helps the fans as well. The more the revenue is spread across the league, the more the teams in smaller markets can compete. Forcing each team to compete in a business way would harm the fans because the poorer teams would not get the revenue sharing that is essential to the success of the NFL. If streaming services were the primary avenue to consume sports in 1961, the exemption would have applied to those providers as well. Therefore, to allow the NFL to continue operating how it has and how the legislature intended, the SBA exemption must apply to agreements with streaming providers.

4. Protect the Consumers

The central goal of antitrust law is to protect competition to benefit the consumer.[242] The Sherman Act was established with the American people in mind—with the goal of ensuring that one or several corporations could not get so large as to control the

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239 *Id.* at 324 ("Thus, the net effects of allowing unrestricted business competition among the clubs are likely to be, first, the creation of greater and greater, inequalities in the strength of the teams; second, the weaker teams being driven out of business; and, third, the destruction of the entire League.").

240 Jacob Eckstein, *How the NFL Profits: Revenue Streams Explained*, INVESTOPEDIA (Feb. 20, 2026), https://www.investopedia.com/articles/personal-finance/062515/how-nfl-makes-money.asp [https://perma.cc/KG6W-EY4C].

241 New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U.S. 656, 662 (1875).

242 State Oil Co. v. Khan, 522 U.S. 3, 15 (1997).

prices or access to resources, thereby limiting the power of the American people.[243] The SBA was enacted because the "public interest in viewing professional league sports" outweighed the concern that antitrust law typically protects.[244]

Enabling the exemption to extend to streaming providers increases access to fans. For sports leagues, allowing member teams to work together is not only necessary but beneficial. The Supreme Court found that even the NCAA, which lacks the same protections as the NFL, needs to work together to "widen consumer choice" and mutual agreement by sports leagues should be seen as procompetitive.[245] Critics of streaming services joining the sports broadcasting fold have admitted as much.[246] Allowing the NFL to work with streaming providers increases the number of viewing options and the number of games that fans can watch. On an average Sunday, the "free" options are limited to anywhere from three to five games, depending on the market a fan is in.[247] Fans cannot watch most "out-of-market" games on the limited broadcast options such as CBS and FOX.[248] Increasing the number of organizations that the NFL may work with increases the number of games that are nationally televised, increasing the number of games the average fan can watch. For example, adding Netflix has increased the number of primetime games, which are available to all fans.[249]

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243 *Guide to Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws [https://perma.cc/CU3X-WHBM] (last visited May 9, 2025).

244 S. REP. NO. 87-1087, at 3 (1961), *as reprinted in* 1961 U.S.C.C.A.N. 3042, 3044 ("The committee is of the opinion that the public interest in viewing professional league sports warrants some accommodation of antitrust principles . . . .").

245 NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 102 (1984).

246 Scott M. Finney, Note, *Too Many, Too Late: The NFL's Inverse Accessibility Issue and the New RPO*, 25 N.C. J.L. & TECH. 161, 166 (2023) ("The inclusion of streaming services in NFL media deals is of course not a bad thing *per se*, and in some ways, it will increase accessibility to NFL games.").

247 Most games are televised on broadcast networks like Fox, NBC, and CBS, but those stations only televise local games. On a typical Sunday, a maximum of two games per "window" will be televised, a 1:00 p.m. window and a 4:00 p.m. window. Currently, *Sunday Night Football* is offered on NBC's open-air channel. Brad Adgate, *More NFL Games Will Be Exclusively Streamed This Season,* FORBES (Sep. 6, 2024, at 09:18 ET), https://www.forbes.com/sites/bradadgate/2024/09/05/to-watch-every-nfl-game-this-season-will-cost-more-money/ [https://perma.cc/4EE6-4FBV].

248 "Out-of-market" refers to NFL games that do not feature the local team or are not being broadcast in a viewer's geographic region based on league and network scheduling rules. *What Is the Regular Season Blackout Policy for Live Games on NFL+?*, NFL, https://support.nfl.com/hc/en-us/articles/35869716961556-What-is-the-blackout-policy-for-live-games-on-NFL [https://perma.cc/TE7R-UWXN] (last visited May 9, 2025).

249 Adgate, *supra* note 247.

NFL fans do not just care about their own teams—they care about players, coaches, and other teams across the league and increasing the number of nationally televised games increases that access.[250] Adding streaming services into the catalogue of options increases the number of opportunities for fans to watch games. One alternative would be putting them on local stations or *NFL Sunday Ticket*, which restricts output.

Additionally, viewership is different today than it was in 1961.[251] For viewers without a cable or satellite television subscription, the change improves accessibility to NFL games. More and more Americans are preferring to watch content on their Smart TVs.[252] With streaming, fans will be able to watch games from almost anywhere, whether they are at home, at work, or traveling. The flexibility of streaming on a variety of devices will allow viewers to choose how and when they engage with the sport, giving fans a level of control over their viewing experience that was not previously possible with traditional broadcast television. Also, the NFL is growing in international markets. Streaming services expand the reach to those markets and increase the access for fans across the world.[253]

Although the current model has faced criticism for inconveniencing and confusing some viewers, there is no concrete evidence that the NFL's relationship with streaming providers has increased prices or diminished the product. For example, the shift of *Thursday Night Football* to Amazon Prime Video has not led to meaningful reductions in access or quality; instead, it has introduced new features and broader digital availability.[254] Plaintiffs in *NFL Sunday Ticket* sought to prove that centralized control over out-of-market games harmed fans, relying on Dr. Rascher's claim that, in a "college football but-for world," games would have

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250 *See* Casey Lambert, *How Fantasy Football Shaped the NFL's Rise to #1 Sport in America*, AZEE BRANDING, https://azeebranding.com/how-fantasy-football-shaped-the-nfls-rise-to-1-sport-in-america/ [https://perma.cc/532D-NXNY] (last visited Apr. 10, 2026).

251 *See* discussion *supra* Section III.C.4.

252 Brad Adgate, *Report: Viewers Continue to Watch More Streaming Content on Smart TVs*, FORBES (June 4, 2024, at 13:03 ET), https://www.forbes.com/sites/bradadgate/2024/06/04/report-viewers-continue-to-watch-more-streaming-content-on-smart-tvs/ [https://perma.cc/8QGZ-U3N2].

253 JAMES T. GRAY, SPORTS LAW PRACTICE § 8.07 (3d ed. 2025) ("NFLP sees one of its key areas of growth as being the international market. In 1989, NFLP opened an office in London. In 1989, gross retail sales of NFL-licensed products in England were expected to exceed $50 million.").

254 Alex Davies, *'Thursday Night Football' Behind-the-Scenes: How Prime's NFL Coverage Comes to Life*, AMAZON NEWS (Sep. 2024), https://www.aboutamazon.com/stories/amazon-prime-thursday-night-football-behind-the-scenes [https://perma.cc/U4QH-ZACT].

been available on basic cable or free over-the-air channels.[255] But the court rejected this theory, finding that Dr. Rascher's model was speculative, economically unsound, and unsupported by the actual structure of college football broadcasting, which itself includes premium and regional exclusives—even for top-ranked teams.[256] Without reliable expert support, the jury's $4.7 billion damages verdict was ultimately vacated as untethered to evidence and based on flawed assumptions about consumer payments.[257] Thus, despite aggressive attempts to prove consumer harm from the NFL's broadcast strategies, the case underscores that no concrete showing has been made that fans have paid more or received less. Therefore, no basis exists to presume that streaming agreements would have anticompetitive or damaging effects.

In any event, the issue is not with the antitrust exemption itself, but the fragmented media landscape. Even if consumers are paying more to access every game because of the growing number of streaming providers, the better solution is to curb those adverse effects rather than eliminate the agreements entirely. This approach would clarify the NFL's options while allowing the legislature to craft a more targeted solution.

Ultimately, clarity will decrease litigation and save money for the fans. Currently, the NFL is operating as if the exemption applies, and it would take a lawsuit from the U.S. government or consumers to disrupt that. A lack of clarity has fueled the *NFL Sunday Ticket* lawsuit, which has dragged on for a decade with no clear resolution in sight. Extending the exemption to streaming providers would increase clarity and avoid litigation like *NFL Sunday Ticket*—the costs of which would ultimately be felt by the fans.[258] Extending the antitrust exemption to include streaming providers would not only align with the SBA's original intent to protect consumers, but would also enhance fan access, reduce litigation costs, and provide the legal certainty necessary for the NFL to innovate without fear of protracted, costly legal battles that ultimately burden its viewers.

In sum, as made clear by the SBA's plain language, its context, and the legislative history, the intent was to provide an ex-

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255 Order Granting Defendants' Motion for Judgment as a Matter of Law at *6–7, *In re* NFL "Sunday Ticket" Antitrust Litig., No. ML 15-02668 (C.D. Cal. Aug. 1, 2024), 2024 WL 3628118.

256 *Id.* at *13–14, 17.

257 *Id.* at *30–31.

258 De Witte, *supra* note 65.

emption for joint agreements made by the NFL with broadcasters. Amazon, Netflix, and Peacock are broadcasters contemplated by the SBA.

IV. AUDIBLES

Sports leagues often seek declaratory judgment on legal disputes they need resolved.[259] The NFL could seek a declaratory judgment to get on the offensive and avoid defending litigation from potential plaintiffs. At this moment, the NFL is exposed to litigation for the joint agreements with streaming services like Amazon and Netflix.[260] Declaratory judgment would give the NFL the opportunity to avoid future litigation and "minimize the danger of avoidable loss" at a time when its future payout to the *NFL Sunday Ticket* subscribers is uncertain.[261]

If the NFL wanted to play it safe, it could simulcast its games instead of having them only available on streaming providers. That would mean the NFL would offer both the paid option through the streaming services and the "free" option on a basic cable channel like ABC or CBS. Peacock currently simulcasts all *Sunday Night Football* games with its open-air affiliate.[262] The NFL can work with local broadcasts to simulcast the games to ensure sports fans can continue watching their own teams without a paid subscription. For example, when a *Thursday Night Football* game on Amazon Prime between the Dallas Cowboys and New York Giants is being played, the NFL can work with local Dallas and New York CBS affiliates to broadcast the game in those areas. That way, Dallas and New York residents could watch their favorite teams at no cost and those with an Amazon Prime subscription could watch the game from any-

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259 The NHL sought a declaratory judgment to clarify whether its compliance with certain equalization rules was protected from antitrust challenges under the non-statutory labor exemption. NHL v. NHL Players Ass'n, 789 F. Supp. 288, 289 (D. Minn. 1992). The NBA sought a declaratory judgment to determine whether it could restrain the movement of one of its franchises, the Los Angeles Clippers, and impose charges related to the franchise's relocation. NBA v. SDC Basketball Club, Inc., 815 F.2d 562, 563 (9th Cir. 1987).

260 Nathanson, *supra* note 50.

261 United Food & Com. Workers Loc. Unions 137 v. Food Emps. Council, Inc., 827 F.2d 519, 524 (9th Cir. 1987) (stating that declaratory judgments "minimize the danger of avoidable loss and the unnecessary accrual of damages and . . . afford one threatened with liability an early adjudication without waiting until his adversary should see fit to begin an action after the damage has accrued").

262 *NFL Completes Long-Term Media Distribution Agreements Through 2033 Season*, NFL (Mar. 18, 2021, at 16:06 PT), https://www.nfl.com/news/nfl-completes-long-term-media-distribution-agreements-through-2033-season [https://perma.cc/WJN8-8Q9P].

where. Local stations already broadcast preseason games, so the infrastructure is there.

Obviously, those agreements would command less money from streaming providers because the exclusivity draws consumers to their platforms when it is the only option to watch a game. At the same time, the NFL gets to "double dip" and retain revenue from two sources for one game, which would help them recoup the losses from the price of exclusivity. This option would likely save the NFL from antitrust scrutiny given the well-established rule of reason test and the Ninth Circuit judge's assessment of the *NFL Sunday Ticket* jury award. To state an antitrust claim, plaintiffs must allege: (1) a conspiracy between two or more distinct entities; (2) an intent to restrain trade; (3) actual harm to competition; and (4) that they have standing as parties harmed by the anticompetitive conduct.[263] Elements one, two, and four are likely to be met, but element three—actual harm—would be near impossible to prove when the broadcast is simulcast.[264] When the broadcast is simulcast, consumers can simply watch the broadcast on basic cable instead of paying for the streaming service.

Third, the NFL could work with Congress, as it did in 1961.[265] With the FCC and DOJ launching investigations into the NFL's agreements with streaming providers, this option has become increasingly appealing. As this Note concludes, removing the SBA's exemption is neither sustainable for the NFL, nor beneficial to consumers. At the same time, inaction does little to address the challenges some consumers face.

A negotiated legislative solution would better serve all parties. Congress could enact a statute clarifying that the SBA applies to streaming providers, reducing uncertainty and limiting litigation, while also protecting consumers. For example, Congress could require simulcasts of certain games, limit the number of streaming providers the NFL may partner with to reduce subscription fragmentation, and permit broader account sharing. Such an approach would recognize the unique nature of professional sports leagues while protecting the fans who helped turn them into multi-billion-dollar enterprises.

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263 Nathanson, *supra* note 50.

264 *See* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 102 (1984).

265 *In re* NFL's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1146 (9th Cir. 2019).

These are the most viable options for avoiding litigation based on the joint agreements with streaming providers. If the NFL seeks declaratory judgment, faces litigation from consumers, and/or does not come to an agreement with the FCC and DOJ, it will need a creative strategy, and this Note provides a framework.

V. ENDZONE

The SBA was enacted to preserve competitive balance and fan access, initially in response to restrictions on terrestrial broadcasts. Now, in response to a new technological shift, the SBA should be interpreted according to its original intent. The statutory text refers to "sponsored telecasting," which read according to its plain language encompasses agreements with streaming providers. Even assuming the statute is ambiguous, a forward-looking and context-aware interpretation must account for how media consumption has fundamentally changed since the SBA's passage in 1961. As viewers increasingly turn to subscription-based streaming platforms for media, the core purpose of the SBA—to promote access to games and preserve league-wide equity—would be undermined if courts refused to read the statute in line with modern technology. The collective sale of broadcast rights, whether to traditional networks or streaming providers like Amazon and Netflix, is not just economically sensible for leagues; it is vital to maintaining competitive parity, widespread viewer access, and a sustainable model for all thirty-two NFL franchises. Therefore, any solutions to consumer concerns must begin with recognizing that the SBA's exemption applies to streaming providers. Interpreting the SBA according to legislative intent requires courts to exempt joint agreements with streaming providers—allowing sports leagues to meet their fans on the next frontier of sports broadcasting.

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