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Emerging Trends in Civil Litigation

In This Issue

Introduction

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My middle child recently became fascinated with choose-your-own-adventure books. For the uninitiated, these are action-packed stories featuring regular decision points that allow the reader to choose how the story unfolds. For example, the book might instruct you to "turn to page 5 if you want to open the door and descend into the dark cellar or turn to page 73 if you want to run home for a flashlight." The allure of these books is the agency it gives the reader—you become both driver and passenger on an exciting ride. So too with civil litigation. Every case is unique and has multiple decision points where lawyers must make critical choices about what happens next. With each of those choices, lawyers are both authors and students of the cases before them.

This edition of the *Department of Justice Journal of Federal Law and Practice* focuses on this journey. Some of the topics will confront all of us on our civil litigation paths. For example, often-overlooked early discovery tools can give you a jump-start on building your story; to learn more about them, turn to page 25.[1] If instead you think your case is ripe for settlement, go back to page 3 for guidance on how to navigate negotiations without falling into an ethical trap.[2] Those further down the road may wish to instead turn to page 129 for a fresh take on evidentiary challenges when witnesses rely on digital tools to refresh memory.[3]

If you find yourself drawn to a particular practice area, there are side quests aplenty. To gather tips for dealing with pro se litigants in employment cases, proceed to page 93.[4] To instead learn about how AI dovetails with patent, copyright, and trademark law, go back to page 31.[5]

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[1] Andrew J. Weisberg, *Starting Off on the Right Foot: Tools for Effective Early Discovery*, 74 DOJ J. Fed. L. & Prac. no. 2, 2026, at 25.
[2] Daniel B. Moar, *Ethics and Settlement Negotiations: Getting to Yes Without Getting Sanctioned*, 74 DOJ J. Fed. L. & Prac. no. 2, 2026, at 3.
[3] H. Ron Davidson, *Remembering What You Do Not Remember in a Digital Age*, 74 DOJ J. Fed. L. & Prac. no. 2, 2026, at 129.
[4] Elizabeth Davis Stone & Kyle M. Melloan, *Pro Tips for Handling Pro Se Employment Cases*, 74 DOJ J. Fed. L. & Prac. no. 2, 2026, at 93.
[5] Kavyasri Nagumotu, *Artificial Intelligence and the Fractured Intellectual Property Landscape*, 74 DOJ J. Fed. L. & Prac. no. 2, 2026, at 31.

But perhaps you find yourself defending the United States while standing on rapidly shifting legal sands. There are three such adventures in these pages. If you are defending agency action in the wake of the decision of the Supreme Court in *Loper Bright*, turn to page 49.[6] If you are instead defending law enforcement after the Supreme Court's decision in *Martin*, turn to page 105.[7] Or, if you need to understand how the Uniformed Services Employment and Reemployment Rights Act changed in 2025, return to page 73.[8] No matter your path through this edition, one thing is certain: You will emerge with newfound knowledge and useful tools for your future litigation practice.

Of course, none of this would have come together if not for the heroic authors brave enough to tell their tales and the story collectors on the Office of Legal Education Publications Team who meticulously curated them into what you find before you. If reading stories allows you to live countless lives beyond your own, then reading about civil litigation handled by others allows you to litigate myriad cases beyond your own. The skills of the Department of Justice's civil attorneys are richer for these individuals' valor.

Now the time has come. To begin your adventure, you need only turn the page.

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[6] Lindsay L. Clayton, *Defending Agency Actions After* Loper Bright*: Sea Change or the Same Old Beach?*, 74 DOJ J. FED. L. & PRAC. no. 2, 2026, at 49; *Loper Bright Enters. v.Raimondo*, 603 U.S. 369 (2024).

[7] Jennifer L. Mallory & Kimberly v. Hamlett, *Defending Law Enforcement After* Martin v. United States, 74 DOJ J. FED. L. & PRAC. no. 2, 2026, at 105; *Martin v. United States*, 605 U.S. 395 (2025).

[8] Kyle M. Melloan, *Uniformed Services Employment and Reemployment Rights Act: Dole Act 2025 Updates,* 74 DOJ J. FED. L. & PRAC. no. 2, 2026, at 73; 38 U.S.C. §§ 4301–4335.

Ethics and Settlement Negotiations: Getting to Yes Without Getting Sanctioned

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I. Introduction

In an ideal world, settlements not only allow parties to resolve lawsuits faster and cheaper than going to trial but also bring a sense of closure and relief. Settling can significantly reduce costs, alleviate stress, and expedite the process, all while steering clear of the uncertainties of trial and opting instead for a clear, negotiated outcome. Settling can be a practical choice for those seeking to move on with their lives. But, alas, this is not an ideal world. And not everyone wants to move on.

A growing body of caselaw shows litigants derailing cases by ignoring the rules, sometimes intentionally, other times out of ignorance. In these cases, settlement discussions do not efficiently resolve cases. Instead, the discussions hamstring the process, and the court and parties become entangled in collateral litigation over misconduct.

There may be little hope for settlement saboteurs, but most parties and lawyers are open to a sensible resolution when possible. This article is for them. It provides guidance on approaching settlement and mediation by the rules and without fear of the proverbial sword of Damocles—sanctions, disciplinary proceedings, or even jail.[1]

Notwithstanding some parties' reluctance, courts can mandate the parties' participation in settlement conferences and mediation. What the courts cannot do is mandate that parties settle.[2] But this is different from mandating participation regardless of the outcome. Thus, even where parties might not otherwise want to participate, they often must and would be best served in following the rules and seeing if, contrary to their initial impression, their case might be settled.

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[1] "[T]he phrase 'sword of Damocles' is now commonly used as a catchall term to describe a looming danger." Evan Andrews, *What Was the Sword of Damocles*, HIST. (Feb. 17, 2016), https://www.history.com/articles/what-was-the-sword-of-damocles.
[2] *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985); *Lucero v. United States*, No. CV 00-357 MV/LFG-ACE, 2001 WL 37124814, at *2 (D.N.M. Oct. 29, 2001).

II. Mediation gone wild

Most mediations follow a familiar formula. The parties show up. They shake hands. They exchange basic pleasantries. The mediator might have the parties give a basic overview of their positions in front of each other. Retired Judge Joe Hilberman advocates not having parties present their positions before each other at the outset:

> This tends to reduce the immediate conflict and confrontation that often results when parties who are suing each other share the same space. In close confines, counsel tend to immediately don their gladiator suits and go into litigator mode, with each side trying to convince the other of the strength of its position, while simultaneously reinforcing their clients' commitment to their own positions, thereby reducing the probability of reasoned negotiation.[3]

Either way, the mediator usually shuffles the parties off to separate rooms and then shuttles between them to see if the parties might re-evaluate the strength of their positions and instead consider a negotiated resolution.

Not all mediations follow protocol, however. Some go horribly wrong. *Pitts v. Francis*, for example, provides a case study of one mediation that took such a nosedive that the court spent months sorting through the rubble of its failed mediation session.[4] *Pitts* was but one of a series of lawsuits following the explosion of sales of videos and DVDs titled *Girls Gone Wild*.[5] The videos, involved a host, Joe Francis, stalking beach towns for young, inebriated women stumbling about and goading them into exposing themselves on camera.[6] The videos and DVDs Francis released collecting the footage generated tens of millions in sales.[7]

In *Pitts*, the plaintiff alleged that when she was just sixteen and on spring break, Joe Francis approached her on the beach and coerced her into exposing herself on video.[8] The video was featured on a Girls Gone Wild video and DVD that included Pitts' image on its cover.[9] In her suit, Pitts brought claims for unjust enrichment, commercial misappropriation,

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[3] Joe Hilberman, *Mediation Is Not a Contact Sport*, 33 L.A. Law. 44 (2011).
[4] No. 5:07CV169-RS-EMT, 2007 WL 4482168 (N.D. Fla. Dec. 19, 2007).
[5] *See Plaintiff B v. Francis,* 631 F.3d 1310 (11th Cir. 2011); *Bullard v. MRA Holding, LLC*, 890 F. Supp. 2d 1323 (N.D. Ga. 2012); *Plaintiff B v. Francis*, No. 5:08-CV-79-RS-AK, 2008 WL 5263435 (N.D. Fla. Dec. 16, 2008); *Capdeboscq v. Francis*, No. CIV-A-03-0556, 2004 WL 463316 (E.D. La. Mar. 10, 2004).
[6] Rich & Shameless: *Girls Gone Wild Exposed* (Apple TV, accessed May 12, 2026).
[7] *Id.*
[8] *Pitts*, 2007 WL 4482168, at *1.
[9] *Id.*

and invasion of privacy, among other claims.[10]

While *Pitts*, like many cases, involved mediation, it was far from typical.[11] Instead, the judge described it as like "something you might expect from a drunk fight in the parking lot of a bar at 3:00 in the morning."[12] The longest part of the mediation was waiting for the defendant, who arrived four hours late.[13] The mediation itself lasted less than three minutes, but those three minutes embroiled the parties in months of litigation.[14]

Instead of business attire, Francis showed up to the mediation in sweat shorts, a backward ballcap, and no shoes.[15] When plaintiff's counsel began to speak, Francis presented his bare, dirty feet atop the office table and glared.[16] After affording counsel four words, Francis berated him, "Don't expect to get a [f***ing] dime—not one [f***ing] dime!"[17] While Francis continued his tirade, plaintiff's counsel got up to leave the room.[18] Francis launched himself around the table, got close enough for plaintiff's counsel to feel his breath, and had to be yanked back by his counsel.[19] As the plaintiff's counsel hurried out of the room, Francis continued to shower him with obscenities.[20]

In considering a contempt motion, the court held an evidentiary hearing and concluded that "Francis chose to attend the 'mediation' and waste the time and money of his adversaries. He made a mockery of himself and of the alternative dispute resolution process."[21] The court emphasized that the issue was not simply that Francis had not been "polite," instead stating that:

> I have attended numerous emotionally-charged mediations. In cases involving deaths and serious injuries, for example, it is not uncommon, nor is it even unreasonable, for litigants to express anger toward each other or to be "impolite." After all, litigants attend a mediation because they are involved in a dispute. Thus, while it may be unreasonable to expect litigants

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10 *Id.*
11 *Id.*
12 *Id.* at *12.
13 *Id.* at *11. Notably, the court could have issued sanctions based solely on showing up so late to the mediation. *See Bulkmatic Transp. Co. v. Pappas*, No. 99-CIV-12070-RMB-JCF, 2002 WL 975625 (S.D.N.Y. May 9, 2002).
14 *Pitts*, 2007 WL 4482168, at *7.
15 *Id.* at *11.
16 *Id.*
17 *Id.*
18 *Id.*
19 *Id.* at *11–12.
20 *Id.* at *12.
21 *Id.* at *14.

to be "polite" to each other, it is wholly improper and unacceptable for a litigant to behave in such a way that physical violence becomes a real possibility.[22]

The court considered Francis' behavior and that his wealth made a financial sanction alone toothless and concluded that incarceration was the only appropriate sanction. It, however, allowed Francis to "cure his contempt and have this sanction of incarceration removed upon his proper participation in mediation."[23] The court also agreed to stay incarceration to allow Francis to mediate immediately.[24]

That same day, Francis took a more orthodox approach to mediation, at least initially. He extended an unconditional offer that the mediator later reported to the court plaintiffs had accepted. The day after the plaintiffs' acceptance, however, "Francis reneged on the offer by adding terms to the agreement that substantially and materially decreased the dollar amount of the offer."[25]

The court held an immediate emergency hearing with counsel that ended with an order that Francis surrender to the United States Marshals Service (USMS) the next day.[26] He did not.[27] Instead, Francis called talk shows and spoke to the media from "undisclosed locations."[28] He candidly told one newspaper that he had "no intention of honoring the court's order."[29] Francis was arrested at an airport five days later.[30] The court held Francis in criminal contempt and sentenced him to 35 days of incarceration.[31] The court also imposed the maximum fine of $5,000 and ordered Francis to reimburse the USMS for its costs in tracking him down.[32]

The belligerence detailed in *Francis v. Pitts* is undoubtedly extreme.[33] After all, it is rare for a court to declare, "Not only had I never witnessed or experienced such vile behavior by a litigant at a court-ordered function in my long career as an attorney and mediator, but plaintiffs' counsel all testified that neither had *they*."[34] The case nonetheless touches on more recurrent issues involving expectations for settlement conferences

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[22] *Id.*
[23] *Id.* at *15.
[24] *Id.* at *16.
[25] *Id.* at *17.
[26] *Id.*
[27] *Id.*
[28] *Id.* at *18.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.* at *12.
[34] *Id.*

and mediations. Below, this article will discuss these issues and other best practices for participating in settlement negotiations and mediation.

III. Show up on time or advise everyone well in advance if there is an issue

Where a court orders a settlement conference or mediation, the parties must show up or risk the consequences. If counsel (or a required party) does not show up, the chance of successful mediation declines while the chance of sanctions increases. Courts have regularly issued sanctions for non-attendance at mandatory settlement conferences or mediations.[35] Moreover, in one case, counsel for a third-party defendant was running so late (2.5 hours) that the mediator had released the parties by the time the counsel arrived.[36] This also led to sanctions.[37]

Where attendance at a court-ordered settlement conference or mediation becomes impossible due to previously unforeseeable circumstances, counsel should advise the opposing party, mediator, and court as soon as possible. While this does not guarantee a sanctions motion will not occur, it does reduce its likelihood and avoids unnecessary surprise on the day of the conference or mediation.

For instance, in one case, plaintiffs' counsel advised the court and defense counsel the day before a settlement conference with the court that only one of the three plaintiffs could attend.[38] The court convened an immediate teleconference in which plaintiffs' counsel explained that one plaintiff was incarcerated and another had a conflict.[39] Upon hearing from defense counsel that she "strongly wished to proceed," the court kept the settlement conference on, excused the incarcerated plaintiff from attending, and urged the other plaintiffs to attend.[40] When only one plaintiff and counsel attended on behalf of the plaintiffs, the court advised that the day-before advisement "fell below the Court's expectations" but denied

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[35] *See* Fed. R. Civ. P. 16(f). *See, e.g.*, Order Denying Motion for Reconsideration and Granting in Part and Denying in Part Motion for Attorney Fees, Marco Crane & Rigging Co. v. Greenfield Prods. LLC, No. 2:17-CV-01836-GMS (D. Ariz. Dec. 17, 2019), Dkt. No. 121; Order Awarding Attorney's Fees and Costs to Defendants, Dude v. Cong. Plaza, LLC, No. 9:17-CV-80522 (S.D. Fla. Aug. 13, 2018), Dkt. No. 253.

[36] *Bulkmatic*, 2002 WL 975625, at *2 n.3.

[37] *Id.* at *1, *4.

[38] *Adams v. Corr. Corp. of Am.*, No. 1:10-CV-259, 2011 WL 4974198 (M.D. Pa. Oct. 19, 2011).

[39] *Id.* at *1.

[40] *Id.* at *2.

sanctions.[41]

In contrast, the court issued sanctions in *Acosta v. American LaFrance, LLC*, where plaintiffs' counsel waited until 7:20 p.m. the night before a mediation session to cancel.[42] There was no real question that plaintiffs' counsel had good cause to cancel. Plaintiffs' firm had been dissolved, and it was unclear who would continue the representation.[43] The problem was that defense counsel were already on a plane*en route*, and the plaintiffs' firm's named partners had signed an agreement to dissolve the firm four days earlier.[44] The court concluded that the failure to "timely inform Defendants (and the mediator) of the likely need to cancel the mediation because of the uncertainties regarding Plaintiffs' representation created by the dissolution constituted a gross indifference to the foreseeable costs, such as long-distance air travel, Defendant's attorneys would necessarily incur in preparing to attend the mediation, amount[ed] to bad faith."[45]

You should also follow the mediator's requirements for appearing for a mediation session. Failing to do so may pave an unnecessary ramp to collateral litigation over sanctions. The clearest example of this is *Leibowitz v. Bandshell Artist Management*, where plaintiff and his lead counsel skipped a mediation and then falsely advised the court that the mediator permitted them to do so.[46] Upon receiving a sworn declaration from plaintiff's counsel at odds with the mediator's account, the court investigated further.[47] It ordered a declaration from the mediator; when this still provided no clarity, it held an evidentiary hearing in which it took testimony from the mediator and plaintiff's counsel.[48] Following the hearing, the court concluded that plaintiff's counsel had engaged in willful violations and "repeatedly lied to the court, including under oath, about receiving permission for [the plaintiff] to appear by telephone at the mediation."[49] The judge ordered the plaintiff's counsel to pay $83,517.49 in sanctions for the work defense counsel had performed for the mediation and in preparing a sanctions motion.[50]

Finally, in a case where settlement appears highly unlikely, you might consider moving to be excused from a court-ordered settlement confer-

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[41] *Id.*
[42] No. 14-CV-881A(F), 2016 WL 9753965, at *1 (W.D.N.Y. May 10, 2016).
[43] *Id.*
[44] *Id.* at *3.
[45] *Id.* A later decision awarded $6,188.83. *See Acosta v. Am. LaFrance, LLC*, No. 14-CV-881A(F), 2016 WL 3679905, at *2 (W.D.N.Y. July 12, 2016).
[46] 6 F.4th 267, 273–74 (2d Cir. 2021).
[47] *Id.* at 277.
[48] *Id.* at 277–78.
[49] *Id.* at 279.
[50] *Id.* at 293.

ence. My advice in most instances: Don't bother. Courts rarely grant such motions.[51] Notwithstanding this, you should be clear in submissions to the mediator when you have a case where settlement appears unwarranted and you are not prepared to make any offer or demand.

You are more likely to succeed, however, in requesting a delay in mediation rather than it being dispensed altogether. For example, a court may allow for delayed mediation, particularly in cases where there may be significant factual issues that warrant taking at least some discovery.

IV. Appear with the required authority

Court orders directing participation in settlement conferences often mandate the personal appearance of a party or, for corporate entities, a party representative with settlement authority. This is not optional. "Attendance in person by the parties is not a mere technicality. It is what [e]nsures a meaningful mediation and is 'the cornerstone of good faith participation.'"[52] Courts generally conclude that having the party present—instead of just counsel—makes for more effective mediation.[53]

Courts are more inclined to issue sanctions when a party appears solely through counsel without obtaining permission for the party's absence.[54] This is particularly true when the court is directly involved in the settlement conference, such as in a jurisdiction where another judge participates. Thus, if counsel knows that a party cannot attend an expected settlement conference or mediation, counsel should obtain permission from the court or mediator and ensure that the party is available by

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[51] *See, e.g., Pa. Nat'l Mut. Cas. Ins. Co. v. Robin Hood Container Express, Inc.,* No. 5:08-CV-531-BO, 2009 WL 10659782, at *2 (E.D.N.C. Dec. 14, 2009) ("[M]ediation of difficult cases sometimes leads to resolution and [defendant's] anticipation that mediation will be difficult is not a sufficient reason to do away with mediation altogether."); *Christopher's Pizza, Inc. v. Direct Cap. Corp.,* No. 03-CV-722, 2006 U.S. Dist. LEXIS 23429, at *6 n.7 (W.D.N.Y. Apr. 26, 2006) (rejecting motion to opt out of mediation where the parties had previous unsuccessful settlement talks because "mediation in front of a different, non-judicial neutral[] allows the parties to reconsider their positions and re-evaluate the case"). *See also Procaps S.A. v. Patheon Inc.,* No. 12-24356-CIV, 2015 WL 3539737, at *11 (S.D. Fla. June 4, 2015) ("[C]ases can and do settle even when the parties and their attorneys predict to the contrary.") (providing examples).

[52] *Critchfield Physical Therapy, P.C. v. Techhealth, Inc.*, No. 4:12-CV-00268-AGF, 2013 WL 12330489, at *1 (E.D. Mo. Feb. 1, 2013) (quoting *Nick v. Morgan's Goods, Inc.*, 99 F. Supp. 2d 1056, 1063 (E.D. Mo. 2000)).

[53] *Univ. of Pittsburgh v. Varian Med. Sys.*, No. 07-CV-0491, 2008 WL 1774115, at *1 (W.D. Pa. Apr. 17, 2008).

[54] *See, e.g., Critchfield,* 2013 WL 12330489, at *1; *Univ. of Pittsburgh*, 2008 WL 1774115, at *3 (ordering $5,000 in sanctions and holding Plaintiff in contempt, but further ordering that contempt would be purged if plaintiff participated in in-person settlement discussions).

phone.[55]

The District of New Mexico described the importance of personal appearances by the parties in settlement conferences handled by magistrate judges:

> Courts require the physical presence of parties or designated representatives with final settlement authority due to the very manner in which settlement conferences are conducted. Unlike mediation, where the facilitator is considered a "neutral" and expresses no opinion on the merits of the claim, settlement conferences in this district conducted under Rule 16 utilize a unique process where an experienced judge, other than the trial judge, meets with the parties and assists in evaluating the strength and weakness of the case.
>
> Additionally, the parties themselves hear the opponent's position, and based on that presentation, often re-evaluate their own settlement posture. The Rule 16 settlement process, especially the judicial evaluation, is important in that a party hears, perhaps for the first time, an evaluation of the strengths and weaknesses of claims and defenses from someone other than the party's own attorney.
>
> The judicial evaluation is especially valuable because it is being made by someone who is neither the accused nor the accuser; is not the plaintiff or the defendant; and is not an advocate for either of them. The evaluation comes from someone who is neither asking for money nor who will be required to pay money, and has no personal interest in the outcome of the litigation, save for a just and fair resolution of the case. Moreover, the very fact that an evaluation is made by a judge, albeit not the trial judge, has special importance. Parties tend to pay particular attention, and often give great weight and deference to that evaluation.[56]

You should also make certain that you understand what a court means when it requires a party representative with "full settlement authority" to appear at the settlement conference. Some courts have concluded that full settlement authority requires a person with unfettered discretion to raise the settlement offer in the face of new information presented during a settlement conference:

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[55] *See, e.g.*, Order Setting Initial Case Management Conference, Univ. of Pittsburg v. Varian Med. Sys., Inc., No. 2:07-cv-00491-AJS (W.D. Pa. Apr. 17, 2007), Dkt. No. 5.

[56] *Lucero v. United States*, 2001 WL 37124814, at *2 (D.N.M. Oct. 29, 2001).

> The plain requirement of the Settlement Conference Order was that [defendant and its counsel] produce a client representative at the conference who had full settlement authority and who could make and modify settlement decisions based on the Plaintiff's presentations at the conference and [the magistrate judge's] view of the case.[57]

Another court struck the pleadings of defendant for sending "an adjuster from the local office" to a settlement conference presided over by the court where it previously directed to counsel, "Tell them not to send some flunky who has no authority to negotiate. I want someone who can enter into a settlement … without having to call anyone else."[58]

This standard can be difficult to meet when representing larger defendants with diffuse levels of settlement authority. For example, a corporate defendant might have lower-level employees at the "branch office" or local level with limited authority but a deep understanding of the facts of a case, while having a small group of high-level executives at the corporate headquarters with limited or no understanding of the facts, but more authority to approve larger settlements. To effectively comply, this situation may require a combination of individuals to attend or for you to get permission to attend with the lower-level employee in person and the high-level employee available telephonically.

Other courts take a more restrained approach. One court suggested that full settlement authority requires "sending a person with authority to settle for the anticipated amount in controversy and who is prepared to negotiate all issues that can be reasonably expected to arise."[59] This approach does not mandate the attendance of a party representative with an unending ability to raise the settlement offer in the face of new and unanticipated facts. It also appears to be more in accord with typical corporate practice where, for example, a defendant might send a representative from the branch office in Scranton with some authority to settle and the ability to call the corporate headquarters in New York City for additional authority when the settlement conference presents new information. Of course, if a party needs to call the headquarters for additional authority, the headquarters must have someone available to take the call. Failure to do so will not be well received. The court in *Karahuta v. Boardwalk Regency Corp.* issued sanctions at a settlement conference presided over by a magistrate judge: "[W]hen the Court requested to speak to the

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[57] *Pitman v. Brinker Int'l*, No. CV-02-1886-PHX-DGC, 2003 WL 23353478, at *2 (D. Ariz. Oct. 3, 2003).

[58] *Lockhart v. Patel*, 115 F.R.D. 44, 45 (E.D. Ky. 1987).

[59] *In re A.T. Reynolds & Sons, Inc.*, 452 B.R. 374, 384 (S.D.N.Y. 2011).

actual decision maker, defense counsel placed a phone call to a paralegal for Defendants in Las Vegas, Nevada. The paralegal advised the Court that the decision maker was on another conference call and unable to speak with the Court."[60]

Notably, the federal government is generally relieved from having a party representative or official with complete settlement authority physically present at mediation or settlement conference of routine cases, at least initially.[61] Complex regulations govern who has authority to finally approve a settlement and how to delegate such approval. Along with the impracticality of having high-level officials physically present in mediations and settlement conferences around the country, courts generally allow government personnel to be available telephonically.[62] Moreover, in high-value cases, where settlement amounts require final approval from the highest-level officials, even attendance by telephone should be excused.[63] Instead, trial counsel should be prepared to obtain allowance from the court to negotiate a recommended settlement, subject to later approval from the necessary high-level officials.[64] In *Hamilton ex rel. United States*, the District Court of Arizona granted a motion to excuse the United States from having a representative attend a settlement conference:

> It would be futile to order [a high-ranking] DOJ official, such as the Assistant Attorney General for the Civil Division, the Deputy Assistant Attorney General for the Civil Division, or the Associate Attorney General, to attend a settlement conference because these officials will not have personal knowledge of this case and the Court finds it extremely unlikely that they would authorize a settlement during a settlement conference

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[60] No. CIV-A-06-4902, 2007 WL 2825722, at *2 (E.D. Pa. Sep. 27, 2007).

[61] *United States v. U.S. Dist. Ct. for N. Mar. I.*, 694 F.3d 1051, 1053 (9th Cir. 2012) ("[T]he district court abused its discretion in ordering a government representative with full settlement authority to appear at an initial settlement conference.").

[62] *In re Stone*, 986 F.2d 898, 904 (5th Cir. 1993) (describing regulations and recognizing "that the government sometimes must be treated differently"); *Mayfaire v. United States*, No. 18-CV-61643, 2019 WL 8810372, at *1 (S.D. Fla. Apr. 26, 2019) ("[T]he government is in a special category of defendant because of its need for centralized decision-making and because it is a party to a far greater number of cases on a nationwide basis than even the most litigious private entity . . . [I]t is appropriate to permit counsel for the United States Postal Service to appear telephonically at mediation." (citation omitted)).

[63] *See* 28 C.F.R. §§ 0.160–0.172 (addressing settlement amounts that require approval from Assistant Attorney Generals, the Deputy Attorney General, and Associate Attorney General, along with the approval process).

[64] *See Hamilton ex rel. United States,* No. CV-12-08193-PCT-GMS, 2019 U.S. Dist. LEXIS 240072, at *5 (D. Ariz. May 3, 2019).

without the review and recommendation procedures that DOJ regulations require").[65]

This is not, however, a per se rule—courts have authority to order even high-ranking government personnel to be physically present. But courts should resist such an order and reserve them for exceedingly rare instances where the lack of physical presence gets in the way of meaningful settlement discussions.[66]

V. Appear at settlement conferences and mediations in "good faith"

Most attorneys understand that failure to follow objective mediation requirements can amount to failure to participate in "good faith." Refusing to follow the court's rules regarding mediation or failing to submit a required mediation statement before the mediation are both examples.

But the concept of good faith is not limited to solely check-the-box requirements. Admittedly, "the good faith concept can at times be an inherently vague and subjective notion."[67] Notwithstanding this, most courts conclude that the concept encompasses something more than simple rote procedural compliance.

As detailed below, there are at least three considerations for complying with expectations for good faith settlement negotiations.

A. Avoid making improper misrepresentations

First, while a party can emphasize favorable facts and minimize unfavorable facts in settlement negotiations, a party cannot lie about objectively verifiable information material to the case.[68] As discussed in *Ausherman v. Bank of America Corp.,* an attorney who makes material misrepresentations in settlement negotiations may be subject to sanctions and disciplinary proceedings.[69]

In *Ausherman*, the plaintiff's counsel sued Bank of America, alleging that an employee, John Doe 1, illegally obtained customer reports and

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[65] *Id.*

[66] *U.S. Dist. Ct. for N. Mar. I.*, 694 F.3d at 1060.

[67] *Procaps S.A. v. Patheon Inc.,* No. 12-24356, 2015 WL 3539737, at *1 (S.D. Fla. June 4, 2015).

[68] *Statewide Griev. Comm. v. Kennelly*, No. CV-040833515S, 2005 WL 758055, at *2 (Conn. Super. Ct. Feb. 25, 2005) ("While a great deal of leeway is allowed during settlement discussions in enhancing a party's claim and denigrating an opponent's claim, misrepresentation by an attorney of an indisputable fact, especially a fact uniquely in his knowledge, is never countenanced.").

[69] 212 F. Supp. 2d 435 (D. Md. 2002).

disseminated them to John Doe 2 and others.[70] When Bank of America's internal investigation found no evidence of this, it sought discovery.[71] The plaintiff's counsel was uncooperative.[72] He instead sent a settlement letter proposing that in return for a $1.875 million payment, he would disclose the identity of John Doe 3, the purported "kingpin of the network" obtaining credit reports illegally from Bank of America through John Doe 1.[73]

The plaintiff's counsel did not know John Doe 3's identity.[74] In response to evasive discovery responses, the court eventually ordered a deposition of plaintiff's counsel.[75] He then admitted he did not know John Doe 3 and that his representation was "settlement bluster."[76]

Unimpressed with this excuse, the court ordered monetary sanctions and a referral to the disciplinary committee.[77] It recognized that "both the federal and state courts have been ready to discipline or hold liable attorneys who make knowing, material misrepresentations to third persons during settlement negotiations."[78] It then concluded that not only was the settlement representation regarding John Doe 3 a material misrepresentation under Maryland Rule of Professional Conduct 4.1 (which is identical with the American Bar Association Model Rule)[79] warranting disciplinary referral,[80] but also that counsel's related discovery abuses warranted sanctions under Federal Rule of Civil Procedure 37(b).[81]

In making its findings, the court provided a four-factor framework for considering whether an attorney made a material misrepresentation under Rule 4.1 during settlement negotiations:

> In each instance the questions for the negotiating attorney, as well as a reviewing disciplinary committee or court if called upon to do so, is to determine: (1) what is the statement or omission in dispute? (2) is it untrue or deceptively incomplete in any significant respect? (3) reasonably viewed, is it important to the subject that is being negotiated? and (4) at the time it was made, did the attorney know or should have known

[70] *Id.* at 437.
[71] *Id.* at 438.
[72] *Id.*
[73] *Id.* at 451.
[74] *Id.* at 439, 451–52.
[75] *Id.* at 438–39.
[76] *Id.*
[77] *Id.* at 440, 451.
[78] *Id.* at 448.
[79] *Id.* at 445–46.
[80] *Id.* at 445–52.
[81] *Id.* at 442, 455–56.

under the circumstances that the statement was untrue?[82]

The court found each factor to be easily met.[83] It emphasized that "there is little doubt" that the statement was material: "This entire lawsuit involves asserted liability against the Defendants because, allegedly, an employee, John Doe Number 1, sold information to a non-employee co-conspirator, John Doe Number 2, all, according to the settlement letter, at the instance of the 'kingpin,' John Doe Number 3."[84] The court also noted that the identity of John Doe 3 was not just important, but "the only real term suggested by [counsel] for the more than $1.8 million that Defendants were being asked to pay."[85]

Ausherman is, unfortunately, not an isolated case. Courts have imposed sanctions or damages against counsel for making the following misrepresentations during settlement negotiations:

- misrepresenting the amount of insurance coverage available to settle a claim;[86]
- neglecting to mention that counsel was seeking settlement on behalf of a plaintiff who had died but had not appointed a representative of the estate;[87]
- misstating the amount of assets available for distribution from an estate while knowing that the client had already liquidated some assets and was in the process of diverting additional assets;[88] and
- seeking to leverage an expert report premising plaintiff's damages on her remaining unemployed when plaintiff's counsel knew that

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[82] *Id.* at 451.
[83] *Id.*
[84] *Id.* at 451–52.
[85] *Id.* at 452.
[86] *E.g.*, *Slotkin v. Citizens Cas. Co. of N.Y.*, 614 F.2d 301 (2d Cir. 1979) (holding on appeal in fraud case that followed a personal injury case that plaintiffs settled for $185,000 after being falsely informed that the policy limit was $200,000, that the personal injury plaintiffs could elect to either proceed with a new personal injury trial or accept $680,000); *Statewide Griev. Comm. v. Kennelly*, No. CV-040833515S, 2005 WL 758055 (Conn. Super Ct. Feb. 25, 2005) (reprimanding attorney for violation of the Connecticut Rules of Professional Conduct).
[87] *E.g.*, *Mok v. 21 Mott St. Rest. Corp.*, No. 14-CV-8081-PKC, 2017 WL 3981308, at *3 (S.D.N.Y. Sep. 8, 2017) (sanctioning plaintiff's counsel $3,000 under the court's inherent power and for excessive costs under 28 U.S.C. § 1927 because "[h]e knew he was purporting to settle a case on behalf of a dead client without disclosing that his client was dead").
[88] *E.g.*, *In re Potts*, 158 P.3d 418 (Mont. 2007) (censuring attorney and ordering him to pay costs for disciplinary proceedings for violating the Montana Rules of Professional Conduct).

plaintiff had already received a new, higher-paying job but had lied about this during her deposition.[89]

While these cases illustrate the prohibition on making false objectively verifiable statements, "the difference between an unethical material misrepresentation or omission and generally accepted settlement posturing is not always easily discernible to the untrained eye."[90] Take a leg injury, for example. If a client suffered a sprained ankle due to the defendant's negligence, counsel could not represent that the client had a broken leg or was permanently wheelchair-bound to secure a higher settlement. Counsel could, however, represent that the client was in "great pain" and suffered "significant limitations" in her mobility.

When trying to figure out on which side of the line you fall, you should ask whether the statement is objectively verifiable—a broken leg is confirmable via X-ray—or simply a matter of degree or opinion—but "great pain" or "significant limitations" are both relative concepts.

One area lacking clarity is whether attorneys can represent a settlement figure as their "bottom line" when authorized to accept a lower figure. Similarly, there is some murkiness about whether counsel could claim a settlement offer is their maximum authority when their clients have approved more.

For example, the New York Rules of Professional Conduct—based on the ABA Model Rules—appear to suggest that such statements are not actionable misrepresentations.[91] Rule 4.1 states, "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person."[92] Comment 2, however, appears to leave wiggle room: "Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category."[93]

Notwithstanding this, an ABA ethics opinion concludes that parties cannot explicitly misrepresent their bottom line or authority in negotiations: "[A] certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel, a party's actual bottom line or the settlement authority given to a lawyer

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[89] *E.g.*, *In re Filosa*, 976 F. Supp. 2d 460 (S.D.N.Y. 2013) (ordering attorney's suspension for one year for violating the New York Rules of Professional Conduct).

[90] Christopher J. Brasco et al., *Understanding Ethical Limits on Attorney Behavior in Settlement Negotiations: A Practical Approach*, 45 Brief 12, 13 (2016).

[91] *E.g.*, N.Y. Rules of Pro. Conduct § 4.1 (McKinney 2025).

[92] *Id.*

[93] *Id.* at cmt. 2.

is a material fact."[94]

At first glance, it appears difficult to reconcile the Comment's guidance that "a party's intentions as to an acceptable settlement of a claim" is not a "statement of fact" with the ABA's guidance that "a party's actual bottom line or the settlement authority given to a lawyer is a material fact."[95] The narrow path between the guidance appears to reference "a party's intention."[96] Thus, for example, you can state that your client is looking to settle this case for at least $200,000 when you have the authority to settle for $150,000. But you cannot represent that your client's bottom line is $200,000.

Follow-up guidance from the ABA confirms that that the allowance for puffery in negotiations allows for wiggle room as to a client's intentions:

> [W]hether in a direct negotiation or in a caucused mediation, care must be taken by the lawyer to ensure that communications regarding the client's position, which otherwise would not be considered statements "of fact," are not conveyed in language that converts them, even inadvertently, into false factual representations. For example, even though a client's Board of Directors has authorized a higher settlement figure, a lawyer may state in a negotiation that the client does not wish to settle for more than $50. However, it would not be permissible for the lawyer to state that the Board of Directors had formally disapproved any settlement in excess of $50, when authority had in fact been granted to settle for a higher sum.[97]

B. Avoid "gotcha" tactics

Adhering to express rules for mediation and settlement conferences is only a start. Counsel should also avoid conduct that, while not expressly prohibited, seriously undermines the purpose of these conferences. In other words, counsel should not employ "gotcha" tactics. A few cases illustrate this point.

In an employment litigation case with a magistrate judge set to preside over a settlement conference, the court ordered the plaintiff's counsel to serve a written settlement demand on defense counsel two weeks before

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[94] A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 93-370 (1993) (discussing judicial participation in pretrial settlement negotiations).

[95] *Id.*

[96] *Id.*

[97] A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 06-439 (2006) (discussing a lawyer's obligation of truthfulness when representing a client in negotiation).

the settlement conference.[98] He did so.[99] Minutes before the conference began, however, plaintiff's counsel doubled his demand, not based on new facts or law but on his claimed sudden re-evaluation of the case as worth much more.[100] This rendered the conference of little value because the defense representative only had authority to settle up to the amount of plaintiff's written demand.

The court concluded that the plaintiff's sudden assertion of double damages was not in good faith.[101] Its direction to plaintiff's counsel to make his demand in advance was in place to ensure that defense counsel came to the settlement conference with a representative with the requisite authority.[102] The plaintiff had not acted in good faith by abruptly doubling his demand moments before the conference.[103] The court, accordingly, sanctioned plaintiff's counsel $1,000, under Federal Rules of Civil Procedure 16(f)(2) and 37.[104]

In *Fisher v. Smithkline Beecham Corp.*, the court also issued sanctions for failure to mediate in good faith.[105] The defendant had filed a motion for summary judgment the evening before the mediation while plaintiff's counsel was flying from New Orleans to Buffalo to attend the mediation.[106] The next morning, after making introductory remarks, the mediator asked the parties to give an overview of their positions.[107] The plaintiff's counsel did.[108] Defendant's counsel, however, simply slapped down his newly filed motion onto the conference table and dictated that he was unwilling to put forth a meaningful settlement offer unless plaintiff could rebut it on the spot.[109] The mediation, unsurprisingly, broke down, and the court found that the defense counsel had acted without good faith and violated Federal Rule of Civil Procedure 16(f)(2) and 28 U.S.C. § 1927.[110]

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[98] *Chen v. Marvel Food Servs., LLC*, No. CV-156206-JMA-AYS, 2016 WL 6872626, at *1 (E.D.N.Y. Nov. 21, 2016).
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.* at *5.
[103] *Id.* at *4.
[104] *Id.* at *5.
[105] No. 07-CV-0347A(F), 2008 WL 4501860 (W.D.N.Y. Sep. 29, 2008).
[106] *Id.* at *2.
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] The docket reflects that the court ordered payment of $9,525.63 for legal fees and expenses, but they vacated it as part of a settlement. Decision and Order at 3, Fisher v. Smithkline Beecham Corp., No. 07-cv-347-RJA-LGF (W.D.N.Y. Mar. 26, 2009), Dkt No. 139; Order Granting Joint Motion to Vacate September 29, 2008 and

The court similarly issued sanctions for failure to attend a mediation in good faith in *Grigoryants v. Safety-Kleen Corp.*[111] The issue there was not simply that defendant declined to put forth a settlement offer; it was *why*. During a private caucus, the defendant advised that it "had a standard 'process' of not discussing potential settlement until the completion of discovery and dispositive motions and was 'not in a position to respond' to Plaintiffs' demand or negotiate potential settlement."[112] The court issued sanctions under Federal Rule of Civil Procedure 16(f), concluding that defendant

> had an obligation to be forthright and notify the Court and Plaintiffs that it had a 'standard policy' to wait until after the close of discovery to make any offer of settlement. The failure of [defendant] to notify the Court that a mediation would be a futile act wasted precious judicial resources and it caused [the plaintiff] to miss work, leave her ailing husband and child and travel to Pittsburgh—incurring substantial expenses and attorneys' fees.[113]

In each case, courts found an absence of good faith in settlement negotiations based on conduct that substantially defeated the point of holding a settlement conference even though it did not explicitly violate any written rules. Accordingly, counsel should steer clear of similar infractions.

C. Practice civility during mediation

Strive to act civilly toward all participants in the settlement process. Discourteous behavior does not advance the case to a resolution. Instead, incivility conjures up the likelihood of collateral litigation.[114]

March 26, 2009 Orders and for Dismissal of Action with Prejudice, Fisher v. Smithkline Beecham Corp., No. 07-cv-347-RJA-LGF (W.D.N.Y. May 7, 2009), Dkt. No. 148. *See* Fed. R. Civ. P. 16(f)(2); 28 U.S.C. § 1927.

[111] No. CIV-A-11-267E, 2014 WL 2214272 (W.D. Pa. May 28, 2014). *See also Acquisto v. Manitowoc FSG Operations,* LLC, No. 11-CV-00803(A)(M), 2012 WL 4722028, at *3 (W.D.N.Y. Aug. 1, 2012) ("It is beyond dispute that although courts may require parties to participate in mediation, they lack the power to sanction a party for refusing to make a settlement offer.").

[112] *Grigoryants*, 2014 WL 2214272, at *3.

[113] *Id.* at *8. In a subsequent order, the court ordered reimbursement totaling $11,880.23. *See* Order at 1, Grogoryants v. Safety-Kleen Corp., No. 11-cv-267-JFC (W.D. Pa. July 8, 2014), Dkt. No. 77.

[114] *In re A.T. Reynolds & Sons, Inc.*, 452 B.R. 374, 376 (S.D.N.Y. 2011) ("[T]he specter of sanctions and contempt spawns ancillary litigation that often eclipses the issues at the heart of the underlying proceeding."). Indeed, courts can and do consider sanctions even after resolving the merits of the underlying case or appealing. *See Rice v. NBCUniversal Media,* LLC, No. 19-CV-447-JMF, 2019 WL 3000808, at *4 (S.D.N.Y. July 10, 2019) ("[V]oluntary dismissal 'does not preclude

Besides, there is no reason not to be civil. If the client does not want to settle a case, so be it. "[A] party is within its rights to adopt a 'no-pay' position."[115] The lead case discussed in this article would not exist if Joe Francis had sat respectfully and declined to agree to a settlement.[116] His diatribe—"Don't expect to get a [f***ing] dime—not one [f***ing] dime!"—offered him no benefit, only a stay behind bars.[117]

In short, civility matters.

VI. Be mindful of confidentiality requirements

Court orders and local rules often require meditation to be confidential.[118] Even if there is no express confidentiality requirement, communications during settlement discussions have limited evidentiary value.[119] These constraints are vital to allowing parties to speak candidly without fear that statements will be used against them if the case proceeds. As one court described it, "Strict confidentiality regarding details of mediation discussions is the touchstone of any effective mediation program."[120]

Courts have shown little hesitancy in sanctioning parties for breaching required confidentiality. This includes scenarios where a party disclosed the settlement figures to the trial judge and cases where a party disclosed representations made during the settlement conferences to prospective witnesses or the public.[121] In *Frank v. L.L. Bean Inc.*, the plaintiff dis-

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the district court from considering collateral issues such as sanctions.'" (quoting *U.S. D.I.D. Corp. v. Windstream Commc'ns, Inc.*, 775 F.3d 128, 134 (2d Cir. 2014))); *Jones v. Metro. Life Ins. Co.*, No. C-08-03971-JW-DMR, 2010 WL 4055928, at *5 (N.D. Cal. Oct. 15, 2010) ("Generally, once one files a notice of appeal, the district court is divested of jurisdiction over the matters. However, the court is not divested of jurisdiction over matters collateral to a determination of the merits of the case." (citation omitted)).

115 *In re A.T. Reynolds & Sons*, 452 B.R. at 382.

116 *Pitts v. Francis*, No. 5:07CV169-RS-EMT, 2007 WL 4482168 (N.D. Fla. Dec. 19, 2007).

117 *Id.* at *11.

118 *See, e.g.*, E.D.N.Y. Civ. R. 83.8(a) (court-annexed mediation); W.D.N.Y. Civ. R. 16(a) (alternative dispute resolution and pretrial conferences).

119 Fed. R. Evid. 408.

120 *Spoth v. M/Y Sandi Beaches*, No. 09-CV-647S(F), 2010 WL 2710525, at *6 (W.D.N.Y. July 7, 2010).

121 *Id.* (party disclosed the settlement figures to the trial judge); *Bernard v. Galen Grp. Inc.*, 901 F. Supp. 778 (S.D.N.Y. 1995) (party disclosed the settlement figures to the trial judge); *Malkan v. Mutua*, No. 12-CV-0236A(SR), 2015 WL 13746778 (W.D.N.Y. Dec. 1, 2015) (party disclosed representations made during the settlement conferences to the public).

closed representations made during the settlement conferences to prospective witnesses.[122] "By revealing [the defendant's] settlement position to a potentially key witness in an attempt to convince the witness of the strength of her case, [the plaintiff] not only violated the rule, but violated it in a way that strikes at the heart of the rule's purpose. Parties will not feel free to engage in candid settlement talks if they fear that their positions can be later used in attempts to turn witnesses against them."[123]

In one particularly egregious breach, the court even dismissed the case. Specifically, in *Hand v. Walnut Valley Sailing Club*, a plaintiff suing a sailing club for discrimination sent an email to dozens of club members "disparaging the club's positions and relating all the details of the mediation, including what the mediator said and the amount of the club's settlement offer."[124] The plaintiff's disclosures reached people who might testify. Moreover, the club was "prejudiced by its inability to respond to [plaintiff's] disclosures because it was bound by the confidentiality requirement that [plaintiff] 'fully disregarded.'"[125]

The court held that the breach of confidentiality warranted dismissal.[126] The plaintiff "committed a serious violation of the confidentiality rule. He didn't just share a few tidbits about the mediation with a friend, he revealed extensive and prejudicial details about the mediation to over forty people, many likely witnesses in the case."[127]

Confidentiality does not, however, serve as a shield for bad behavior in settlement conferences. "Although settlement negotiations are of course confidential for most purposes, their contents may be revealed insofar as necessary for the decision of an issue of alleged misconduct in them."[128]

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122 *Frank v. L.L. Bean Inc.*, 377 F. Supp. 2d 233, 239 (D. Me. 2005).
123 *Id.*
124 475 F. App'x 277, 278 (10th Cir. 2012) (unpublished).
125 *Id.* at 279.
126 *Id.* at 277.
127 *Id.* at 279.
128 *Otto v. Hearst Commc'ns, Inc.*, No. 17-CV-4712-GHW-JLC, 2019 WL 1034116, at *13 (S.D.N.Y. Feb. 21, 2019) (quoting *In re Young*, 253 F.3d 926 (7th Cir. 2001)). *See also Pitts v. Francis,* No. 5:07CV169-RS-EMT, 2007 WL 4482168, at *13 (N.D. Fla. Dec. 19, 2007) ("To permit a recalcitrant litigant to shield his vile and threatening behavior at a court-sanctioned proceeding from judicial review under the guise of confidentiality is tantamount to giving him full license to convert a benign, court-sanctioned event into an unrecognizable and dangerous fracas. This I will not permit."). Additionally, any evidence exchanged in settlement negotiations will still be generally admissible. *See* FED. R. EVID. 408 advisory committee's note to 1974 enactment ("This amendment [ensures] that evidence . . . is not rendered inadmissible merely because it is presented in the course of compromise negotiations if the evidence is otherwise discoverable. A party should not be able to immunize from admissibility documents otherwise discoverable merely by offering them in a compromise negotia-

Nor does Federal Rule of Evidence 408 shield a party from disclosing sanctionable conduct during settlement negotiations.[129] While Rule 408 prohibits using evidence of compromise offers and negotiations "to prove or disprove the validity or amount of a disputed claim," this does not bar disclosures related to sanctionable conduct.[130] "For those who see within [Federal Rule of Evidence] 408 the reflection of their own ingenuity at having discovered a means to lie, threaten, or coerce with impunity to negotiate a settlement advantageous to their clients, the sanctuary they perceive is illusory."[131]

While a party can disclose settlement communications to the extent necessary to pursue sanctions, two points are in order. First, parties should limit disclosures to what they need for a sanctions motion—or as one court calls it, disclosures should be "generic."[132] When parties limit disclosures to only what they need for a sanctions motion, it reduces the likelihood that sanctions allegations ricochet back against them for breaching confidentiality. Second, an attorney should consider filing disclosures of misconduct under seal to avoid the potential that the disclosures could influence witnesses or outside opinion on the case.[133]

VII. Conclusion

A principled approach to settlement discussions and mediation offers the best chance of successfully resolving a case. Failing to abide by court rules and misconduct not only blows up the chance of a resolution but also raises the prospect that the parties become unnecessarily mired in ancillary litigation.

Aim significantly higher than bare compliance. A review of sanctions decisions shows many near misses where bare compliance almost resulted in serious consequences. One should expect this because whether a judge will warrant sanctions is a highly fact-dependent determination. Even in decisions where judges deny sanctions, however, they often identify ma-

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tion." (citing S. Rep. No. 93-1277 (1974))).

129 Fed. R. Evid. 408.

130 *Holly v. UPS Supply Chain Sols., Inc.*, No. 3:13-CV-980-DJH-CHL, 2015 WL 3850103, at *12 (W.D. Ky. June 22, 2015). *See* Fed. R. Evid. 408.

131 *Ausherman v. Bank of Am. Corp.*, 212 F. Supp. 2d 435, 454 (D. Md. 2002).

132 *Herrmann v. Wells Fargo Bank, N.A.*, No. 7:19-CV-827, 2021 WL 890573, at * 2 (W.D. Va. Mar. 9, 2021).

133 *Otto v. Hearst Commc'ns, Inc.*, No. 17-CV-4712-GHW-JLC, 2019 WL 1034116, at *13 (S.D.N.Y. Feb. 21, 2019) (detailing defendant's "care" in not providing details of the misconduct in its initial public filing and describing subsequent filings as being under seal).

nipulative, uncivil, or otherwise dubious conduct by attorneys.[134] Though attorneys may evade sanctions, a stamp from the court as "amateurish or indecorous"[135] is far from ideal and poses significant reputational injury.

As one court put it, "Practicing law transcends gamesmanship and making a buck. We should try to make a difference. The profession is more than a business and should remain so. As professionals we should, while trying to solve our clients' problems, make every effort to avoid needless litigation."[136]

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[134] *In re Young*, 253 F.3d 926, 928 (7th Cir. 2001) (describing attorney's conduct as "unjustifiable and indeed contumacious"); *Exec. Wings, Inc., v. Dolby*, 131 F. Supp. 3d 404, 419, n.19 (W.D. Pa. 2015) (declining to sanction "given the mutual mediation misbehavior" which called for "offsetting penalties" and because "the Court does not believe that it is a wise use of further judicial resources to formally scold two business leaders who should know better").

[135] *Exe v. Fleetwood RV, Inc.*, No. 1:11-CV-70-TLS, 2016 WL 305080, at *4 (N.D. Ind. Jan. 26, 2016).

[136] *Pendleton v. Cen. N.M. Corr. Facility*, 184 F.R.D. 637, 641 (D.N.M. 1999).

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Starting Off on the Right Foot: Tools for Effective Early Discovery

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I. Introduction

In new attorneys' training on the lifecycle of a case, they will undoubtedly be told that discovery does not begin until the parties have held their initial case-management conference.[1] Many common tools of discovery are unavailable until the parties have had their first opportunity to meet and confer, and most practitioners will sit idly by after they file the pleadings. But this is a waste of valuable litigation time that could be better served building the case. This article reviews what attorneys can do to get a leg up on opposing counsel in the early discovery period between the filed pleadings and the Rule 26(f) conference.[2]

II. Preservation holds and self-collection

As soon as Department of Justice attorneys are assigned to a case, one of their first tasks should be instructing the client agency to preserve materials related to the action. Attorneys are expected to be personally knowledgeable about preservation requirements and cannot solely rely on the client to carry them out.[3] The scope of required preservation mirrors the scope of discovery set forth in Rule 26(b)(1): "discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case."[4]

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[1] *Strike 3 Holdings, LLC v. Doe,* 964 F.3d 1203, 1207 (D.C. Cir. 2020) (quoting Fed. R. Civ. P. 26(d)(1)).
[2] Fed. R. Civ. P. 26(f).
[3] *DR Distribs., LLC v. 21 Century Smoking, Inc.,* 513 F. Supp. 3d 839, 920 (N.D. Ill. 2021).
[4] *Al Otro Lado, Inc. v. Nielsen,* 328 F.R.D. 408, 416 (S.D. Cal. 2018) (quoting Fed. R. Civ. P. 26(b)(1)).

Before attorneys file the first pleading, they should send a preservation letter and implement a corresponding preservation hold. The time between the filing of an answer and the Rule 26(f) conference ("early discovery period"), however, is an optimal time to check in with the client agency on the status of the preservation hold and collection of relevant materials. All attorneys, including counsel for the federal government, "owe an independent duty to monitor and supervise or participate in [the client agency's] effort to comply with its duty to preserve evidence."[5] To fulfill this duty, it is essential that the attorneys familiarize themselves with the client agency's internal retention policies and electronic systems used to preserve materials.[6]

At the parties' first meet-and-confer, they should try to agree on parameters that will govern an agency's search for electronically stored information (ESI) that is relevant and proportional to the case.[7] The early discovery period is a perfect opportunity for Department attorneys to strategize with their client agency on what "search protocols, search terms, date ranges, and other search and review parameters" will be the least burdensome to the agency while still fulfilling the federal discovery obligations.[8]

Use this early discovery period to think through whether self-collection of discovery is appropriate. Self-collection refers to a client personally "identify[ing], preserv[ing], collect[ing], and produc[ing] documents and electronic information in response to discovery requests."[9] Although self-collection can be an efficient use of resources for small cases, Department attorneys still need to work with the client agency to ensure the following: (1) broad search parameters that comply with Rule 26(b); (2) accurate identification of the universe of documents within the scope of the case; and (3) preservation of those documents for review and (if appropriate) production.[10]

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[5] *Hyundai Motor Am. Corp. v. N. Am. Auto. Servs., Inc.,* No. 20-82102-CIV, 2021 WL 3111191, at *12 (S.D. Fla. July 22, 2021).

[6] *Phoenix Four, Inc. v. Strategic Res. Corp.,* No. 05 Civ. 4837, 2006 WL 1409413, at *5 (S.D.N.Y. May 23, 2006) (citing *Zublake v. UBS Warburg LLC,* 229 F.R.D. 422, 432 (S.D.N.Y. 2004)).

[7] *Leonard v. Chet Morrison Contractors, LLC,* No. CV 19-1609, 2021 WL 1341142, at *3 (E.D. La. Apr. 9, 2021) (citing Fed. R. Civ. P. 26(f)(3)).

[8] *Id.*

[9] *DR Distribs., LLC v. 21 Century Smoking, Inc.,* 513 F. Supp. 3d 839, 934 (N.D. Ill. 2021).

[10] *Id.* at 935–36; Fed. R. Civ. P. 26(b).

III. ESI protocols

At the first meet-and-confer, some courts highly recommend, if not require, that the parties agree to an ESI protocol outlining "search terms[,]... methodologies for [ESI,] and identifying the databases to be searched for this information."[11] Depending on the complexity of the case, ESI protocols can include even more targeted details, including the "number and identities of custodians whose data will be preserved or collected."[12]

After filing the pleadings, Department attorneys should have enough information to work with client agencies to pin down the universe of ESI and proper custodians of the ESI for discovery. During the early discovery phase, it is often helpful to predict what ESI the opponents will ask for and to have the client agency think through how it would gather the information. To argue that a search is not proportional to the needs of a case as required by Rule 26(b)(1), attorneys will have to come armed with specific details on the burden the client agency will suffer by having to comb through its records.[13]

Depending on the existence and extent of any pre-suit investigation, client agencies will also likely have thoughts on what information Department attorneys can request from their opponents. Investigators from client agencies can be invaluable resources for targeting ESI databases and custodians from the opposing party.

Despite continual advice on how to prepare for the parties' initial meet-and-confer, most practitioners come to a Rule 26(f) conference unprepared to discuss an ESI protocol.[14] Walking into the conference armed with key details about the client agency's retention policies and a background of the opponent's records will give Department attorneys a significant advantage in negotiating the terms of discovery.

IV. Early requests for production

One of the least known but most effective tools in an attorney's early discovery arsenal is Rule 26(d)(2).[15] The conventional wisdom is that a party cannot serve a discovery request until the Rule 26(f) conference has

[11] *Dalton v. Town of Silver City,* No. CV 17-1143, 2021 WL 4307149, at *6 (D.N.M. Sep. 22, 2021).
[12] *HealthEdge Software, Inc. v. Sharp Health Plan,* No. 19-cv-11020, 2021 WL 1821358, at *2 (D. Mass. May 6, 2021) (quoting *Burnett v. Ford Motor Co.,* No. 13-cv-14207, 2015 WL 4137847, at *8 (S.D.W. Va. July 8, 2015)).
[13] Fed. R. Civ. P. 26(b)(1).
[14] *Id.* at 26(f).
[15] *Id.* at 26(d)(2).

concluded.[16] In 2015, however, the Federal Rules Advisory Committee amended Rule 26 to allow requests for production of documents (made under Rule 34) to be served "more than 21 days after the receiving party has been served with the summons and complaint."[17] The requests are not deemed served until the Rule 26(f) conference, and the rationale behind allowing early Rule 34 requests was for the requesting party to give advance notice of the discovery sought to allow for a more focused discussion at the Rule 26(f) conference.[18]

For plaintiffs, early Rule 34 requests are a good method of creating a record of requests in support of a future discovery motion.[19] Certain cases, such as those requiring documents from international sources, typically require expanded discovery periods because foreign entities need long lead times to produce materials.[20] On a motion to extend the discovery deadline or to compel production, an early Rule 34 request is an opportunity for the plaintiff to show a court that it has diligently requested evidence since the first stages of the case.[21]

For defendants, early Rule 34 requests are a chance to take the reins on discovery and set the tone of the case.[22] By taking a proactive approach to discovery, a defendant can guide the momentum of a case toward building its defenses and force a plaintiff to focus on responding to requests over drafting its own.

Definitions are another often-overlooked section of document requests that a party can benefit from in early discovery. By sending early Rule 34 requests, a party can prioritize its interpretation of key terms and poten-

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[16] *See id.* at 26(d)(1), (f) ("A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f) . . . .").

[17] Fed. R. Civ. P. 26(d)(2)(A) ("More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered . . . ."). *See also* Fed. R. Civ. P. 26(d) advisory committee's note to 2015 amendment (Early Rule 34 demands are an "opportunity for advance scrutiny of requests" and "[d]iscussion at the [initial meet-and-confer] may produce changes in the requests.").

[18] *Evanston*, 2021 WL 2400992, at *1–2; Fed. R. Civ. P. 26(f), 34. *See also Change Healthcare Operations, LLC v. Feeney,* No. 3:22-305, 2022 WL 18640593, at *1 (M.D. Tenn. Aug. 4, 2022) ("This relaxation of the discovery moratorium is designed to facilitate focused discussion during the Rule 26(f) conference . . . ." (quoting Fed. R. Civ. P. 26(d) advisory committee's note to 2015 amendment)).

[19] Fed. R. Civ. P. 34.

[20] *See* Kimberle E. Dodd & Nanette L. Davis, *Gathering and Using Foreign Evidence in Tax Cases*, 71 DOJ J. Fed. L. & Prac., no. 4, 199 (2023) ("The key practice tip to remember is to start early because international evidence gathering takes a considerable amount of time and can cause significant delays in an investigation or trial proceeding.").

[21] Fed. R. Civ. P. 34.

[22] *Id.*

tially negotiate adoption of its definitions at the Rule 26(f) conference.[23]

V. Early settlement conferences

Most federal courts require the parties to discuss potential settlement at the first meet-and-confer, and some courts go further in requiring formal settlement recommendations submitted to a magistrate judge.[24] Early settlement discussions—even before the first official meet-and-confer—are a grossly underutilized time to seek informal discovery. Before a settlement conference, running public records searches and contacting friendly witnesses are useful methods for learning more about the parties. Most plaintiffs are more than happy to turn over materials supporting their claim in hopes the case can be resolved before significant litigation costs accrue. Even some defendants can be surprisingly cooperative in exchanging informal early discovery if they believe the government does not appreciate the strength of their defense.

These informal disclosures tie into all the other tools of early discovery. They shape conversations with client agencies on preservation and self-collection, lead to earlier Rule 34 requests and can form the basis of an ESI protocol.[25] The early discovery period can be a time when the parties are at their most cooperative and most willing to voluntarily produce information.

But an early settlement conference is not merely a guise for seeking informal discovery. It can be a time for clarifying the opponent's theory of the case and stress testing your arguments. It can be a good starting point for discussing the client agency's goals for the suit and its expectations for resolution. Most Department attorneys have no authority to settle a case and instead make recommendations to authorized delegates of the Attorney General. Early settlement discussions provide a good framework for Department attorneys to discuss with authorized delegates litigation hazards and what information should be provided with a settlement recommendation.

VI. Conclusion

When Department attorneys have an ever-increasing caseload and related responsibilities, it is easy to put cases on the backburner between the answer being filed and the Rule 26(f) conference.[26] Although it is undoubtedly challenging to focus on early discovery when other deadlines

[23] *Id.* at 26(f).
[24] *See, e.g.,* MS R USDCT L.U. Civ. R. 26(f); S.D. Cal. L.R. 16.1(c).
[25] Fed. R. Civ. P. 34.
[26] *Id.* at 26(f).

seem more pressing, the extra allocation of time at the beginning of a case will pay substantial dividends when the parties are knee-deep in discovery. Most importantly, having early conversations with the client agency and opposing counsel about discovery expectations will streamline the process and lead to a more effective litigation strategy.

About the Author

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Artificial Intelligence and the Fractured Intellectual Property Landscape

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I. Introduction

Artificial intelligence (AI) has transformed the way we create, innovate, and regulate. Once confined to automating repetitive tasks, AI systems now draft legal briefs, compose music, generate visual art, and invent technology. These rapid advances pose significant challenges for intellectual property (IP) law. Patent, copyright, and trademark regimes rest on foundational assumptions about human participation and perception.

As AI systems increasingly act with minimal human intervention, assumptions in IP law no longer precisely apply. Courts, Congress, and administrative agencies must now determine how far existing legal doctrines can stretch to accommodate AI-generated output. This article examines how the law currently treats AI-generated works in patent, copyright, and trademark contexts, and explores the emerging role of AI in the practice of law. It concludes by identifying key ethical and regulatory considerations for government attorneys navigating this rapidly evolving landscape.

II. Patent

Perhaps the most visible fault line of applying existing IP laws to AI lies in patent law. The concept of "inventorship" has become the testing ground for determining whether AI has a role. Once limited to assisting with mundane tasks, AI systems are now capable of creating novel inventions.[1] Patent law has always assumed that natural persons conceive

[1] *See* Ryan Abbott, *I Think, Therefore I Invent: Creative Computers and the Future of Patent Law*, 57 B.C. L. Rev. 1079, 1083–91 (2016) (discussing cases where machines have autonomously created patentable creations).

inventions.[2] The focus, however, is what happens now that AI can create a new technology, such that no human can claim to have conceived of the final invention. To an extent, the Patent and Trademark Office (PTO) and the federal courts seem to hold on to traditional notions of inventorship and adhere to a human-centered model.

The core of the patent system's constitutional doctrine empowers Congress to "promote the Progress of Science and useful Arts" by granting "Inventors the exclusive Right" to their inventions.[3] The statutory text ties inventorship to natural persons. The Patent Act defines "inventor" as an "individual or, if a joint invention, the individuals collectively who invented or discovered the subject matter of the invention."[4] The PTO has reinforced this interpretation, instructing examiners that the term "individual" refers exclusively to a natural person, that is, a human being, not AI.[5]

Courts have framed inventorship around the concept of "conception."[6] As the Federal Circuit explained in *Burroughs Wellcome Co. v. Barr Laboratories*, conception is the "formation in the mind of the inventor[] of a definite and permanent idea of the complete and operative invention, as it is hereafter to be applied in practice."[7] Conception requires a mental act, firmly rooting inventorship in human cognition.[8] This has historically distinguished inventors from those who only reduce an invention to practice.[9] When multiple individuals contribute to an invention, courts apply the *Pannu* factors to determine joint inventorship: (1) whether the alleged co-inventor contributed to the conception of the invention; (2) whether the contribution was significant in quality; and (3) whether the contribution was made in collaboration with the other inventor(s).[10] Applying the same understanding in the AI context leads to the conclusion that AI cannot be named an inventor to a patent because inventorship requires "conception," a mental act that can only be performed by a natural person; accordingly, non-human systems fall outside the statutory definition.

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[2] 35 U.S.C. § 100(f).
[3] U.S. Const. art. I, § 8, cl. 8.
[4] 35 U.S.C. § 100(f).
[5] U.S. Dep't of Com., Manual of Patent Examining Procedure § 2109 (9th ed. 2024).
[6] *Burroughs Wellcome Co. v. Barr Lab'ys, Inc.*, 40 F.3d 1223, 1227–28 (Fed. Cir. 1994) (quoting *Hybritech Inc. v. Monoclonal Antibodies, Inc.*, 802 F.2d 1367, 1376 (Fed. Cir. 1986)).
[7] *Id.*
[8] *See id.*
[9] *Hybritech*, 802 F.2d at 1376.
[10] *Pannu v. Iolab Corp.*, 155 F.3d 1344, 1351 (Fed. Cir. 1998).

The leading case in denying AI-conceived inventions a patent is *Thaler v. Vidal*.[11] The Federal Circuit held that an AI system could not be listed as an inventor under current law.[12] The plaintiff, Dr. Stephen Thaler, submitted patent applications that listed AI system Device for the Autonomous Bootstrapping of Unified Sentience (DABUS) as the sole inventor.[13] Despite claims that DABUS autonomously produced patentable inventions (including a "Fractal Container" design) the court concluded that only natural persons may qualify as inventors.[14] The Federal Circuit emphasized that Congress's use of the term "individual" unambiguously excludes non-human entities.[15] Thaler's argument was that since he owned and created the system, the resulting work should be considered a work-made-for-hire under copyright law.[16] Because the Supreme Court denied certiorari, the Federal Circuit's ruling is currently the controlling law.[17] The PTO has since issued guidance consistent with *Thaler*, emphasizing that AI systems cannot be named as inventors, confirming that human inventors may rely on AI as a tool as long as the human makes a significant contribution to the claimed invention.[18]

Thaler still leaves open questions around inventorship based on whether there is some level of human input in the AI-generated invention that is patentable. For example, a human may input a prompt identifying a problem and setting parameters for a needed invention. A human may also shape models that the AI uses. A human may evaluate several outputs and then choose to expand on the one that works best. There is some level of distinguishing whether what the AI is doing is "conception" or mere "execution."[19] More clarity is needed to determine the degree of human input necessary to confer inventorship.

The PTO has continued to release guidance about inventorship for AI-generated patent claims.[20] One regulation in particular states that all patent claims must have significant contribution from a human inventor, with each claim requiring at least one natural person inventor who made a

[11] *Thaler v. Vidal*, 43 F.4th 1207 (Fed. Cir. 2022).
[12] *Id.* at 1209.
[13] *Id.*
[14] *Id.* at 1213.
[15] *Id.* at 1211–12.
[16] *Id.* at 1209–10.
[17] *Thaler v. Vidal*, 143 S. Ct. 1783 (2023).
[18] *See* Inventorship Guidance for AI-Assisted Inventions, 89 Fed. Reg. 10043 (Feb. 13, 2024); Guidance on Use of Artificial Intelligence-Based Tools in Practice Before the United States Patent and Trademark Office, 89 Fed. Reg. 25609 (Apr. 11, 2024).
[19] *See* Haochen Sun, *Artificial Intelligence Inventions*, 50 Fla. St. U. L. Rev. 61, 78–82 (2022).
[20] Inventorship Guidance for AI-Assisted Inventions, 89 Fed. Reg. at 10043.

significant contribution to the claimed invention.[21] Moreover, it provides that an AI-assisted invention is patentable if a human made a "significant contribution" to the invention by analogy to the rules for joint inventors set forth in *Pannu v. Iolab Corp.*[22] The PTO views the AI system as a "tool" even if it was "instrumental in the creation of the invention."[23] The PTO was clear to not set a strict no-AI-as-inventor rule as it may discourage disclosure, reduce incentives for innovation, and push valuable inventions to resort to trade secrecy.[24] The PTO wants to avoid limiting the public's access to technical knowledge despite its value to society, which is what the patent system was designed for.

The intersection of AI and patent law exposes the tension between a human-centered statutory framework and the realities of AI-driven innovation. While *Thaler v. Vidal* affirmed that only natural persons are recognized as inventors under existing law, the growing sophistication of AI challenges the conceptual foundation of "conception" itself.[25] The PTO's guidance leaves unanswered how far human involvement must extend before patent rights attach, and whether the traditional mental act model of conception remains sustainable in an era of algorithms. Ultimately, AI is forcing Congress, the courts, and administrative agencies to reconsider the rule of human agency in innovation.

III. Copyright

The limitations of inventorship under the Patent Act find their counterpart in copyright law's equally human-centered conception of authorship.[26] The Copyright Act vests exclusive rights in the copyright holder, which the holder can later transfer or license.[27] Here, "authorship" of the work is the central requirement for copyright protection.[28] While the Copyright Act does not define the term "author," courts and the Copyright Office have long interpreted it to mean human creators.[29] AI models, particularly large language models like ChatGPT, Gemini, and Claude,

[21] *Id.*
[22] *Id.*
[23] *Id.* at 10046.
[24] *See Kewanee Oil Co. v. Bicron Corp.,* 416 U.S. 470, 484 (1974) (noting that trade-secret law can encourage innovation in areas where patent law does not reach).
[25] *Thaler v. Vidal*, 43 F.4th 1207 (Fed. Cir. 2022).
[26] 35 U.S.C. §§ 1–13.
[27] 17 U.S.C. § 106.
[28] *Id.* § 102(a) (copyright law protects original works of authorship).
[29] *See Burrow-Giles Lithographic Co. v. Sarony,* 111 U.S. 53 (1884); *Mazer v. Stein*, 347 U.S. 201 (1954); *Goldstein v. California*, 412 U.S. 546 (1973).

rely heavily on analyzing massive amounts of textual data.[30] This textual data may come from copyrighted books, journalism, source code, and artistic expression. This unauthorized reproduction or copying of a protected work by AI may constitute copyright infringement. There are two distinct questions:

1. Is AI-generated work copyrightable?
2. Does training AI models using copyrighted work count as infringement?

Turning to the first question, the answer is akin to the evaluation of whether AI inventions are patentable. The Supreme Court in *Feist Publications v. Rural Telephone Service Co.*, held that originality requires "independent creation" and a "modicum of creativity."[31] The Court assumed human authorship but did not explicitly consider non-human creators.[32] In a recent case affirmed by the U.S. Court of Appeals for the District of Columbia, a district court held that the Copyright Act does not protect works created entirely by AI.[33] In *Thaler v. Perlmutter*, the plaintiff, Thaler, again used a computer system to generate a work of visual art that he later sought to register for a copyright.[34] The computer system was listed as the author in the plaintiff's application to register the AI-generated work.[35] Thaler claimed, however, that the copyright should nonetheless transfer to him as the owner of the computer system.[36] The Copyright Office denied the application, finding that because the AI-generated work was not authored by a human, it could not be protected by copyright law.[37] The D.C. Circuit opinion affirmed the Copyright Office's requirement of human authorship to be eligible for copyright protection.[38] In 2026, the Supreme Court's denial of certiorari in *Thaler* does

[30] *See generally* ChatGPT, https://chatgpt.com/ (last visited May 27, 2026) (advanced AI chatbot developed by OpenAI); Gemini, https://gemini.google.com/app (last visited May 27, 2026) (Google's family of AI models, designed to understand and generate text, code, audio, images, and video); Claude, https://claude.ai/login, (last visited May 27, 2026) (AI assistant and large language model developed by Anthropic).
[31] *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–46 (1991).
[32] *Id.*
[33] *Thaler v. Perlmutter*, 687 F. Supp. 3d 140 (D.D.C. 2023).
[34] *Id.* at 146; Opinion at 13, Thaler v. Perlmutter, No. 23-5233 (D.C. Cir. Mar. 18, 2025), Dkt. No. 2106229. *See* Joseph C. Gratz & Sara Talebian, *D.C. Circuit Holds That Works Created Solely by AI Are Not Copyrightable*, MOFO Tech (Mar. 24, 2025), https://mofotech.mofo.com/topics/circuit-holds-that-works-created-solely-by-ai-are-not-copyrightablev.
[35] *Thaler*, 687 F. Supp. 3d at 142.
[36] *Id.*
[37] *Id.*
[38] *Thaler v. Perlmutter*, 130 F.4th 1039 (D.C. Cir. 2025).

not change the current legal framework.[39] While a denial of certiorari is not a decision on the merits of the case, it effectively cements the D.C. Circuit's interpretation as controlling law. As a result, AI systems remain categorically excluded from authorship status.

The Copyright Office has issued a series of reports clarifying its position regarding AI-generated work. In its March 2023 guidance, the Copyright Office concluded that AI-generated works are not registrable unless they include meaningful human authorship.[40] The Copyright Office distinguished three categories of protectable human contributions: (1) expressive prompts that rise above mere instructions; (2) substantive modifications or arrangements of AI outputs; and (3) editing or curating selections that reflect creative choices.[41] By contrast, works produced solely by an AI without human involvement fall into the public domain. The Copyright Office's guidance will be helpful but the boundary between permissible human authorship and impermissible AI authorship remains unclear.

Taking a strict approach to authorship may undermine incentives for creators and companies who invest in developing AI systems. Public domain defaults could discourage disclosure and distort downstream creativity.[42] On the other hand, granting protection too broadly may encourage "copyright trolls" who claim ownership of vast swaths of AI-generated content.[43] Striking the right balance between incentivizing human creativity and addressing the realities of AI authorship remains an open issue in copyright law.

Turning next to the question of using copyrighted material to train AI models, the answer is even less clear. Because AI developers routinely make digital copies of complete works as part of their training process, copyright infringement claims have emerged against AI companies for these types of "intermediate" copying.[44] In the landmark *Authors*

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[39] *Thaler v. Vidal*, 143 S. Ct. 1783 (2023).

[40] U.S. Copyright Off., Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence (2023). The Copyright Office has similarly denied protection to works created by non-human actors, including animals and natural processes. *See* U.S. Copyright Off., Compendium of the U.S. Copyright Off. Practices §§ 307, 313.2 (3d ed. 2021).

[41] Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, note 40, at 3–4.

[42] Jane C. Ginsburg & Luke Ali Budiardjo, *Authorship and Machines*, 34 Berkeley Tech. L.J. 343, 366–68 (2019).

[43] *Id.* at 369–70.

[44] Chloe Veltman, *Anthropic Settles with Authors in First-of-Its-Kind AI Copyright Infringement Lawsuit*, NPR (Sep. 5, 2025), https://www.npr.org/2025/09/05/nx-s1-5529404/anthropic-settlement-authors-copyright-ai.

Guild v. Google case, the court allowed Google to scan millions of books to create a searchable index, concluding that Google's use was highly transformative because it significantly expanded public access to information without substituting for the original books themselves.[45] This case suggests that copying for non-expressive, transformative purposes can qualify as fair use when it expands public access to knowledge.[46] Similarly, courts have permitted Google's image search engine to create and display thumbnail images from copyrighted photographs, finding these uses to be transformative because they provided entirely new functionalities that benefited the public.[47] In *Thomson Reuters Enterprise Centre GMBH v. Ross Intelligence Inc.*, the court found that Ross's use was not transformative because it used Westlaw headnotes for the same purpose they were created—to provide legal research answers.[48] Ross signals that where AI models replicate the expressive content of copyrighted material to serve the same functional market purpose, they are likely not transformative.[49] These cases illustrate the uncertainty surrounding the application of fair use to AI training. The challenge is to delineate when machine learning constitutes a socially beneficial analytic process versus an impermissible act of reproduction.

There are several cases filed regarding using copyrighted works to train AI models.[50] In one case, *Bartz v. Anthropic PBC*, authors claimed Anthropic illegally downloaded and stored millions of copyright protected books from pirate databases to train its AI system, Claude.[51] The judge in the case sided with Anthropic that training with copyrighted material may be fair use, but found that the use of millions of pirated books was not.[52] The parties agreed to a proposed settlement of $1.5 billion pending judicial approval.[53] The settlement is the largest copyright recovery related to AI training input claims.[54] The Anthropic settlement leads the

45 *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).

46 *Id.*

47 *See Perfect 10 v. Amazon.com, Inc.,* 508 F.3d 1146 (9th Cir. 2007).

48 *Thomson Reuters Enter. Ctr. GMBH v. Ross Intel. Inc*, 765 F. Supp. 3d 382 (D. Del. 2025).

49 *Id.*

50 *Bartz v. Anthropic PBC*, 791 F. Supp. 3d 1038 (N.D. Cal. 2025); *Kadrey v. Meta Platforms, Inc.*, 788 F. Supp. 3d 1026 (N.D. Cal. 2025); Complaint, Disney Enters. v. Midjourney Inc., No. 2:25CV5275 (C.D. Cal. June 11, 2025), Dkt. No. 1; *N.Y. Times Co. v. Microsoft Corp.*, 777 F. Supp. 3d 283 (S.D.N.Y. 2025).

51 *See Bartz*, 791 F. Supp. 3d at 1045.

52 *Id.* at 1034.

53 Plaintiffs' Notice of Motion and Motion for Attorneys' Fees, Reimbursement of Expenses, and Plaintiff Service Awards at 2, 11, Bartz v. Anthropic PBC, No. 3:24-cv-5417-WHA (N.D. Cal. Dec. 3, 2025), Dkt. No. 505.

54 Cade Metz, *Anthropic Agrees to Pay $1.5 Billion to Settle Lawsuit with Book Au-*

way for other copyright holders pushing back against companies using copyrighted work to train AI models.[55]

The emergence of AI as a creative force compels a reevaluation of copyright's foundational principles. Caselaw and the Copyright Office's guidance reflect a cautious adherence to established doctrine. Striking a balance between incentivizing human imagination and ensuring progress in the "useful Arts" is what Congress, courts, and administrative agencies continue to contemplate with.

IV. Trademark

While patent and copyright law struggle in defining inventorship and authorship, trademark law raises distinct challenges involving consumer perception and confusion. A trademark is a logo, symbol, word, or phrase a company uses to denote its specific goods and services.[56] A company obtains trademark rights by using the trademark in commerce related to specific goods or services. The Lanham Act provides that "[a]ny person who shall, without the consent of the registrant . . . use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark" in a manner "likely to cause confusion" may be liable for infringement.[57] Courts have assessed likelihood of confusion under multi-factor balancing tests, such as the *Polaroid* factors.[58] These include the strength of the mark, proximity of goods, similarity of marks, evidence of actual confusion, and the intent of the alleged infringer.[59] AI systems can now autonomously generate logos, slogans, and even product configurations.[60] While such tools may be intended to enhance creativity, they carry the risk of inadvertent duplication of existing marks.[61] Generative AI works

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thors, N.Y. TIMES, (May 27, 2026), https://www.nytimes.com/2025/09/05/technology/anthropic-settlement-copyright-ai.html.

[55] J. Dylan Grafe & Nilesh Patel, *Midjourney Faces Disney Lawsuit Just as Court Backs Fair Use in AI Training*, FBT GIBBONS (June 30, 2025), https://frostbrowntodd.com/midjourney-faces-disney-lawsuit-just-as-court-backs-fair-use-in-ai-training/; Prabhanu Kumar Das, *Apple Faces Copyright Lawsuit for Using Pirated Books from Shadow Libraries to Build Its New AI System*, MEDIANAMA (Oct. 13, 2025), https://www.medianama.com/2025/10/223-apple-copyright-lawsuit-pirated-books-ai-system-apple-intelligence/.

[56] *What Is a Trademark?*, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/trademarks/basics/what-trademark (last visited May 29, 2026).

[57] 15 U.S.C. § 1114(1).

[58] *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961).

[59] *Id.*

[60] *See* AIDESIGN, https://www.logoai.com/design/ (last visited May 29, 2026).

[61] Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CAL. L. REV. 1581, 1610–12 (2006).

by "ingesting" large amounts of information and then generating content based on that information. If an AI image generator produces a logo like a well-known brand, even without user intent, liability questions arise. Using AI-generated trademarks in marketing may generate content that blurs brand distinctiveness or misdirects consumers toward competing products.[62] Unlike traditional infringement, the confusion may result not from deliberate copying but from the algorithm's association and suggestion functions.

In one instance, the Walt Disney Company raised concerns about AI-generated content potentially infringing on its trademarks.[63] Disney was concerned with the use of Microsoft's Bing AI-powered DALL-E 3 technology to create images of pets in a "Pixar" style.[64] There was the possibility of the AI inadvertently generating the iconic Disney-Pixar logo within the images, constituting a trademark infringement. This incident highlights the potential for AI-generated content to unintentionally infringe upon established trademarks, requiring brand owners to stay vigilant in protecting their trademarks in the AI age. Because AI systems often rely heavily on user prompts, trademark liability could hinge on whether the human input meaningfully caused the infringing output.

AI systems generate parodic or explicit versions of existing marks, raising dilution concerns under 15 U.S.C. § 1125(c).[65] Courts historically applied dilution doctrine where uses "blurred" or "tarnished" established marks, as in *Brookfield Communications v. West Coast Entertainment*.[66] A similar framework may apply if AI-generated content diverts consumer attention from famous brands or degrades their goodwill. A lawsuit filed by Getty Images against Stability AI showcases the concern for dilution of trademarks by the use of AI.[67] Getty Images alleged that Stability AI used millions of its copyrighted images to train its AI image generation software.[68] This alleged use, according to Getty Images, involved Stability AI's incorporation of Getty Images' marks into low-quality, un-

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[62] Mark P. McKenna, *Testing Modern Trademark Law's Theory of Harm*, 95 Iowa L. Rev. 63, 78–80 (2009).
[63] Cristina Criddle, *Microsoft Tweaks AI Image Generator over Disney Dogs Poster Trend*, Fin. Times (Nov. 17, 2023) https://www.ft.com/content/64958031-6d7b-4c2c-aeb3-d4df0b04ae32.
[64] Emilia David, *OpenAI Releases Third Version of DALL-E*, The Verge (Sep. 20, 2023), https://www.theverge.com/2023/9/20/23881241/openai-dalle-third-version-generative-ai.
[65] 15 U.S.C. § 1125(c).
[66] *Brookfield Commc'ns v. W. Coast Ent. Corp.*, 174 F.3d 1036, 1053 (9th Cir. 1999).
[67] Complaint, Getty Images (US), Inc. v. Stability AI, Inc., No. 23-cv-135-UNA (D.D.E. Feb. 3, 2023), Dkt. No. 1.
[68] *Id.* at 1.

appealing, or offensive images which dilutes those marks in further violation of federal and state trademark laws.[69] The lawsuit highlights the potential for AI to blur the lines between inspiration and infringement, weakening the association between a trademark and its source. Similar concerns appear in *Advance Local Media LLC v. Cohere Inc.*, where plaintiffs allege that AI-generated outputs reproduce or mimicked protected content in ways that may create confusion or dilute brand value.[70] In *Rescuecom Corp. v. Google*, the court recognized potential liability for automated keyword advertising.[71] This suggests that courts may analogize AI-generated marks to automated ad systems, with liability attaching to the party deploying or profiting from the system.

Another issue raised by AI-generated trademarks is the use of the marks in the commercial marketplace. The PTO's April 2024 guidance on AI tools in practice cautions submitting applications for AI-generated marks that are not used in commerce, emphasizing that hypothetical or purely generated uses fail to satisfy the statutory requirement of use in commerce.[72] Under trademark law, a mark must be "used in commerce" to qualify for registration, and trademark applicants must show that it has been.[73] AI-generated marks that only make hypothetical uses of the mark fail to meet the standard.

The crux of trademark law is to ensure that consumers can rely on marks as indicators of origin. AI-generated content may produce confusingly similar marks without deliberate copying and marketing them in a way that is distinctive and used in commerce. There must be a careful weighing of consumer confusion against expressive uses to ensure that AI-generated trademarks are validated. Some have also begun using trademark law as a defensive tool against AI, by seeking to register distinctive phrases or branding elements before AI can generate imitations.[74]

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[69] *Id.* at 4.

[70] *Advance Loc. Media LLC v. Cohere Inc.*, No. 25-cv-1305-CM, 2025 WL 3171892 (S.D.N.Y. Nov. 13, 2025).

[71] *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123 (2d Cir. 2009).

[72] Guidance on Use of Artificial Intelligence-Based Tools in Practice Before the United States Patent and Trademark Office, 89 Fed. Reg. 25609 (Apr. 11, 2024).

[73] 15 U.S.C. §§ 1051–1052.

[74] *See* Ben Fritz, *Matthew McConaughey Trademarks Himself to Fight AI Misuse,* Wall Street J. (Jan. 13, 2026), https://www.wsj.com/tech/ai/matthew-mcconaughey-trademarks-himself-to-fight-ai-misuse-8ffe76a9.

V. Artificial intelligence use and ethical considerations for intellectual property lawyers

The rapid integration of AI into legal practice has transformed the way attorneys approach core professional tasks, from drafting pleadings to conducting legal research. Companies are increasingly marketing AI tools as solutions to streamline efficiency, reduce costs, and improve accuracy in legal work. But the integration of AI into the legal practice raises pressing questions about reliability, ethics, and the very nature of legal judgment.

AI tools are rapidly transforming the IP legal landscape. AI can assist in patent drafting, including claim construction, technical specification summaries, prior art searches, and predictive analysis of patentability and likelihood of allowance.[75] For example, AI patent search platforms use machine learning and natural language processing to analyze and categorize millions of patents worldwide. This speeds up the search process and minimizes the chance of overlooking critical prior art. AI tools for patent drafting can assist in preparing patent applications by suggesting improvements in language, compliance, and even legal strategy. Tools like Solve Intelligence help with the patenting process, from drafting and invention disclosure creation to responding to office actions, aiming to reduce costs and time associated with the traditional patenting workflow.[76] Patent Bots provides essential tools for patent prosecution including automated patent proofreading and examiner statistics.[77] PatSnap is a platform that focuses on IP research and development intelligence, helping organizations streamline patent research, prior art analysis, and innovation processes .[78]

The integration of AI into legal practice has implications for IP litigators. AI supports attorneys in drafting motions, memoranda, and briefs as well as in flagging controlling precedents and analyzing trends in caselaw.[79] Predictive algorithms also forecast likely court outcomes, offering attorneys new insights into litigation risks. A study has shown that on simple legal task as an invoice review, AI was 20% more accurate, 50–80

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75 *See* Ryan Abbott, *The Reasonable Robot: Artificial Intelligence and the Law,* Cambridge Univ. Press 83–84 (2020). The tools referenced herein are illustrative examples of commercially available technologies and do not constitute endorsement by the author or the Department.

76 *See* Solve Intel., https://www.solveintelligence.com/ (last visited May 29, 2026).

77 *See* Pat. Bots, https://www.patentbots.com/ (last visited May 29, 2026).

78 *See* Pat Snap, https://www.patsnap.com/ (last visited May 29, 2026).

79 *See* Westlaw Edge, https://legal.thomsonreuters.com/en/products/westlaw-edge (last visited May 29, 2026).

times faster, and 99% cheaper than experienced lawyers.[80]

In civil litigation, AI can help with discovery and document drafting by reducing research and drafting time, enhance accuracy through machine learning, and enable data-driven decisions during negotiation and settlement discussions. Particularly with legal research, AI can provide insights into caselaw beyond just keywords and analyze the content and generate caselaw summaries and help with citation accuracy. AI can assist with document review by improving speed and consistency through predictive coding, keyword expansion, and data visualization, especially when attorneys properly validate outputs. AI can assist with the document review process by predictive coding, keyword expansion, and data visualization.[81] While existing platforms such as LexisNexis and Thomson Reuters are integrating AI, there are also new tools being introduced to the market.[82] For instance, Spellbook assists with contract drafting and review; Harvey AI analyzes cases and refines arguments; and Clearbrief integrates AI into legal writing and analysis.[83]

Proponents emphasize AI's ability to save time, reduce costs, and increase consistency across tasks, particularly for solo practitioners or small firms with limited resources.[84] There are, however, risks that are equally salient. AI systems may misstate law or misinterpret facts, raising the specter of malpractice.[85] They also risk introducing bias, particularly when trained on incomplete or skewed datasets.[86] Moreover, to be an effective lawyer, it is important to keep up and understand the changes of technology in law.[87] There is hesitance in using AI because of concerns of data privacy, misuse, unintended consequences, and se-

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[80] Nick Whitehouse et al., AI Ctr. of Excellence Better Bill GPT: Comparing Large Language Models Against Legal Invoice Reviewers (2025).

[81] *See* RelativityOne, https://www.relativity.com/ (last visited May 29, 2026); Everlaw, https://www.everlaw.com/ (last visited May 29, 2026). *See also* Disco Ediscovery, https://csdisco.com/offerings/ediscovery (last visited June 3, 2026) (designed to help complete discovery more quickly and effectively).

[82] *See* CoCounsel, https://www.thomsonreuters.com/en/cocounsel (last visited May 29, 2026). *See also* Westlaw Edge, https://legal.thomsonreuters.com/en/products/westlaw-edge (last visited June 3, 2026) (expedite complex legal research tasks).

[83] *See* Spellbook, https://www.spellbook.legal (last visited May 29, 2026); Harvey AI, https://www.harvey.ai/ (last visited May 29, 2026); Clearbrief, https://clearbrief.ai (last visited May 29, 2026).

[84] Hannah Mayer et al., Superagency in the Workplace: Empowering People to Unlock AI's Full Potential (2025); Darrell M. West & John R. Allen, How Artificial Intelligence Is Transforming the World (2018).

[85] Damien Charlotin, *AI Hallucination Cases*, (June 15, 2026), https://www.damiencharlotin.com/hallucinations/?q=&sort_by=-date&states=USA&period_idx=0.

[86] *Id.* at 370–71.

[87] Model Rules of Pro. Conduct r. 1.1 cmt. 8 (A.B.A. 2020).

curity vulnerabilities. A further concern is overreliance: Attorneys may miss subtle distinctions in precedence or fail to detect fabricated authorities. *Mata v. Avianca* exemplifies this problem, where counsel submitted a brief containing fictitious AI-generated citations.[88] In 2026, the Ninth Circuit fined and suspended three immigration attorneys for six months after they filed an opening brief containing fake legal cases generated by artificial intelligence.[89] In another case, the Seventh Circuit sanctioned an attorney $5,000 for filing two legal briefs "riddled with" fabricated quotes and case citations hallucinated by ChatGPT and rejected the client's petition challenging an immigration court's removal order on the merits.[90]

Questions also remain regarding confidentiality and IP in AI-generated work.[91] The use of AI in government litigation raises distinctive issues. While AI promises potential cost savings in the expenditure of taxpayer dollars, its reliability and fairness in public decision-making demand closer scrutiny.[92] Attorneys must balance efficiency against the risk of delegating too much discretion to opaque algorithms.

AI tools present both opportunities to efficiently manage caseloads and ethical risks for attorneys. The use of AI by government attorneys also creates constitutional and administrative law concerns. The Administrative Procedure Act's (APA's) requirement of reasoned decision-making implies a corresponding duty of for government attorneys to be able to explain how AI-assisted recommendations were generated.[93] The APA authorizes courts to set aside agency actions that are "arbitrary, capricious, [or] an abuse of discretion."[94] Federal agencies could use AI to seek recommendations, which litigants can challenge as insufficiently reasoned or unreviewable. This challenges the very principle of APA, which requires agencies to articulate a rational connection between facts and conclusions.[95] Federal agencies deploying AI-driven tools in adjudication or discovery should ensure outputs do not embed bias or distortion in outputs that may affect fairness or neutrality. Government attorneys should be

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[88] *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443, 445–46 (S.D.N.Y. 2023).
[89] *Malkeet Lnu v. Blanche*, No. 24-4790, 2026 WL 1587554, at *12 (9th Cir. June 3, 2026).
[90] *Perez-Castillo v. Blanche*, No. 25-1988, 2026 WL 1533877, at *9 (7th Cir. June 1, 2026).
[91] Pamela Samuelson, *Allocating Ownership Rights in Computer-Generated Works*, 47 U. Pitt. L. Rev. 1185, 1190–92 (1986).
[92] Cary Coglianese & David Lehr, *Regulating by Robot: Administrative Decision Making in the Machine-Learning Era*, 105 Geo. L.J. 1147, 1156–57, 1184–85 (2017).
[93] *Id.* at 1178–81.
[94] 5 U.S.C. § 706(2)(A).
[95] *See Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).

cautious to ensure that the rationale underlying agency decisions can be explained in administrative records with transparent methodology. The integration of these technologies into legal practice has prompted bar associations and courts to clarify how existing ethical rules apply in the AI context.

First, under American Bar Association (ABA) Model Rule 1.1 (Competence), attorneys must provide competent representation, which includes understanding how the AI tools work.[96] The "technological competence" portion of Rule 1.1 and Comment 8 recognize that lawyers need to understand both the functionality and limitations of AI tools.[97] This may include being aware of where the AI is conducting its searches to provide output and being cognizant of how many facts about the case the lawyer is disclosing to AI. It is vital that the lawyer understands the reasoning and reliability before blinding following AI's guidance.

Second, ABA Model Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants) applies to AI tools as far as they function analogously to human assistants.[98] Lawyers must supervise AI usage and remain responsible for the work product. The use of AI as human assistants remains untested because AI tools lack agency or intent. The standards of traditional supervision cannot readily provide guidance on oversight. But it is important to review or correct AI-drafted materials, such as patent claims or legal arguments, to avoid professional misconduct.

Third, ABA Model Rule 1.6 (Confidentiality of Information) raises heightened concerns when attorneys upload client data into AI platforms.[99] Federal agencies already have heightened data-protection duties that do not create any exceptions for AI usage. Submitting patents, litigation strategies, or protective orders to public AI models may inadvertently disclose this information. This creates licensing and trade secret risks, as well as potential violations of federal data security statutes such as Federal Information Security Modernization Act, International Traffic in Arms Regulations, or other classified information regimes.[100] The Department of Justice's (Department's) Cybersecurity Program and the Federal Acquisition Regulation require safeguarding Controlled Unclassified Information.[101] Uploading controlled information to unvetted AI

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[96] Model Rules of Pro. Conduct r. 1.1 (A.B.A 2024).
[97] *Id.* at cmt. 8 (duty of technology competence).
[98] *Id.* at r. 5.3 (responsibility for nonlawyer assistants). *See* N.Y. St. Bar Ass'n Comm. on Pro. Ethics, Op. 1240 (2022).
[99] Model Rules of Pro. Conduct r. 1.6 (A.B.A 2024).
[100] *Id. See also* 44 U.S.C. §§ 3551–3558 (the Federal Information Security Modernization Act of 2014); 22 C.F.R. §§ 120–130 (International Traffic in Arms Regulations).
[101] *See Cybersecurity Shared Services Program*, U.S. Dep't of Just., https://www.

systems may result in waiver of privilege or violation of statutory obligations. Government attorneys must also comply with applicable federal cybersecurity and information governance requirements when using AI tools, particularly where sensitive or nonpublic information is involved.

Fourth, ABA Model Rule 3.3 (Candor Toward the Tribunal) underscores that lawyers may not submit fabricated statements of law or facts.[102] Government counsel must ensure AI is not misused in filings before administrative or judicial bodies. In the patent context, disclosure of confidential material to AI systems could trigger findings of inequitable conduct under 37 C.F.R. § 1.56.[103] Federal agencies following AI recommendations without sufficient record evidence may also contravene Rule 3.3's duty of candor and expose the agency to judicial remand.[104]

Finally, several state bars have issued detailed ethical opinions on generative AI use. California has provided practical guidance for its use in legal practice, emphasizing attorney supervision.[105] Florida and Kentucky have issued similar opinions, each underscoring duties of competence and confidentiality.[106] The District of Columbia Bar clarified that attorneys must treat AI like other forms of technology, ensuring adequate oversight of its deployment.[107] Michigan and Missouri have addressed frequently asked questions and informal guidance, respectively, while New Jersey has published preliminary guidelines on AI use by lawyers.[108] Pennsylvania's joint opinion highlighted accuracy, transparency, and accountability as baseline obligations.[109] And in 2024, the ABA Standing Committee issued Formal Opinion 512, which provides guidance on the ethical use of

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justice.gov/jmd/cybersecurity-services (last visited May 29, 2026); 48 C.F.R. § 52.204-21 (Basic Safeguarding of Covered Contractor Information Systems).

[102] Model Rules of Pro. Conduct r. 3.3 (A.B.A 2023).

[103] 37 C.F.R. § 1.56 (duty of candor before the PTO).

[104] Model Rules of Pro. Conduct r. 3.3 (A.B.A 2023).

[105] Cal. State Bar Standing Comm. on Pro. Resp. & Conduct, Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law (2024).

[106] Fla. Bar Prof. Ethics Comm., Op. 24-1 (2024); Ky. Bar Ass'n Ethics. Op. E-457 (2024).

[107] D.C. Bar Ethics, Op. 388 (2024).

[108] *Artificial Intelligence for Attorneys – Frequently Asked Questions*, State Bar of Mich. (Nov. 2024), https://www.michbar.org/opinions/ethics/AIFAQs; Mo. Off. Legal Ethics Couns., Informal Op. 2024-11 (2024); *Preliminary Guidelines on the Use of Artificial Intelligence by New Jersey Lawyers*, N.J. Cts. (Jan. 25, 2024), https://www.njcourts.gov/notices/notice-legal-practice-preliminary-guidelines-use-of-artificial-intelligence-new-jersey.

[109] Pa. Bar Ass'n Comm. Legal Ethics & Pro. Resp. & Phila. Bar Ass'n Pro. Guidance Comm., Joint Formal Op. 2024-200 (2024) (discussing ethical issues regarding the use of artificial intelligence).

generative AI tools for use in legal practice.[110]

Across patent, copyright, and trademark law, the integration of AI raises significant professional responsibility concerns for attorneys. The ambiguity surrounding AI-assisted inventorship and authorship raises potential issues of candor. When an AI system plays a substantial role in generating a work, applicants must disclose the nature and extent of human contribution to avoid misrepresentations. As the current law evaluates the extent of human involvement, failing to disclose the role of AI may risk violating duty of candor. The use of AI systems trained on potentially infringing material raises parallel professional responsibility concerns in copyrights. Reliance on AI-generated works applying for copyrights or trademarks implies duties of competence and diligence. Attorneys must accurately assess AI-generated outputs for originality. Similarly, attorneys must evaluate whether AI-generated trademarks are inadvertently replications or approximate existing trademarks. In doing so, attorneys navigate duties of candor, competence, and diligence when assisting clients who are using AI.

For government attorneys, the ethical duties imposed by AI extend farther than those in private practice. Accuracy and truthfulness in filings are especially vital given the government's heightened obligation to serve the public interest.[111] Moreover, due process and fairness considerations require that AI not introduce biases that would disadvantage litigants.[112] Finally, transparency and accountability are crucial in ensuring that innovation balances against public trust in legal institutions.[113]

Government lawyers thus face a dual imperative: They must harness AI's efficiency while safeguarding against its risks. The ethical framework provided by the ABA and state bars reflects an evolving consensus that attorneys cannot outsource professional judgment to machines. Instead, lawyers must act as informed supervisors, ensuring AI aids the rule of law. The ethical landscape for government attorneys mirrors the broader challenge of governance in the new age of AI. As institutions adopt AI for litigation, policy analysis, and regulatory enforcement, government attorneys must translate the traditional duties of competence, candor, confidentiality, and fairness into the AI context. Even though technology continues to evolve rapidly, the professional values anchoring public service remain constant.

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[110] ABA Comm. on Ethics & Pro. Resp., Formal Op. 512 (2024) (Generative Artificial Intelligence Tools).

[111] *See* Model Rules of Pro. Conduct r. 3.3 (A.B.A 2023).

[112] *See id.* at r. 8.4 (prohibiting conduct prejudicial to the administration of justice).

[113] *See* Joint Formal Op. 2024-200, note 110.

VI. Conclusion

The integration of AI into creative, commercial, and professional domains has outpaced the legal system's ability to adapt. Across IP law a common thread emerges: The existing statutory frameworks presuppose human agency. Courts have repeatedly reaffirmed that only natural persons can be inventors or authors. And trademark law continues to rely on human perception of confusion and intent. But still, AI-generated innovation and expression challenge these boundaries.

Administrative agencies like the PTO and the Copyright Office have issued pragmatic guidance framing AI as a tool rather than a creator. As AI becomes increasingly capable of autonomous conception and expression, rigid adherence to human authorship may suppress disclosure, distort incentives, and drive valuable innovations underground.

For lawyers, the challenge is to use AI to assist with caseloads but ensure fairness, accountability, and public trust. Ethical rules on competence, confidentiality, and candor remain fully applicable in the AI context. Ensuring that innovation serves the public interest without eroding the values underlying the rule of law will define the next era of legal development.

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Defending Agency Actions After *Loper Bright*: Sea Change or the Same Old Beach?

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I. Introduction

Reading breathless coverage of the Supreme Court's 2024 decision in *Loper Bright Enterprises v. Raimondo* gave the impression that the administrative state would come tumbling down with the end of judicial deference to agency statutory interpretations.[1] But to many legal observers, the death of the deferential "*Chevron*" approach was already a long time coming.[2] Indeed, in a 2022 dissent from the Supreme Court's denial of a petition for a writ of certiorari, Justice Gorsuch delivered a comprehensive criticism of *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.* that portended its doom.[3] Justice Thomas had long made similar grumblings, some of which Justice Gorsuch joined.[4] The government had already moved away from reliance on *Chevron*, and the Supreme Court had not upheld agency action based on *Chevron* in a

[1] 603 U.S. 369 (2024). *See, e.g.*, Adam Liptak, *Justices Limit Power of Federal Agencies, Imperiling an Array of Regulations*, N.Y. Times (June 28, 2024), https://www.nytimes.com/2024/06/28/us/supreme-court-chevron-ruling.html; Ann E. Marimow & Justin Jouvenal, *Supreme Court Curbs Federal Agency Power, Overturning Chevron Precedent*, Wash. Post (June 28, 2024), https://www.washingtonpost.com/politics/2024/06/28/supreme-court-chevron-federal-agency-authority/; Elie Mystal, *We Just Witnessed the Biggest Supreme Court Power Grab Since 1803*, The Nation (June 28, 2024), https://www.thenation.com/article/society/chevron-deference-supreme-court-power-grab/.
[2] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), *overruled by Loper Bright,* 603 U.S. at 369.
[3] *Id.*; *Buffington v. McDonough*, 143 S. Ct. 14 (2022).
[4] *See, e.g.*, *Cnty. of Maui v. Haw. Wildlife Fund*, 590 U.S. 165, 194 (2020) (Thomas, J., dissenting); *Baldwin v. United States*, 589 U.S. 1231 (2020) (Thomas, J., dissenting from denial of certiorari); *Michigan v. EPA*, 576 U.S. 743, 761–64, (2015) (Thomas, J., concurring).

majority opinion for nearly a decade.[5] Now that *Loper Bright* has been the law of the land for over a year, we can evaluate what has changed so far. Has *Loper Bright* caused a sea change for government litigators defending agency action, or do we find ourselves largely sitting on the same old beach?

II. The Supreme Court's decision in *Loper Bright*

Loper Bright involved, of all things, herring fishing companies operating in the Atlantic.[6] In 1976, the Magnusen-Stevens Fishery Conservation and Management Act (MSA) extended the United States' jurisdiction over fishery management deep into the Atlantic and established exclusive fishery management authority in the claimed zone.[7] The Secretary of Commerce delegated these management duties to the National Marine Fisheries Service (NMFS).[8]

In *Loper Bright* (and the companion case, *Relentless Inc. v. U.S. Department of Commerce*, decided in the same opinion), the herring industry challenged NMFS regulations that required fishing vessels to carry observers on their vessels to collect conservation and management data, while bearing the cost of those observers.[9] Specifically, the challengers objected to an amendment to the regulations that empowered NMFS to charge the herring fishermen the observer fee if federal funding became unavailable.[10] A key question, then, was what level of deference to afford NMFS's regulatory action.

This question put the continued vitality of *Chevron*, decided in 1984,

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[5] *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261 (2016) (affording *Chevron* deference to Patent Office rules requiring patent claims to receive broadest reasonable construction in inter partes review). *See, e.g.*, *HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 594 U.S. 382, 394 (2021) (quoting the government's brief and noting that "[w]ith the recent change in administrations, the government is not invoking *Chevron*" (cleaned up)); *Cnty. of Maui*, 590 U.S. at 180 (explaining that "[n]either the Solicitor General nor any party has asked us to give what the Court has referred to as *Chevron* deference to EPA's interpretation of the statute").

[6] *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

[7] 16 U.S.C. § 1801.

[8] *See Laws & Policies: Magnuson–Stevens Act*, NOAA Fisheries, https://www.fisheries.noaa.gov/topic/laws-policies (last visited May 6, 2026).

[9] *Loper Bright*, 603 U.S. at 381–82; *Relentless Inc. v. U.S. Dep't of Com.*, No. CV 20-108 WES, 2025 WL 1939025 (D.R.I. July 15, 2025) (pending appeal).

[10] *Loper Bright*, 603 U.S. at 381–82; Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Industry-Funded Monitoring, 85 Fed. Reg. 7414 (Feb. 7, 2020) (to be codified at 50 C.F.R. pt. 648).

squarely before the Supreme Court.[11] In *Chevron*, the Supreme Court articulated a two-step approach for evaluating agency action.[12] First, courts determined "whether Congress has directly spoken to the precise question at issue," and "[i]f the intent of Congress is clear, that is the end of the matter."[13] If, however, the statute did not directly address "the precise question at issue," courts proceeded to the second step of determining "whether the agency's answer is based on a permissible construction of the statute."[14] If courts answered this step in the affirmative, they had to give the agency's interpretation deference, even if it was not the only interpretation or the one the court itself would have reached.[15]

Thus, the Supreme Court had to determine whether it should view the herring fishermen's challenge through the *Chevron* lens or a different test should prevail. In deciding *Loper Bright*, the Supreme Court opted for door number two.

A. What *Loper Bright* changed

Loper Bright begins from the premise that the Administrative Procedure Act (APA) is the "fundamental charter of the administrative state," requiring courts to "exercise independent judgment in determining the meaning of statutory provisions."[16] In exercising that judgment, courts may "seek aid from the interpretations of those responsible for implementing particular statutes"—namely, federal agencies.[17] In particular, "interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning."[18] But nowhere does this framework remove from judicial purview the prerogative to interpret statutes in the first instance.

The decision in *Loper Bright* thus explicitly overrules *Chevron* deference as inconsistent with the APA, finding it "defies the command . . . that 'the reviewing court'—not the agency whose action it reviews—is to 'decide *all* relevant questions of law" and 'interpret . . . statutory provisions.'"[19] The decision criticized *Chevron* for requiring courts "to *ignore*,

[11] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).
[12] *Id.*
[13] *Id.* at 842.
[14] *Id.* at 843.
[15] *Id.* at 843 n.11.
[16] *Loper Bright*, 603 U.S. at 392 (quoting *Kisor v. Wilkie*, 588 U.S. 558, 580 (2019)); *id.* at 394. *See also* 5 U.S.C. §§ 701–706 (Administrative Procedure Act).
[17] *Loper Bright*, 603 U.S. at 394.
[18] *Id.* (citing *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 549 (1940)).
[19] *Id.* at 398 (quoting 5 U.S.C. § 706).

not follow, 'the reading the court would have reached' had it exercised its independent judgment" and for "demand[ing] that courts mechanically afford *binding* deference to agency interpretations."[20] The Supreme Court reasoned that this "turns the statutory scheme for judicial review of agency action upside down."[21]

The key change wrought by *Loper Bright* is this: When faced with a statutory ambiguity, a court is "not somehow relieved of its obligation to independently interpret the statute" and may not simply defer to agency interpretations under *Chevron*.[22] Instead, courts must first independently "use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity."[23] Simply put, after *Loper Bright,* "courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous."[24]

B. What *Loper Bright* did *not* change

While *Loper Bright* did effect a change in administrative law, there is much more that it did not change. First, *Loper Bright* did not rewrite the APA.[25] Judicial review remains limited to "final agency action for which there is no other adequate remedy in a court."[26] And courts can only set aside agency action as detailed in 5 U.S.C. § 706, including most famously for being "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[27] *Loper Bright* does not undermine any of this. It merely states that "[t]he text of the APA means what it says."[28]

Second, *Loper Bright* did not negate the importance of agency views in interpreting statutes. To the contrary, the Supreme Court recognized as longstanding the principle that courts should give "'the most respectful consideration' to Executive Branch interpretations simply because '[t]he officers concerned [were] usually able men, and masters of the subject,' who were '[n]ot unfrequently . . . the draftsmen of the laws they [were] afterwards called upon to interpret.'"[29] Nor did *Loper Bright* purport to overrule *Skidmore v. Swift & Co.*, which counseled courts to look to

[20] *Id.* at 398–99 (quoting *Chevron*, 467 U.S. at 843, n.11).
[21] *Id.*
[22] *Id.* at 400.
[23] *Id.*
[24] *Id.* at 413.
[25] 5 U.S.C. §§ 701–706.
[26] *Id.* § 704.
[27] *Id.* § 706(2)(A).
[28] *Loper Bright*, 603 U.S. at 393.
[29] *Id.* at 386 (quoting *United States v. Moore*, 95 U.S. 760, 763 (1877)).

agency interpretations for guidance.[30] Under *Skidmore*, courts afford an agency's legal interpretation weight depending on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[31] Similarly, *Loper Bright* left intact *Kisor v. Wilkie* and *Auer v. Robbins*, which afford agencies deference when it comes to interpreting their own guidance or regulations.[32]

Third, *Loper Bright* did not undo agencies' ability to write regulations or issue guidance in the first place. The decision acknowledged that, "[i]n a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes."[33] Some of these statutes allow agencies to fill in the details of a statutory scheme; others expressly delegate authority to give meaning to statutory terms.[34] In these circumstances, the court's role remains merely to ensure the agency acts within the bounds of its authority and engages in "reasoned decisionmaking."[35]

Fourth, *Loper Bright* did not overrule every decision applying the *Chevron* framework. The decision was explicit that it does "not call into question prior cases that relied on the *Chevron* framework," and that such decisions are "still subject to statutory *stare decisis* despite our change in interpretive methodology."[36] While lower courts are now debating the full scope of statutory *stare decisis*, the import is clear: *Loper Bright* did not overrule *en masse* every case that ever relied upon *Chevron*, nor does it require courts to put on blinders to the context of those cases and how they have been relied upon since.[37] And as *Loper Bright* explained, a precedent's reliance on *Chevron* alone is insufficient to justify overruling

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30 *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).
31 *Id.* at 140.
32 *Kisor v. Wilkie*, 588 U.S. 558 (2019); *Auer v. Robbins*, 519 U.S. 452 (1997). *See also United States v. McIntosh,* 124 F.4th 199, 206 (3d Cir. 2024) (citing cases and noting ongoing vitality of *Kisor* following *Loper Bright*).
33 *Loper Bright*, 603 U.S. at 394.
34 *Id.*
35 *Id.* at 395.
36 *Id.* at 412.
37 *See, e.g.*, *Lopez v. Bondi*, 151 F.4th 1196 (9th Cir. 2025) (Bumatay, Circuit Judge, dissenting) (debating whether statutory *stare decisis* applies only to prior Supreme Court decisions or also decisions of lower courts); *Garcia Pinach v. Bondi*, 147 F.4th 117, 132–33 (2d Cir. 2025) (declining to find that statutory *stare decisis* does not apply to lower court decisions and applying it to prior circuit-level precedent); *Tennessee v. Becerra*, 131 F.4th 350, 365 (6th Cir. 2025) (noting *Loper Bright* does not say whether statutory *stare decisis* includes circuit-court precedent); *Singleton v. Allen*, 740 F. Supp. 3d 1138, 1168 (N.D. Ala. 2024) (applying principles of statutory *stare decisis* even absent a definitive Supreme Court decision).

a statutory precedent because it is "just an argument that the precedent was wrongly decided."[38]

Fifth, *Loper Bright* did not change anything for the herring fishermen, at least as of this publication. Following remand, the *Relentless* district court decided the case again under the new standard of *Loper Bright* and reached the same result, upholding the NMFS's observer-fee scheme as falling within Congress's delegation of regulatory authority.[39] The next day, the *Loper Bright* parties sought to hold their case in abeyance for settlement discussions.[40]

III. Review of administrative actions after *Loper Bright*

It is one thing to explain what *Loper Bright* did and did not change in the abstract, but what matters for government litigators is what happens now in practice. There are two ways to look at that question. First, how are individual lower courts wrestling with the new *Loper Bright* standard? Second, how has the legal landscape changed overall? This article looks at both questions, beginning at the micro level with two case studies and then zooming out to take an empirical view of the macro level.

A. A tax-oriented case study: *Lissack* versus *3M*

As a litigator for over 15 years in the former Tax Division, I would be remiss not to inflict a little tax law on my Department of Justice colleagues. And it just so happens that two tax cases—*Lissak v. Commissioner* and *3M Co. v. Commissioner*—offer a handy comparison for how courts are addressing *Loper Bright* in the year since it released its decision.[41]

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38 *Loper Bright*, 603 U.S. at 412.
39 *Relentless Inc. v. U.S. Dep't of Com.*, No. CV 20-108 WES, 2025 WL 1939025 (D.R.I. July 15, 2025) (pending appeal).
40 Joint Motion for Abeyance, Loper Bright Enters., Inc. v. Lutnick, No. 21-5166, (D.C. Cir. July 16, 2025). As of May 11, 2026, settlement discussions were ongoing, with the Department of Commerce considering changes to the challenged regulations. Joint Report, Loper Bright Enters., Inc. v. Lutnick, No. 21-5166, (D.C. Cir. May 11, 2026).
41 *Lissack v. Comm'r*, 125 F.4th 245 (D.C. Cir. 2025); *3M Co. v. Comm'r*, 154 F.4th 574 (8th Cir. 2025).

1. Same old beach: the D.C. Circuit's decision in *Lissack*

In addition to serving as a cautionary tale about tax issues in luxury condominium development, *Lissack* was one of the first cases decided in the post-*Loper Bright* world.[42] The case centered around a whistleblower disclosure Lissack made to the Internal Revenue Service alleging that a condominium development group was evading taxes through improper treatment of golf club membership deposits.[43] Though the IRS opened an investigation, it concluded the group's original tax treatment was appropriate.[44] The IRS, however, discovered an unrelated $60 million problem with how the development group reported intercompany debt.[45] At issue was whether Lissack should receive any monetary reward. The IRS concluded he should not, but Lissack (perhaps predictably) believed he should.[46]

The crux of the dispute turned on regulations issued in connection with the Tax Code's whistleblower statute, 26 U.S.C. § 7623.[47] This statute allows the IRS to pay awards to whistleblowers who help identify and collect underpaid taxes.[48] While the IRS has significant discretion with respect to whistleblower awards, certain awards are mandatory.[49] Specifically, whistleblowers "shall" receive an award if the IRS "proceeds with any administrative or judicial action" described in the whistleblower statute "based on information brought to the Secretary's attention by" the whistleblower.[50]

Regulations expand on this statutory language in several important ways. First, the regulations define "administrative action" to mean "all or *a portion of* an [IRS] civil or criminal proceeding against any person that may result in collected proceeds . . . including, for example, an examination, a collection proceeding, a status determination proceeding, or a criminal investigation."[51] By virtue of this definition, the IRS can partition examinations into discrete sub-portions related to distinct tax issues, with each being its own "administrative action" for purposes of

42 *Lissack*, 125 F.4th at 245.
43 *Id.* at 248–49.
44 *Id.* at 245.
45 *Id.* at 249, 252.
46 *Id.* at 241.
47 26 U.S.C. § 7623.
48 *Id.*
49 *Id.* § 7623(b).
50 *Id.* § 7623(b)(1).
51 26 C.F.R. § 301.7623-2(a)(2) (emphasis added).

the whistleblower laws.[52]

Second, the regulations clarify that the IRS "proceeds based on information provided by a whistleblower when the information provided *substantially contributes* to an action against a person identified by the whistleblower."[53] This includes, for example, when the IRS "initiates a new action, expands the scope of an ongoing action, or continues to pursue an ongoing action, that the IRS would not have initiated, expanded the scope of, or continued to pursue, but for the information provided."[54]

Third, the regulations define "related actions" in the whistleblower statute to mean "an action against a person other than the person(s) identified in the information provided and subject to the original action(s), when" the facts are substantially the same as those in the information provided by the whistleblower.[55] The IRS proceeds with the other action based on those facts, and the other person is related to the person the whistleblower identified.[56] In other words, related actions are confined to certain actions against new parties.

In challenging the IRS's denial of his whistleblower payout, Lissack attacked these portions of the regulations. In 2021, the Tax Court upheld them under *Chevron*, and the D.C. Circuit sustained the Tax Court's decision in 2023, on the eve of *Loper Bright*.[57] Shortly after deciding *Loper Bright*, the Supreme Court vacated the D.C. Circuit's judgment and remanded the case for further consideration.[58] *Lissack* thus became one of the first cases a court reevaluated under the new test in *Loper Bright*.

Much like the herring fishermen, Lissack wound up back where he started, with the D.C. Circuit again upholding the regulations—this time under *Loper Bright*.[59] The decision found the regulations "correctly implement[] the tax whistleblower statute."[60] As to the scope of administrative action and whether it is "based on" whistleblower information, the court relied primarily on the ordinary meaning and context of the statute to uphold the regulations.[61]

Repeating much of the reasoning from its 2023 decision, the D.C. Cir-

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[52] *Lissack*, 125 F.4th at 250–51.
[53] 26 C.F.R. § 301.7623-2(b)(1) (emphasis added).
[54] *Id.*
[55] *Id.* § 301.7623-2(c)(1).
[56] *Id.*
[57] *Lissack v. Comm'r*, 157 T.C. 63 (2021); *Lissack v. Comm'r*, 68 F.4th 1312 (D.C. Cir. 2023).
[58] *Lissack v. Comm'r*, 144 S. Ct. 2707 (2024).
[59] *Lissack*, 125 F.4th at 256.
[60] *Id.* at 257.
[61] *Id.*

cuit considered policy implications, including that a broader construction than that in the regulations would improperly "encourage whistleblowers to flyspeck major taxpayers in search of any plausible hint of underpayment" just to collect a payout based on the IRS's further examination.[62] By comparison, the regulatory interpretation properly calibrated mandatory awards to the "fruits of the particular IRS actions that the whistleblower's information substantially assists."[63]

Next, the court applied *Skidmore* deference to the IRS's focused, third-party oriented definition of "related action," noting the "persuasive value of an agency's interpretation" and holding that the definition "makes good sense of that statutory phrase in context."[64] The court also looked to the preamble in the regulations, finding that the Department of the Treasury took care to consider and reject broader definitions of "related action."[65] In doing so, the court rejected Lissack's suggestion that a broad, dictionary definition of "related" should prevail.[66] Thus, *Loper Bright* largely left Lissack sitting on the same old beach.

2. Sea change(?): the Eighth Circuit's decision in *3M*

The Eighth Circuit's recent decision in *3M* stands in contrast with *Lissack*.[67] 3M is a Fortune 500 company based in St. Paul, Minnesota that develops, manufactures, and sells industrial, worker safety, and consumer goods.[68] 3M operates globally with subsidiaries all over the world. At issue was whether 3M reported sufficient royalty income from a Brazilian subsidiary in 2006.[69] At the time, Brazilian law capped the royalties a subsidiary could pay to a non-Brazilian controlling company, which meant 3M's Brazilian subsidiary paid only a fraction of the royalty the IRS should have charged based on the value of the intellectual property underlying the royalty arrangement.[70] After evaluating the reporting position, the IRS determined 3M was required to report the royalties it should have received ($27.7 million) instead of the amount it actually re-

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[62] *Id.* at 258.
[63] *Id.*
[64] *Id.* at 259.
[65] *Id.*
[66] *Id.*
[67] *3M Co. v. Comm'r*, 154 F.4th 574 (8th Cir. 2025). On January 29, 2026, the United States petitioned for rehearing *en banc.* Petition for *en banc* Rehearing, 3M Co. v. Comm'r, No. 23-3772 (8th Cir. Jan. 29, 2026).
[68] *About 3M: Our History*, 3M, https://www.3m.com/3M/en_US/about-3m/history/ (last visited May 6, 2026).
[69] *3M*, 154 F.4th at 577.
[70] *Id.*

ceived ($5.1 million).[71] After additional computational adjustments, the ultimate deficiency the IRS calculated was $23.7 million.[72]

In making its adjustments, the IRS initially relied on 26 U.S.C. § 482, which broadly allows the Treasury Secretary to reallocate tax attributes within a controlled group to prevent tax evasion or better reflect economic reality.[73] The question was whether this power included the ability to tax 3M on the economic value of the royalty, despite Brazilian law prohibiting the subsidiary from paying it in full. A regulation addressed precisely this scenario, instructing the IRS that "a foreign legal restriction will be taken into account only to the extent that it is shown that the restriction affected an uncontrolled taxpayer under comparable circumstances for a comparable period."[74] Because the Brazilian restrictions did not meet this test, the IRS did not take them into account and charged 3M the full amount.

3M challenged the IRS in Tax Court.[75] By a bare majority with various concurring and dissenting opinions, the Tax Court concluded the IRS could do what it did.[76] In its ruling, the Tax Court found the statute to be ambiguous, applied *Chevron*, and concluded the regulation was valid as a reasonable interpretation of the statute.[77] Notably, the Tax Court judges disagreed vigorously about whether the statute alone required, permitted, or forbade the IRS's reallocation.[78]

On appeal, the Eighth Circuit noted that, with the decision in *Loper Bright*, the "legal landscape has changed since the case's last stop."[79] Using the text of the statute as its guide, the Eighth Circuit concluded that the "best reading" of the statute "rules out what the IRS did here."[80] Hewing to the statute, the IRS can only use the reallocation powers in 26 U.S.C. § 482 "when '*necessary*' to (1) 'prevent evasion of taxes' or (2) 'clearly ... reflect the [controlled entities'] income.'"[81] Since 3M was following Brazilian law, the Eighth Circuit concluded there could be no

[71] *Id.*; *3M Co. v. Comm'r*, 160 T.C. 50, 86 (2023).
[72] *Id.*
[73] 26 U.S.C. § 482.
[74] *Id.* § 1.482-1(h)(2).
[75] *3M*, 160 T.C. at 50.
[76] *Id.*
[77] *Id.* at 255–88, 296–98.
[78] *Id. See also 3M*, 154 F.4th at 574 (holding that the IRS could not reallocate extra royalty income to taxpayer form subsidiary).
[79] *3M*, 154 F.4th at 577 (quoting *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024)).
[80] *Id.*
[81] *Id.* at 578 (quoting 26 U.S.C. § 482).

evasion.[82] Moreover, because 3M did not have complete control over the income at issue, "shifting income to 3M here would *not* 'clearly . . . reflect [its] income.'"[83]

Because the reallocation involved an intangible, however, the Eighth Circuit next had to address the second sentence of the statute, which provides "[i]n the case of any transfer (or license) of intangible property . . . the income with respect to such transfer or license shall be commensurate with the income attributable to the intangible."[84] The question, then, was how this provision interacts with the first sentence of the statute. The court concluded that it could not untether the reference to "income" in the second sentence from the meaning of "income" in the first sentence, which requires a measure of control that 3M did not have.[85] Thus, the best reading of the statute is that "[t]he power of reallocation always depends on a taxpayer's 'complete dominion' over the funds, regardless of the type of property involved."[86] Some commentators have criticized the Eighth Circuit's decision on these points as overly simplistic and not, in fact, fully accounting for the statutory language.[87]

In reaching its decision, the court appears to have been influenced by how "[t]he shifting sands of administrative law brought a change in the IRS's position."[88] Whereas the government had previously argued under *Chevron* that the statute was silent and regulatory deference was required, post-*Loper Bright* it argued that the statute itself required the reallocation provided for in the regulation.[89] In rejecting this shift, the decision noted that "a statute cannot both be silent as to the precise question and unambiguously answer it at the same time."[90] These kinds of "having it both ways" arguments have found a chilly judicial reception in other

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[82] *Id.*

[83] *Id.* (footnote omitted) (quoting 26 U.S.C. § 482). The Eighth Circuit was particularly influenced by the Supreme Court's decision in *Commissioner v. First Security Bank of Utah, N.A.*, where the IRS was barred from reallocating income among related banking entities where a law prohibited certain entities from receiving the insurance commission income at issue. *Comm'r v. First Sec. Bank of Utah, N.A.*, 405 U.S. 394 (1972). A decade later, however, 26 U.S.C. § 482 was amended to directly address income from intangibles. 26 U.S.C. § 482.

[84] 26 U.S.C. § 482.

[85] *3M*, 154 F.4th at 580.

[86] *Id.* at 581.

[87] Ryan Finley, *Rehearing En Banc Petition Offers a Chance to Fix* 3M, Tax Notes (Feb. 16, 2026), https://www.taxnotes.com/tax-notes-international/transfer-pricing/rehearing-en-banc-petition-offers-chance-fix-3m/2026/02/16/7tyzx.

[88] *Id.*

[89] *Id.*

[90] *Id.* (cleaned up).

regulatory challenge cases, regardless of which side advances them.[91] Further, the regulations themselves did not apply a bright-line reallocation rule for intangibles.[92] The decision also rejected the idea that the statute delegated discretionary authority to the IRS to issue those regulations, finding them to be beyond the bounds of any such delegation.[93] Moreover, the court would not defer to the IRS's interpretation based on its specialized experience "when the agency recently invented it and the statute has another 'be[tter] reading.'"[94]

3. Comparing *Lissack* and *3M*

How do we read the tea leaves of *Lissack* and *3M*, and what can we gain from comparing them? There are two obvious differences. First, *Lissack* sits more completely within the *Chevron* "step 2" wheelhouse, where regulations flesh out a statute that is already precise but does not definitively answer the questions the regulations do. Thus, the *Lissack* court had to wrestle with whether the regulations were the best interpretation of the statute. Meanwhile, *3M* sits almost entirely in *Chevron*'s "step 1." Even at the trial court level, before *Loper Bright*, numerous experienced Tax Court judges had different views of whether a sweeping, but facially straightforward, statute created ambiguity in the first place. Despite the Eighth Circuit's repeated citation to it, *Loper Bright* did little to change the threshold statutory ambiguity analysis that *Chevron* already required. In other words, if the statute dictates the result, then whether we are in a *Chevron* or *Loper Bright* world is irrelevant.

Second, the regulations at issue in *Lissack* do not stray far from the statute, merely interpreting what different words of the statute mean. The regulation at issue in *3M*, on the other hand, is aimed at answering a detailed question that the statute does not directly address. Thus, the regulations in *Lissack* are more classically interpretive, whereas the regulation at issue in *3M* veers more legislative.

Thus, it is far from clear that the different results in *Lissack* and *3M* have much to do with *Loper Bright*. Put differently, given that the *3M* court decided the statute was clear and prohibited the regulatory result, under *Chevron* would have required the same result. And because *Loper Bright* preserves concepts of agency expertise as a statutory North

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91 *See, e.g.*, *Facebook, Inc. v. Comm'r*, 164 T.C. 194, 313 (2025) (upholding different regulations associated with 26 U.S.C. § 482, noting "[n]either can we accept petitioner's rejection of the methods in the regulations and at the same time use the methods to determine petitioner's reporting position was reasonable").
92 *3M*, 154 F.4th at 581.
93 *Id.* at 582.
94 *Id.* (quoting *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024)).

Star, the result in *Lissack* remained the same both before and after *Loper Bright*. Our comparison, however, suggests that regulatory actions may be more vulnerable where the *Chevron* "step 1" analysis would have been especially difficult or where regulations are taking on more of a legislative gap-filling role without a clear delegation of authority to the agency. One wonders whether the result in *3M* would have changed if Congress had specifically delegated broad regulatory authority to the IRS in 26 U.S.C. § 482.[95] And maybe the *Lissack* decision was colored by the presence of an explicit delegation in 26 U.S.C. § 7623(a).[96]

B. Survey of circuit-level decisions in the year after *Loper Bright*

But perhaps looking at only two cases is overly myopic. Anyone could find an outlier and draw overbroad conclusions. Having indulged in a detour through tax land, let us return to the big picture.[97] What does a survey of the circuit-level cases decided post-*Loper Bright* tell us about the overall state of administrative law in its wake?

To gain some insight, this article looks at federal circuit-level cases citing *Loper Bright* from its issuance through October 8, 2025.[98] It includes cases that address a federal regulation, rule, or other legal position in the context of a statutory scheme. But this article omits some cases citing *Loper Bright*. Specifically, the data does not include cases that found *Loper Bright* inapplicable, mentioned it only in a concurrence or dissent, or elided it without any substantive discussion, such as by remanding for further proceedings or stating that a party waived arguments based on it.[99] The data likewise does not include cases that cited *Loper Bright* in addressing only ancillary issues that did not implicate federal agency action. Also omitted are cases that mention *Loper Bright* but are really about *Kisor* or *Auer* deference. The data only includes duplicative decisions in the same case once. For example, where a court updated an opinion, the data only includes the updated opinion. The data omits

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[95] 26 U.S.C. § 482.

[96] *Id.* § 7623(a).

[97] If you are not yet ready to leave (and why should you be?), you may continue your studies with another recent scholarly article. *See* Doron Narotzki & Tamir Shanan, *The Decline of* Chevron*, the Rise of* Loper Bright*, and the Shifting Sands of Tax Law*, 28 Fla. Tax Rev. 480 (2025).

[98] The complete dataset with case citations is available in the appendix. *See* Lindsay L. Clayton, *Post* Loper Bright *Case Data*, 74 DOJ J. Fed. L. & Prac. no. 2, 2026, app. at 153. All figures were created with this data, which was generated by the author.

[99] Cases that included a more robust *Loper Bright* discussion but did not decide whether agency action passed muster were included in a small group classified as "not decided."

cases that were purely about an agency's factual analysis as opposed to the agency addressing a statutory or legal interpretation. And it counts each case just once, even if the court addressed multiple agency acts. With that, Figure 1 shows the results.

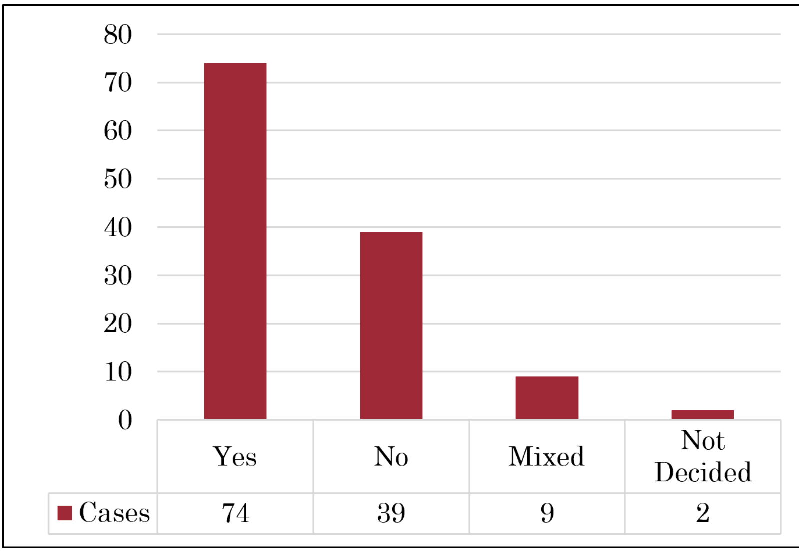


Figure 1: Agency actions upheld post-*Loper Bright*

In the post-*Loper Bright* world so far, courts have often upheld agency action. Of the 124 cases in the dataset, 74 (roughly 60%) resulted in courts upholding agency actions. Courts fully rejected agency action in only about a third of the cases, with the rest reaching mixed or ambiguous results.

But how does this compare to the pre-*Loper Bright* world? During briefing before the Supreme Court, one amicus compiled a list of cases decided under *Chevron* in 2020–2021.[100] Leaving out the post-*Loper Bright* cases with mixed or unclear results and then comparing them to the 2020–2021 data reveals the information displayed in Figures 2 and 3.

[100] Isaiah McKinney, Cato Inst. & Liberty Just. Ctr., Circuit Court of Appeals Opinions Analyzing and Applying Chevron in 2020–2021 (2022).

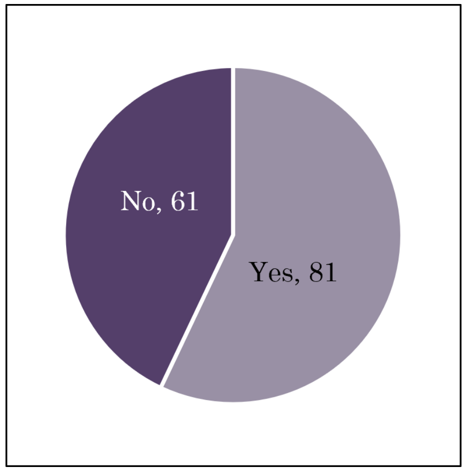


Figure 2: Agency actions upheld pre-*Loper Bright*

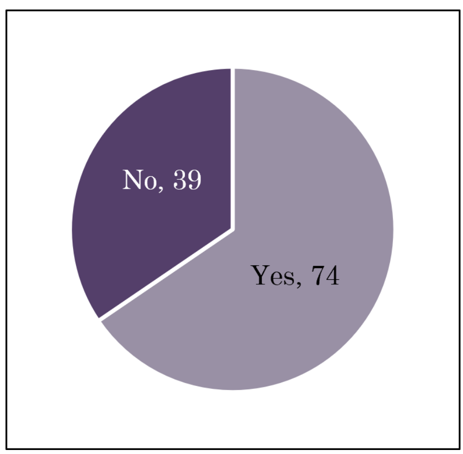


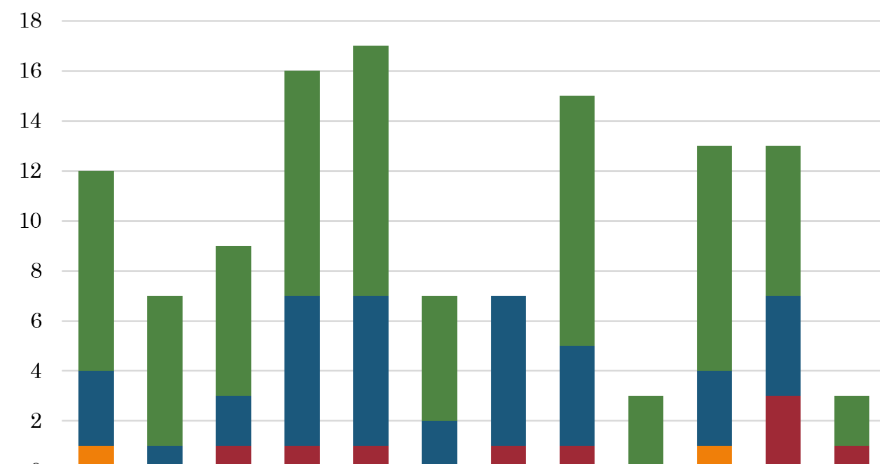
Figure 3: Agency actions upheld post-*Loper Bright*

Both before and after *Loper Bright*, the circuit courts upheld agency actions roughly 60% of the time. This is consistent with the findings of pre-*Loper Bright* empirical studies of court rulings on agency action under *Chevron*.[101] When comparing only cases with clear and binary results, the post-*Loper Bright* world appears slightly more favorable to agency action, with 66% of cases upholding agencies in full compared to 57% in

[101] *See, e.g.,* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 6–9 (2017) (finding 71% agency win rate); David Zaring, *Reasonable Agencies*, 96 Va. L. Rev. 135, 171–74 (2010) (collecting studies and noting that "agencies have won their *Chevron* cases roughly two thirds of the time in the courts of appeals."); Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 Admin. L. Rev. 77, 83–84 (2011) (collecting studies and noting win rates falling in a band from 64%–81.3%); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 Univ. Chi. L. Rev. 823 (2006) (finding agency win rate of 64%).

the 2020–2021 timeframe. While we should be cautious about reading too much into that difference, one thing is clear: These data are not consistent with the anti-agency tsunami many commentators predicted.

Civil litigators who do not practice nationwide may be curious about whether there is any variation across different jurisdictions. Luckily, we can break down the data by circuit as Figure 4 shows.



	Second	Third	Fourth	Fifth	Sixth	Seventh	Eighth	Ninth	Tenth	Eleventh	D.C.	Federal
Yes	8	6	6	9	10	5		10	3	9	6	2
No	3	1	2	6	6	2	6	4		3	4	
Mixed			1	1	1		1	1			3	1
Not decided	1									1		

Figure 4: Agency actions upheld post-*Loper Bright* by circuit

As above, we should take caution not to read too much into the data. The overall 60/40 breakdown, however, is relatively consistent across circuits except in the Eighth Circuit, which appears significantly more hostile to agency action, as well as the Third and Tenth Circuits, which appear relatively more accepting. And we unfortunately lack data from the First Circuit.

But did *Loper Bright* mark a turning point in any of the circuits? Figure 5 offers a comparison using the 2020–2021 data.

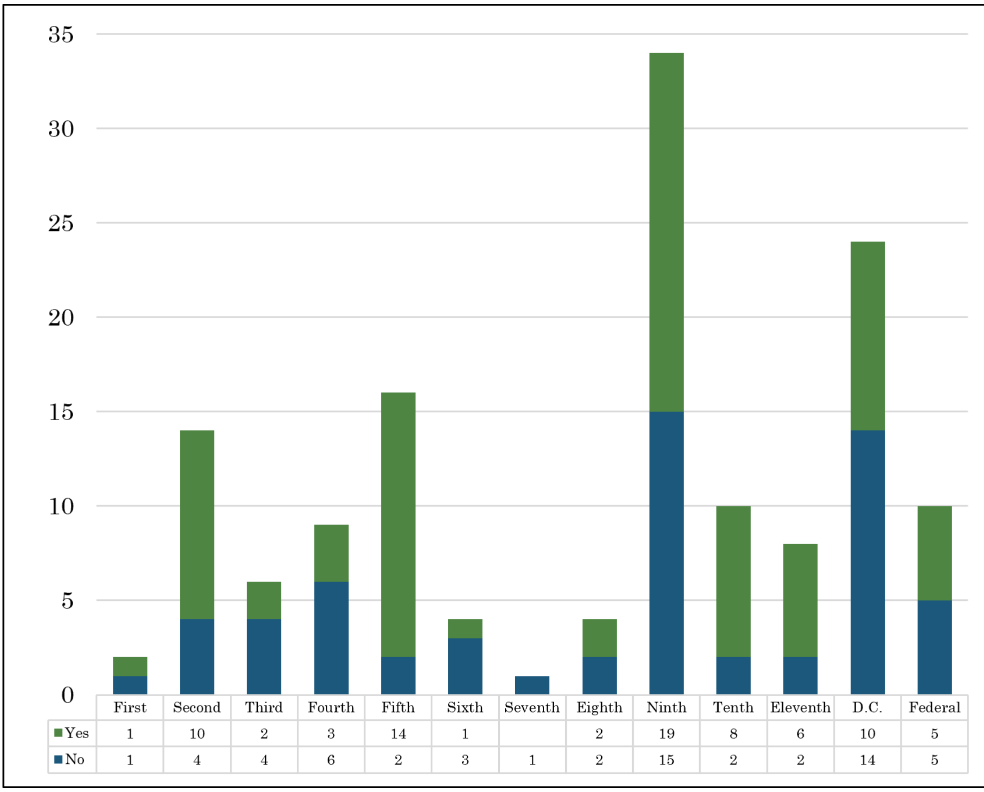


Figure 5: Agency actions upheld pre-*Loper Bright* (2020–2021) by circuit

Again, the rough 60/40 breakdown prevails in most circuits even under the *Chevron* standard. Here, the data looks more uniform. While the Seventh Circuit may appear to have been relatively hostile to agency action, this conclusion would be shaky at best given that it rests on a single case. Thus, one takeaway is that *Loper Bright* may have led to more inter-circuit variation in how courts decide cases involving agency action. But whether this is a blip or a trend will depend on how the data develop over time.

But what if it's more about the agency or sub-agency than the circuit deciding the case? Figure 6 shows another way to cut the data.

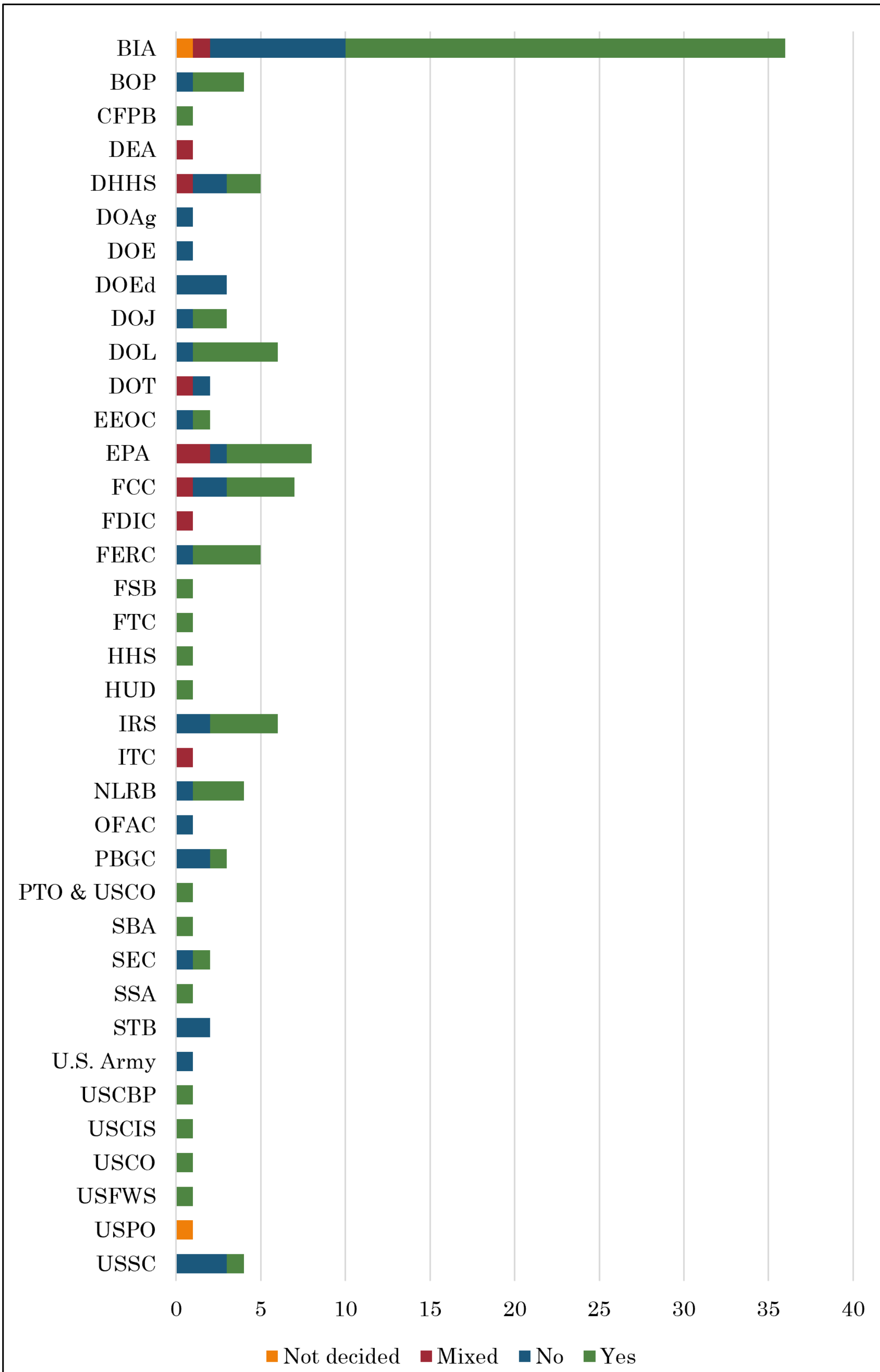


Figure 6: Agency actions upheld post-*Loper Bright* by agency

The most challenged governmental entity by far is the Board of Immigration Appeals. Decisions on its actions, however, are somewhat more favorable than the familiar 60/40 breakdown. Yet this rough breakdown pertains across the board for other entities whose actions have been the subject of more than five cases decided in the post-*Loper Bright* world: (1) the Department of Labor (83% upheld); (2) the Environmental Protection Agency (63% upheld); (3) the Federal Communications Commission (57% upheld); and (4) the IRS (67% upheld).[102] Other agencies have too few decided cases to draw any conclusions. There, too, we will learn more as courts issue more decisions.

Our survey of circuit decisions following *Loper Bright* ultimately leaves us back in the same boat. Overall, the circuit courts remain more likely to uphold agency action than not, and at similar rates as they did under *Chevron*, hovering around two agency wins for every loss. This result largely carries across agencies, sub-agencies, and circuits, though increased variability across circuits is a potential trend to watch.

A final caveat: This data is not a sextant. As legal academics have noted, predicting the precise impact of a particular standard of review is more difficult than it appears because of the high number of potentially confounding variables.[103] After all, the composition of cases coming to the federal court system changes with the litigants and issues of the day. And litigants often choose a particular court in which to litigate, creating unevenness in which courts hear contentious regulatory challenges.[104] Further, this data does not attempt to weigh cases by importance, nor does it eliminate redundancy where multiple circuits decide the same issue. For example, since *Loper Bright*, multiple circuits (sometimes more than once) have had to review the Board of Immigration Appeal's interpretation of the timing rules for evaluating age of eligibility under 8 U.S.C. § 1229b(b)(1)(D).[105] Forthcoming research focused on "major rules" sug-

[102] Another interesting question is whether results may differ depending on whether a challenge arrives at the circuit court directly following an administrative adjudication or first passes through the district court.

[103] Cass R. Sunstein, *Our* Marbury*:* Loper Bright *and the Administrative State*, 74 Duke Law J. 1893 (2025).

[104] *See, e.g.*, *Conference Acts to Promote Random Case Assignment*, U.S. Cts. (Mar. 12, 2024), https://www.uscourts.gov/data-news/judiciary-news/2024/03/12/conference-acts-promote-random-case-assignment.

[105] 8 U.S.C. § 1229b(b)(1)(D). *See Ceniceros v. Bondi*, No. 24-3345, 2025 WL 1012712 (6th Cir. Mar. 31, 2025) (upholding BIA interpretation); *Gonzalez-Juarez v. Bondi*, 137 F.4th 996 (9th Cir. 2025); *Rangel-Fuentes v. Bondi*, 155 F.4th 1138 (10th Cir. 2025); *Pina v. U.S. Att'y Gen.*, No. 24-12590, 2025 WL 1216719 (11th Cir. Apr. 28, 2025); *Diaz-Arellano v. U.S. Att'y Gen.*, 120 F.4th 722 (11th Cir. 2024). Each of these cases is a unique government win in the underlying data, but an argument could be made

gests lower agency win rates and an overall trend toward slightly reduced agency wins over time (while the challenge rate has risen), though these trends predate *Loper Bright*.[106] But it is safe to say that the early data does not support the notion that *Loper Bright* is a tidal wave set to wash away the administrative state.

IV. Takeaways for civil litigators

Our odyssey through the post-*Loper Bright* seascape leaves us with several observations of the legal world we navigate moving forward.

A. Start with the statute

First and foremost, *Loper Bright* emphasizes the primacy of a judicial approach to statutory interpretation. Statutory analysis must speak the language of the judiciary, not the agency. *Loper Bright* mandates that courts must exercise "independent legal judgment."[107] Good advocates will help them do that, "applying all relevant interpretive tools."[108] Many practitioners have collected the Supreme Court's maxims of statutory interpretation. Use them.[109] Indeed, this is the ground on which the litigants in *3M* fought.

B. Address the boundaries of delegations of authority

Agencies have more room to maneuver when they act within an express congressional delegation of authority. Though coverage of the potential for the Supreme Court to make a significant change in this area by reviving the nondelegation doctrine has been as breathless as the pre-*Loper Bright* coverage, no such change has come to pass so far.[110] As the Supreme Court itself stated, "[W]hen a particular statute delegates authority to an agency consistent with constitutional limits, courts *must* respect the delegation."[111] The courts' role is simply to ensure agencies

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that this may give too much weight to a single issue simply because challenges have been brought repeatedly across the country.

[106] Libby Dimenstein, Donald L. R. Goodson & Tyler Szeto, *Major Rules in the Courts: An Empirical Study of Challenges to Federal Agencies' Major Rules*, 13 Tex. A&M L. Rev. 1 (2025).

[107] *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 373 (2024).

[108] *Id.*

[109] *See, e.g.*, Valerie C. Brannon, Cong. Rsch. Serv., Statutory Interpretation: Theories, Tools, and Trends (2023).

[110] *Cf. Fed. Commc'ns Comm'n v. Consumers' Rsch.*, 606 U.S. 656 (2025) (showing no changes related to the nondelegation doctrine).

[111] *Loper Bright*, 603 U.S. at 413 (emphasis added).

act within those delegations and "police the[ir] outer statutory boundaries."[112]

A natural takeaway is that this places an increased focus on the existence and scope of delegations of authority. Civil litigators would do well to crisply identify and explain the scope of applicable delegations of authority to assist courts in this endeavor whenever there is a challenge to agency action.

C. Agencies still have specialized expertise

As acknowledged in *Loper Bright* and reflected in decisions since, agency expertise continues to carry significant persuasive weight. This is especially true when an agency's position has been longstanding, consistent, and repeatedly relied upon.[113] Agencies do not arrive at final action in a vacuum. Decisions are informed by history, expertise, and practical knowledge. Thus, as was the case in *Lissack*, it should not be surprising that the agency's position is often the best interpretation of a statute.

This sword, however, has a second edge: When an agency waffles or shifts its interpretation of a statute, it could undermine the potential influence of the agency's position. Indeed, the Eighth Circuit cited shifting interpretations of 26 U.S.C. § 482 in refusing to accept the IRS's view in *3M*.[114] Thus, advocates defending agency action must not only understand the full history of the agency's approach to statutory interpretation but must also be able to explain why that approach has evolved when it has changed over time.

D. Judges are human

Regardless of whether a court is applying *Chevron* or *Loper Bright*, it is fundamentally trying to answer a simple question: Is what the agency did reasonable? At least one empirical study of agency deference has posited

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[112] *Id.* at 404.

[113] *See, e.g.*, *Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. 748, 782–83 (2025) (citing consistent 26-year Executive Branch reading of statutory term as "buttress[ing]" the Court's ultimate interpretation); *Bondi v. VanDerStok*, 604 U.S. 458, 480 (2025) (noting "decades" of consistent agency interpretation in upholding ATF rule under *Loper Bright*); *Thaler v. Perlmutter*, 130 F.4th 1039 (D.C. Cir. 2025) (emphasizing that agency application of the term "author" had been consistent since the 1960s); *Perez v. Owl, Inc.*, 110 F.4th 1296 (11th Cir. 2024) (noting agency's 80-year consistency). *See also Nuclear Regul. Comm'n v. Texas,* 605 U.S. 665, 683 (2025) (noting 50-year history of agency interpretation, but without deciding merits challenge to agency action). *Cf. City & Cnty. of San Francisco v. EPA*, 604 U.S. 334, 355 (2025) (noting "arguably inconsistent" agency positions over time in rejecting EPA guidance under *Loper Bright*).

[114] 26 U.S.C. § 482.

that judges decide regulatory law cases for "unarticulated" reasonableness reasons that they merely dress in the language of legal tests.[115] Getting overly wrapped up in legal doctrines is an easy way to miss the big picture.

It is important to not forget the adage so many experienced litigators emphasize: Judges are humans. You must tell a story, and that story should explain why the agency's action is the most reasonable approach to the problem the statute is trying to solve. Do not be so captivated by the legal twists and turns of the applicable test that you forget the commonsense reasons the agency's interpretation should prevail.

E. There is much that *Loper Bright* did not change

Do not be taken in by the breathless commentators: Early data and case results do not support any great unraveling of the administrative state. Recall all that *Loper Bright* has not changed. The entirety of the APA remains intact and still says what it says. Agency views and expertise are still important and persuasive, and we can still look to *Skidmore*, *Kisor*, and *Auer* to defer to them.[116] Agencies still possess the powers Congress has given them, and past decisions based on *Chevron* remain standing.

This is not to say that there are no interesting legal fights ahead. *Loper Bright* invites us to deeply engage with the language of the statutes that Congress charges agencies with enforcing. (If you are a word nerd who likes diagramming sentences and reading the dictionary, get excited.) And courts will need to wrestle with the boundaries of delegations of authority and statutory *stare decisis*. But there is no need to flee to higher ground. The waves may be moving a dune here or there as they have always done, but we remain sitting on the same old beach.

About the Author

Lindsay L. Clayton is an Assistant Director in the Civil Division's Tax Litigation Branch, where she oversees and reviews attorneys litigating civil tax cases nationwide, focused in the Ninth and Tenth Circuits. She is a regular instructor at the Department's National Advocacy Center on topics including dispositive motions practice, negotiation, and civil discovery. Before the Tax Division's dissolution in 2025, she was an Assistant Chief with the Western Civil Trial Section. She has played a key role in the litigation of regulatory challenges under the APA, employee retention credits, foreign banking and information reporting penalties, complex corporate and individual Chapter 11 bankruptcies, IRS summons disputes,

[115] Zaring, note 97, at 186–87.
[116] *Skidmore*, 323 U.S. at 134; *Kisor*, 588 U.S. at 558; *Auer*, 519 U.S. at 452.

jeopardy levies, white-collar fraud, tax procedure, and listed transactions. Before 2017, she served as a Tax Division Trial Attorney, handling a varied docket including complex estate and gift tax issues, research credits, the domestic production activities deduction, and the extraterritorial income exclusion regime. During her time as a Trial Attorney, she handled both jury and bench trials and engaged in extensive civil discovery and motions practice. In addition, she successfully obtained a writ of *ne exeat republica*, one of only a handful the Department has sought. In 2004, she graduated *summa cum laude* from Dartmouth College with a Bachelor of Arts in Economics. In 2007, she graduated from Yale Law School. Before joining the Department, she spent three years as an associate with the Washington, D.C. office of Skadden, Arps, Slate, Meagher & Flom LLP.

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Uniformed Services Employment and Reemployment Rights Act: Dole Act 2025 Updates

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The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) was designed to protect uniformed service members from employment discrimination based on their service and to require the prompt reemployment of those members when they complete their service.[1] USERRA allows various agencies to prescribe regulations.[2] State and local laws may offer more protections, but USERRA preempts any lower benefits or more stringent restrictions.[3]

The Senator Elizabeth Dole 21st Century Veterans Healthcare and Benefits Improvement Act, enacted on January 2, 2025, made several changes to USERRA with the intent to improve the reemployment rights of service members.[4] Understanding these changes is important to successfully litigating USERRA cases.[5]

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[1] 38 U.S.C. §§ 4301–4335.

[2] *See id.* § 4331; 20 C.F.R. §§ 1002.1–1002.314 (Department of Labor regulations); 5 C.F.R. §§ 353.101–353.304 (Office of Personnel Management regulations). Other agencies may have their own guidance. *See, e.g.*, U.S. Dep't of Def., DoD Instruction 1205.12: Civilian Employment and Reemployment Rights for Service Members, Former Service Members, and Applicants of the Military Services (2024). States may also have laws that provide similar protections or attempt to fill perceived gaps. *See, e.g.*, 330 Ill. Comp. Stat. Ann. 61/1-1 to 61/40-5 (Illinois Service Member Employment and Reemployment Rights Act).

[3] *See* 38 U.S.C. § 4302. *See also, e.g.*, *Kutz v. Bonita Springs Fire Control & Rescue Dist.*, No. 25-CV-152-SPC-NPM, 2026 WL 444924, at *4 (M.D. Fla. Feb. 17, 2026) (refusing to require service member to exhaust union collective bargaining agreement grievance procedure before bringing USERRA claim).

[4] Senator Elizabeth Dole 21st Century Veterans Healthcare and Benefits Improvement Act, Pub. L. No. 118-210, § 221, 138 Stat. 2706, 2778–80 (2025) [hereinafter Dole Act].

[5] This article is not an in-depth discussion of the various aspects of USERRA but rather provides this information as background to help understand the changes in the Dole Act. As a result, this article only generally discusses the basic provisions of

I. USERRA basics

"Congress enacted USERRA as an exercise of its [constitutional] power '[t]o raise and support Armies' and '[t]o provide and maintain a Navy.'"[6] USERRA was not the first act to protect uniformed service members but is rather part of a broader tradition of such protection.[7]

USERRA generally applies to past, current, and future members of the uniformed services.[8] USERRA broadly defines "uniformed services" to mean the following:

> Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the Commissioned Corps of the Public Health Service, the commissioned officer corps of the National Oceanic and Atmospheric Administration, System members of the National Urban Search and Rescue Response System during a period of appointment into Federal service under section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, intermittent personnel who are appointed into Federal Emergency Management Agency service under section 306(b)(1) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5149(b)(1)) or to train for such service, and any other category of persons designated by the President in time of war or national emergency.[9]

Although it is not possible to calculate exactly how many individuals USERRA does or will protect, it is certainly in the millions. As of March 31, 2026, there were 2,106,961 members of the Armed Forces, including 771,212 members of the reserve component.[10] This number does not in-

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USERRA. Further research is necessary to determine whether USERRA applies to any specific set of facts.

[6] *Torres v. Texas Dep't of Pub. Safety*, 597 U.S. 580, 587 (2022) (quoting U.S. CONST., art. I, § 8, cls. 12–13).

[7] *See, e.g.*, *id.* at 585 (discussing predecessor statute). *See also* Nicole Siegel et al., *Protecting Those Who Protect Us: An Introduction to the Servicemembers Civil Relief Act and Uniformed Services Employment and Reemployment Rights Act for AUSAs Interested in Starting a Servicemembers and Veterans Practice*, 70 DOJ J. FED. L. & PRAC. 143, 145 (2022) (overview of related protections).

[8] *See, e.g.*, 38 U.S.C. § 4311 (preventing discrimination, retaliation, and reprisal against uniformed service members); *id.* § 4312 (granting certain reemployment rights to uniformed service members).

[9] *Id.* § 4303(17). *See also id.* § 4303(13) (broadly defining "service in the uniformed services").

[10] *DoD Personnel, Workforce Reports & Publications: Military Personnel: Military and Civilian Personnel by Service/Agency by State/Country (Updated Quarterly):*

clude those who have honorably completed their service, who are also protected, including an additional estimated 17,588,000 living veterans.[11] Nor does it include those who intend to serve in the future, who cannot, for example, be discriminated against because of their desire to serve.[12] And, to have an accurate count, we would need to also address protected individuals who have, are, or will serve in other uniformed services, such as the Commissioned Corps of the Public Health Service.[13] Moreover, USERRA protects individuals against reprisal even if they are not uniformed service members.[14]

USERRA protects individuals in a variety of ways. USERRA prohibits employment discrimination and reprisal against service members based on their past, present, or future service.[15] And—subject to certain conditions and potential defenses—USERRA grants reemployment rights to uniformed service members when they are absent from work because of their service.[16] USERRA intends that this reemployment be "prompt."[17] These protections extend to employees in the private sector, in state and local governments, and in federal agencies.[18] USERRA uses "employee"

March 2026, U.S. Dep't of Def., Def. Manpower Data Ctr., (Mar. 31, 2026), https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/workforce-reports. "The term 'Armed Forces' means the United States Army, Navy, Marine Corps, Air Force, Space Force, and Coast Guard, including the reserve components thereof." 38 U.S.C. § 101(10). The "reserve component" includes members of the Army National Guard, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard, Air Force Reserve, and Coast Guard Reserve. *Id.* § 101(27).

[11] *See National Center for Veterans Analysis and Statistics: Veteran Population: Population Tables, The Nation*, U.S. Dep't of Veterans Affs., https://www.va.gov/vetdata/veteran_population.asp (last visited June 9, 2026) (expand section titled "Population Tables" and open any table under "The Nation" heading). *Practice Note*: USERRA does not apply to individuals who received certain characterizations of their service, such as under other than honorable conditions. 38 U.S.C. § 4304.

[12] *See, e.g.*, 38 U.S.C. § 4311(a) (protecting "[a] person who . . . applies to be a member of . . . applies to perform, or has an obligation to perform service in a uniformed service").

[13] *Cf. id.* § 4303(17) (defining "uniformed services").

[14] *Id.* § 4311(b) (extending protections to individuals "regardless of whether that person has performed service in the uniformed services").

[15] *Cf. id.* § 4311 (prohibiting discrimination and acts of reprisal against persons who serve in the uniformed services).

[16] *Id.* § 4312.

[17] *Id.* § 4301(a)(2). *See also id.* § 4313(a) (a person entitled to reemployment "shall be promptly reemployed").

[18] *See, e.g.*, *id.* § 4303(4) (defining "employer" broadly to include "the Federal government" and "a State"); *id.* § 4303(5) (defining "federal executive agency" to include many, but not all, federal agencies); *id.* § 4303(6) (defining "Federal government" to include "any Federal executive agency, the legislative branch of the United States, and the judicial branch of the United States"); *id.* § 4303(14) (defining "State" to include

to mean the following:

> [A]ny person employed by an employer. Such term includes any person who is a citizen, national, or permanent resident alien of the United States employed in a workplace in a foreign country by an employer that is an entity incorporated or otherwise organized in the United States or that is controlled by an entity organized in the United States, within the meaning of [38 U.S.C. § 4319(c)].[19]

USERRA defines "employer" as "any person, institution, organization, or other entity that pays salary or wages . . . or that has control over employment opportunities."[20] Consistent with the broad definition of "employer," some courts have allowed personal liability in USERRA actions.[21] Although some federal agencies are excluded from the definition of the term "employer," they may still be required to implement USERRA in their own policies.[22]

But USERRA's protections go even further. Consistent with the goals of encouraging service and minimizing the disruption of service to the lives of those who serve, USERRA requires in many instances that employees returning from service be reemployed at an "escalator position," that is, the position they would have been employed in if they had not been called away for service.[23] And USERRA generally intends that reemployed service members retain all their seniority rights, as if they had not been called away for service.[24] As the Supreme Court described a USERRA precursor: A returning service member "does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continually during [service]."[25] However, this may result in unfavorable outcomes if, for example, the employer eliminated the employee's position while the

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"agencies and political subdivisions").

[19] *Id.* § 4303(3). *See also id.* § 4319(c) ("For the purpose of this section, the determination of whether an employer controls an entity shall be based upon the interrelations of operations, common management, centralized control of labor relations, and common ownership or financial control of the employer and the entity.").

[20] *Id.* § 4303(4). *See also, e.g.*, *United States v. Dep't of Health & Env't*, 162 F.4th 1238, 1244–47 (10th Cir. 2025) (discussing control test and concept of joint employers).

[21] *See, e.g.*, *Risner v. Ohio Dep't of Rehab. & Corr.*, 577 F. Supp. 2d 953, 966–67 (N.D. Ohio 2008) (refusing to dismiss complaint against individual defendants).

[22] *See* 38 U.S.C. § 4315. *See also id.* § 4325 (providing for inspector general enforcement); *id.* § 4301(b) ("It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter.")

[23] *Id.* § 4301(a); *id.* § 4313. *See also id.* §§ 4314–4315 (regarding federal employees).

[24] *Id.* § 4316.

[25] *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284–85 (1946).

employee was away.[26]

Returning employees may have protection from discharge "except for cause"—with the length of protection depending on how long they were performing service.[27] Additionally, USERRA contains specific provisions to protect employees' interests in health and pension plans.[28]

Along with these significant protections, USERRA includes a robust system for compliance and enforcement. The Department of Labor (DOL), the Department of Justice (Department), the U.S. Office of Special Counsel (OSC), and Inspectors General of certain agencies are tasked with enforcing USERRA.[29] The Department has jurisdiction over USERRA complaints referred by the DOL against state and local government employers and private employers.[30] The OSC, after referral of a complaint from the DOL, and Inspectors General of certain agencies have jurisdiction over USERRA complaints against federal government employers.[31] The DOL, the Department, and OSC have established how they will accomplish USERRA's objectives.[32] Service members and their families can ask for informal assistance from the Employer Support of the Guard and Reserve, an office within the Department of Defense.[33]

Affected individuals can seek assistance through the DOL from Veterans' Employment and Training Service (VETS), who will investigate the complaint and attempt to resolve the issue.[34] After the investigation, the complainant may ask VETS to refer the complaint to the Department or to the OSC, as applicable.[35] At the Department, the Civil Rights Division enforces USERRA against state and local government employers and private employers.[36] "Since DOJ assumed USERRA enforcement author-

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[26] *See* 20 C.F.R. § 1002.194.
[27] 38 U.S.C. § 4316(c).
[28] *Id.* §§ 4317–4318.
[29] *See generally id.* §§ 4322–4325 (enforcement of rights).
[30] *See id.* § 4323.
[31] *See id.* §§ 4324–4325.
[32] *See, e.g.*, Memorandum from James D. Rodriguez, Acting Assistant Sec'y for Veterans' Emp. & Training, Dep't of Lab. & Kristen M. Clarke, Assistant Att'y Gen. for the C.R. Div. of the Dep't of Just. on the Uniformed Services Employment and Reemployment Rights Act of 1994, as Amended to U.S. Dep't of Lab. & U.S. Dep't of Just. (Dec. 8, 2021).
[33] *See Who is ESGR*, U.S. Dep't of Def., https://www.esgr.mil/About-ESGR/Who-is-ESGR (last visited June 9, 2026).
[34] *See* 38 U.S.C. §§ 4321–4322, 4326–4327; *USERRA—Uniformed Services Employment and Reemployment Rights Act*, U.S. Dep't of Lab., https://www.dol.gov/agencies/vets/programs/userra (last visited June 9, 2026).
[35] 38 U.S.C. §§ 4323(a)(1), 4324(a).
[36] *See, e.g.*, *Employment*, U.S. Dep't of Just., (Nov. 4, 2024), https://www.justice.gov/servicemembers/employment-0.

ity in 2004 and through the end of FY 2024, it has filed 119 USERRA lawsuits and favorably resolved 221 USERRA complaints either through consent decrees obtained in those lawsuits or through facilitated private settlements."[37]

Individuals may also file their own lawsuits against private employers or state and local governments.[38] Individuals may sue private employers in federal district court, but they must sue states in state court.[39]

USERRA may interact with other laws designed to protect service members. Given the potential length of any civil litigation, service members may be concerned about the impact of, for example, being called again to serve on active duty. In these situations, service members may be entitled to a stay of the litigation under the Servicemembers Civil Relief Act.[40] There is no requirement to exhaust administrative remedies before service members file a lawsuit, so long as the service members have not yet requested that VETS investigate their complaint.[41] If the complainants file with VETS, they will have to wait for VETS to close their file before filing suit.[42] And if they request that the Attorney General then file suit, they will have to wait for the Attorney General's decision.[43] Similarly, federal employees may initiate an action with the MSPB.[44] They may do so after working with VETS without a resolution or after OSC declines to represent them.[45] Like suits against state and private employers, if individuals first file a complaint with VETS, they will have to wait for VETS to close their file before filing suit.[46] And if they ask VETS to refer the

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[37] U.S. Dep't of Lab., USERRA Annual Report to Congress: Fiscal Year 2024 10 (2025).

[38] 38 U.S.C. § 4323(a)(3).

[39] *Id.* § 4323(b); *Shadle v. Pennsylvania State Sys. of Higher Educ.*, No. 25-CV-476-MWB, 2025 WL 3296312, at *5 (M.D. Pa. Nov. 26, 2025) (discussing how courts interpreting the language in section 4323(b) normally require individuals to sue states in state court). *See also* 38 U.S.C. § 4323(i) (defining "private employer" to include "a political subdivision of a State" for the enforcement section).

[40] *See generally* 50 U.S.C. § 3932 (stay of proceedings when servicemember has notice). *See also* Siegel et al., note 7, at 147–48 (discussing the SCRA in more depth).

[41] *See* 38 U.S.C. § 4323(a)(3).

[42] *See generally id.* (providing information on commencing action for relief with respect to a complaint against an employer); 20 C.F.R. §§ 1002.303–1002.304 (codifying enforcement of rights and benefits against a state or private employer).

[43] *See generally* 38 U.S.C. § 4323 (enforcement of rights with respect to a state or private employer); 20 C.F.R. §§ 1002.303–1002.304 (codifying enforcement of rights and benefits against a state or private employer).

[44] 38 U.S.C. § 4324(b).

[45] *Id.* §§ 4322, 4324(b).

[46] *See id.* § 4324(b); 5 C.F.R. § 1208.11(b)–(c).

complaint to OSC, they will have to wait for OSC's decision.[47] To reduce wait time, individuals may bypass these administrative remedies and file with the MSPB directly.[48]

Congress' intent for USERRA to be powerful is evident in the statute's language and design. Among other features, USERRA contains no statute of limitations or minimum employee requirement.[49] Some courts have even applied USERRA to find individual liability.[50] USERRA includes significant reporting and notice requirements.[51] The Dole Act, for example, added a requirement that the Government Accountability Office submit a report regarding protections in the intelligence community.[52] USERRA applies to employees who work outside of the United States if they work for a U.S. employer or one controlled by a U.S. entity.[53] And, as previously discussed, it applies to private employers, states, local governments, and certain federal agencies alike.[54] Accordingly, the Supreme Court has rejected the argument that USERRA improperly violates state sovereign immunity.[55]

II. The Dole Act 2025 updates

A. Clarification of USERRA's purposes

USERRA has always protected former services members, regardless of whether they completed one enlisted period or retired after a long career.[56] But, as originally enacted, USERRA stated that one of its purposes

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[47] *See* 38 U.S.C. § 4324; 5 C.F.R. § 1208.11(b)–(c).

[48] 38 U.S.C. § 4324(b); 5 C.F.R. § 1208.11(a).

[49] *See, e.g.*, 38 U.S.C. § 4327(b) ("If any person seeks to file a complaint or claim ... under this chapter alleging a violation of this chapter, there shall be no limit on the period for filing the complaint or claim."); *Won v. Amazon.com Servs. LLC*, 807 F. Supp. 3d 178, 185 (E.D.N.Y. 2025) ("As [the plaintiff] notes, [USERRA] has no statute of limitations."). *See also, e.g.*, 38 U.S.C. § 4303(4) (defining private employer without size limitation); *id.* § 4303(14) (applying USERRA to state and local governments without size limitation); *id.* § 4303(5) (identifying agencies to which USERRA applies).

[50] *See, e.g.*, *Bello v. Vill. of Skokie*, 151 F. Supp. 3d 849, 859 (N.D. Ill. 2015).

[51] 38 U.S.C. § 4334 (requiring employers to provide notice of USERRA rights to their employees). *See id.* § 4332(a). *See generally* USERRA Annual Report to Congress, note 37, at 11–28 (reporting requirements).

[52] Dole Act § 221(g), 138 Stat. at 2779–80.

[53] *See* 38 U.S.C. § 4303(3) (defining employee); *id.* § 4319.

[54] *See id.* § 4323.

[55] *Torres v. Texas Dep't of Pub. Safety*, 597 U.S. 580, 584 (2022).

[56] *See, e.g.*, 38 U.S.C. § 4301(a)(3) (1994) (purpose includes "to prohibit discrimination against persons because of their service in the uniformed service"); *id.* § 4311(a) (1994) (protecting "[a] person who ... has performed ... service").

was to "encourage *noncareer* service in the uniformed services."[57]

Including the term *noncareer* as part of the purpose of USERRA was unclear, at best, and risked confusion. For example, a service member recently tried to extend USERRA coverage by relying on the "noncareer" language.[58] And the Federal Circuit has developed a waiver rule drawing a distinction between individuals who leave their civilian jobs to take noncareer positions and those who leave to take career positions based on this language.[59] From this confusion, the Dole Act removed the word *noncareer* from the purpose section of USERRA.[60]

Arguably, the initial USERRA provisions addressed any distinction between career and noncareer service. For example, reemployment generally requires "advance written or verbal notice" to the employer before service.[61] And the service member is only entitled to reemployment if "the cumulative length of the absence and of all previous absences from a position of employment with that employer by reason of service in the uniformed services does not exceed five years," that is, not the length of a career.[62] Note, however, that the five-year limit is not as friendly to employers as it first appears since USERRA excludes several types of service from the calculation.[63]

Employers may also raise defenses, including change of circumstances and undue hardship.[64] There are also time limits for service members to apply for reemployment after their service ends, depending on the duration of service.[65] Failure to follow those time limits, however, "shall not automatically forfeit" their entitlement to reemployment; instead, those individuals are then "subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline

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[57] *Id.* § 4301 (a)(1) (emphasis added).

[58] *See Bjelobrk v. Suffolk Cnty.,* No. 23-CV-8811-HG, 2025 WL 711791, at *7 (E.D.N.Y. Mar. 5, 2025), *on reconsideration*, No. 23-CV-08811 (HG), 2025 WL 1043624 (E.D.N.Y. Apr. 8, 2025).

[59] *See Erickson v. U.S. Postal Serv.,* 636 F.3d 1353, 1354–55 (Fed. Cir. 2011) (citing *Woodman v. Off. of Pers. Mgmt.*, 258 F.3d 1372, 1376 (Fed. Cir. 2001) (addressing Veterans' Reemployment Rights Act of 1974)).

[60] Dole Act § 221(a).

[61] 38 U.S.C. § 4312(a)(1). *But see id.* § 4312(b) (no notice required if "precluded by military necessity or, under all of the relevant circumstances, the giving of such notice is otherwise impossible or unreasonable").

[62] *See id.* § 4312(a)(2). *See also Erickson,* 646 F.3d at 1357 (recognizing that returning within five years supports claim that employee's service was noncareer and he had not abandoned his civilian job).

[63] 38 U.S.C. § 4312(c).

[64] *Id.* § 4312(d).

[65] *Id.* § 4312(e).

with respect to absence from scheduled work."[66]

Finally, USERRA provides the following:

> In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and *duration* of the person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services, *shall not be a basis for denying protection of this chapter* if the service does not exceed the limitations set forth in subsection (c) [the 5-year limit] and the notice requirements established in subsection (a)(1) [prior to service] and the notification requirements established in subsection (e) [after completing service] are met.[67]

On a plain reading, this language should prohibit drawing a distinction between career and noncareer service without some other explicit distinction elsewhere. And this language has been part of USERRA since its enactment.[68] Although perhaps it should not have been necessary, removing the term *noncareer* from the purposes of USERRA should remove any distinction not explicitly in the statute between career and noncareer service.

B. Prohibiting retaliation

Section 4311(a) is the core USERRA provision protecting uniformed services members from discrimination. Since its enactment, the section has prohibited certain discriminatory acts against a uniformed service member based on past, present, or future service:

> (a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.[69]

Section 4303 broadly defines "benefit of employment," "benefit," and "rights and benefits" to mean the following:

> [T]he terms, conditions, or privileges of employment, including any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed) that

[66] *Id.* § 4312(e)(3).
[67] *Id.* § 4312(h) (emphasis added).
[68] *Id.* § 4312(h) (1994).
[69] *Id.* § 4311(a).

> accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.[70]

Section 4311(b), as originally enacted, explained that discrimination occurs when service "is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of" the service.[71] The Supreme Court has noted the similarity between the language used in USERRA and Title VII.[72] In *Staub v. Proctor Hospital,* a significant case in the development of the "cat's paw" theory of liability, the Supreme Court interpreted USERRA's "motivating factor" language to mean "that if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA."[73] The original section 4311(c) prohibited reprisal.[74] The Veterans' Benefits Improvement Act of 1996 made no changes to section 4311(a), but rewrote sections (b) and (c) in a way that provided for more clarity on what qualified as reprisal and what standard and burden of proof applied:

> (b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person

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[70] *Id.* § 4303(2). *See also, e.g.*, *Brake v. Liberty Univ., Inc.*, No. 25-CV-17-NKM, 2026 WL 581209, at *5 (W.D. Va. Mar. 2, 2026) (finding cell phone subsidy a benefit of employment).

[71] 38 U.S.C. § 4311(b) (1994).

[72] *See Staub v. Proctor Hosp.,* 562 U.S. 411, 417 (2011).

[73] *Id.* at 422 (footnotes omitted). A cat's paw case is where a plaintiff seeks "to hold his employer liable for the animus of a supervisor who was not charged with making the ultimate employment decision." *Id.* at 415 (citing *Staub v. Proctor Hosp.*, 560 F.3d 647, 655–56 (7th Cir. 2009)). The plaintiff must prove that "nondecisionmaker exercised such 'singular influence' over the decisionmaker that the decision to terminate was the product of 'blind reliance.'" *Id.* at 415–16 (quoting *Staub*, 560 F.3d at 659).

[74] 38 U.S.C. § 4311 (1994).

regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited—

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.[75]

To prohibit retaliation, the Dole Act maintained this language with one change: adding "or other retaliatory action" after "adverse employment action" in section 4311(b).[76] It now begins: "An employer may not discriminate in employment against or take any adverse employment action *or other retaliatory action* against any person because such person" has, generally, engaged in protected activity under USERRA.[77]

This amendment broadened the conduct considered as reprisal. The "adverse employment action" language was potentially problematic for claimants because many jurisdictions required a showing that the employment action was *materially* or *significantly* adverse, or similar language, consistent with other civil rights statutes.[78] For example, jurisdictions im-

[75] Veterans' Benefits Improvements Act of 1996, Pub. L. No. 104-275, § 311(3), 110 Stat. 3334. *Practice Note:* This act also separated a sentence from what was previously section (c) to create 38 U.S.C. § 4311(d): "The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title." 38 U.S.C. § 4311(d).

[76] Dole Act § 221(b), 138 Stat. at 2778.

[77] 38 U.S.C. § 4311(b) (emphasis added).

[78] *See, e.g., Espinoza v. City of Seattle,* 458 F. Supp. 3d 1254, 1271 (W.D. Wash. 2020) ("[A] number of other courts have concluded that a USERRA plaintiff must establish

posing that requirement may have defined "[a] materially adverse action [a]s one that 'significantly alters the terms and conditions of an employee's job,' such as 'termination, demotion accompanied by a decrease in pay, or a material loss of benefits or responsibilities.'"[79]

By extending USERRA's retaliation provision to include "other retaliatory action[s]," the Dole Act extended USERRA's anti-discrimination and anti-retaliation provisions to cover actions that may not have qualified under those more restrictive tests.

This change is consistent with the Supreme Court's decision in *Muldrow v. City of St. Louis*, which found that an employee alleging a violation of Title VII of the Civil Rights Act of 1964 did not need to show a materially adverse action in a discrimination claim.[80] The Supreme Court required only "some harm," not "significant," "serious," "substantial," or a similarly heightened standard.[81] Although *Muldrow* did not address retaliation, the Supreme Court specifically focused on the text of the statute in its ruling.[82] Like Title VII, USERRA's text does not contain any heightened standard for discrimination or retaliation.

Moreover, the "other retaliatory action" language is not limited to "employment" actions. This should also overcome any lingering requirement that a retaliatory action must be directly related to employment.[83] Recognizing that retaliation can occur in ways not directly tied to employment is consistent with the Supreme Court's interpretation of Title VII's anti-retaliation provision.[84]

C. Expanding injunctive relief

USERRA contains specific provisions about enforcing the rights it provides against a state or private employer.[85] Since USERRA's inception,

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he or she suffered a 'materially adverse' employment action to sustain a discrimination or retaliation claim under USERRA.")

[79] *Id.* (quoting *Spann v. City of Los Angeles*, No. CV 14-1751-ABC-AGRX, 2014 WL 12703994, at *3 (C.D. Cal. Apr. 3, 2014)).

[80] 601 U.S. 346, 357–58 (2024).

[81] *Id.* at 355.

[82] *See id.* at 350.

[83] *See, e.g.*, *Kitlinski v. Merit Sys. Prot. Bd.*, 857 F.3d 1374 1381 (Fed. Cir. 2017) (finding that a Blackberry device allegedly placed under hood of employee's car to record him after he filed multiple USERRA complaints was not retaliation under USERRA because it was not "discrimination in employment" or an "adverse employment action").

[84] *See Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 57 (2006) ("We conclude that the antiretaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace.").

[85] 38 U.S.C. § 4323.

those provisions have allowed the court to use equity powers against state or private employers.[86] USERRA's language allows equitable remedies even if the claimant does not establish monetary damages.[87] As originally enacted, USERRA provided that the court had jurisdiction "to require the employer to comply" with USERRA, among other remedies.[88] That language remains as an available remedy.[89]

USERRA also originally provided that "[t]he court *may* use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter."[90] This language was amended in 2008 to reflect that the court "*shall* use, in any case in which the court determines it is appropriate," those measures.[91]

The Dole Act goes one step further by eliminating this section and replacing it with one that generally allows equitable remedies but requires an injunction to stop an employer from violating USERRA when the claimant meets a specific standard:

> **Equity powers**.–(1) The court shall use, in any case in which the court determines it is appropriate, its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.
>
> (2) A person bringing an action to enforce a provision of this chapter pursuant to subsection (a) *shall* be entitled to an injunction under paragraph (1) if such person demonstrates–
>
> > (A) a violation–
> >
> > > (i) of the provisions of this chapter; or
> > > (ii) of the provisions of this chapter is threatened or is imminent;
> >
> > (B) the harm to the person outweighs the injury to the employer;
> >
> > (C) a likelihood of success on the merits of such action; and
> >
> > (D) awarding such relief is in the public interest.

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86 *Id.* § 4323(c)(3) (1994).

87 *See, e.g.*, *Hill v. Michelin N. Am., Inc.*, 252 F.3d 307, 316 n.5 (4th Cir. 2001).

88 38 U.S.C. § 4323(c)(1)(A)(i)–(iii) (1994).

89 *Id.* § 4323(d)(1) (2025) ("The Court may require the employer to comply with the provisions of this chapter.").

90 *Id.* § 4323(c)(3) (1994) (emphasis added).

91 *Id.* § 4323(e) (1996).

> (3) The court may not deny a motion for injunctive relief on the basis that a party bringing an action to enforce a provision of this chapter may be awarded wages unearned due to an unlawful termination or denial of employment at the conclusion of such action.[92]

Ordinarily, to obtain an injunction a party must show four factors: (1) "that they are likely to succeed on the merits"; (2) "that they are likely to suffer irreparable harm in the absence of preliminary relief"; (3) "that the balance of equities tips in their favor"; and (4) "that an injunction would be in the public interest."[93] The Dole Act eliminates the need for a USERRA claimant to show irreparable harm, replacing it with a requirement to show an occurring, threatened, or imminent violation of the statute.[94] This change is especially striking given the Supreme Court's emphasis on showing irreparable harm in other contexts.[95] And the Dole Act removes any argument by the employer that the harm cannot be irreparable because the court may award lost wages at the end of litigation.[96]

Although the Dole Act also modified the third factor ("that the balance of equities tips in their favor") and replaced it with whether "the harm to the person outweighs the injury to the employer," it is not initially clear whether or how this change will affect decisions.[97]

The overall changes from the Dole Act, however, should make obtaining injunctions in USERRA cases easier in every jurisdiction. Given the varying ways that the circuits apply the four factors, this change may have even more impact in some circuits than others.[98] When one factor is easier to prove, it may increase the likelihood of obtaining an injunction. Though the Department would object to doing so, it is unknown whether courts may impose upon USERRA claimants any different or heightened requirements than those set forth in the statute depending on the relief requested.[99]

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92 *Id.* § 4323(e) (2025) (emphasis added).

93 *Mahmoud v. Taylor*, 606 U.S. 522, 546 (2025) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

94 *See* 38 U.S.C. § 4323(e).

95 *See Winter,* 555 U.S. at 375–76 (rejecting "possibility" standard in favor of requiring plaintiff to "demonstrate that irreparable injury is *likely* in the absence of an injunction").

96 *See* 38 U.S.C. § 4323(e)(3).

97 *Id.* § 4323(e). *See Mahmoud,* 606 U.S. at 546 (citing *Winter*, 555 U.S. at 20).

98 *See, e.g.*, *S. Glazer's Distribs. of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 849 (6th Cir. 2017) ("We have often cautioned that these are factors to be balanced, not prerequisites to be met.").

99 *See generally, e.g.*, *Crookshanks as next friend of C.C. v. Elizabeth Sch. Dist.*, 775 F.

D. Modifying damages against private and state employers

Since enactment, USERRA has allowed remedies against private and state employers to include "compensat[ion to] the person for any loss of wages or benefits suffered by reason of such employer's failure to comply" with USERRA.[100] The Dole Act now specifically allows prejudgment interest on this amount, at a statutory 3% interest rate.[101] This 3% rate is both higher and lower than rates courts used before there was clear statutory guidance.[102] Although some claimants presumably could have received a higher interest rate before the Dole Act, the clarity from this change generally helps everyone involved.

USERRA, as originally enacted, also provided for liquidated damages against private and state employers in an amount equal to the person's lost wages or benefits, "if the court determines that the employer's failure to comply with the provisions of this chapter was willful."[103]

Now, "[t]he court may require the employer to pay the person the greater of $50,000 or the amount" of lost wages or benefits (plus interest, if awarded, at 3%) "as liquidated damages, if the court determines that the employer *knowingly* failed to comply with the provisions of this chapter."[104] This modification altered service member rights in three ways. First, the Dole Act increased the potential amount of liquidated damages for cases where the amount of lost wages or benefits is less than $50,000.[105]

Second, the Dole Act made it so that awarding liquidated damages is no longer dependent on awarding lost wages or other benefits.[106] This should make it easier for claimants to receive liquidated damages even when they cannot show, for whatever reason, pecuniary loss.[107] And it

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Supp. 3d 1160, 1170 (D. Colo. 2025) (discussing categories of "specifically disfavor[ed] injunctions" that are "more closely scrutinized").

100 38 U.S.C. § 4323 (c)(1)(A)(ii) (1994).

101 *Id.* § 4323(d)(C).

102 *See, e.g.*, *Harwood v. Am. Airlines, Inc.*, No. 17-cv-484-LO, 2018 WL 8803959, at *3 (E.D. Va. Aug. 20, 2018) (applying 2.08% interest rate); *House v. Metal Transp. Sys.*, No. 7-CV-10-JSK, 2010 WL 1068058, at *11 n.5 (N.D.W. Va. Mar. 16, 2010) (applying 7% interest rate); *Huhmann v. FedEx Corp.*, No. 13-CV-787-BAS, 2015 WL 6127198, at *10 (S.D. Cal. Oct. 16, 2015) (applying 0.25% interest rate).

103 38 U.S.C. § 4323(c)(1)(A)(iii) (1994).

104 *Id.* § 4323(d)(1)(D) (2025) (emphasis added).

105 *See id.*

106 *See id.*

107 *Compare, e.g.*, *Babineaux v. Se. Baptist Coll.*, No. 24-CV-3-KS-MTP, 2025 WL 2655358, at *9 (S.D. Miss. Sep. 16, 2025) (rejecting standing challenge because liquidated damages were "still in play"), *with Weaver v. Madison City Bd. of Educ.,* No.

may prevent employers from successfully "mooting out" cases by, for example, paying wages that were due.[108] It is also possible that this will allow greater enforcement of essential USERRA provisions not clearly tied to lost wages or other benefits (for example, notice requirements).[109]

Third, the Dole Act changed "willful" to "knowingly" such that courts now allow liquidated damages when an "employer knowingly failed to comply with the provisions of this chapter."[110] The Dole Act, however, did not define "knowingly," and USERRA does not otherwise define it.

USERRA did not include a definition of "willful" under the old standard, but the DOL regulations provide that "[a] violation shall be considered to be willful if the employer either knew or showed reckless disregard for whether its conduct was prohibited by the Act."[111] This definition was largely consistent with a line of cases that had defined "willful" in similar statutes where it was also undefined, particularly the Age Discrimination in Employment Act (ADEA).[112] The ADEA continues to allow liquidated damages for "willful violations."[113] Understanding the term *willful*, however, has not always been easy.[114] The Supreme Court has defined "will-

11-CV-3558-TMP, 2016 WL 7210447, at *14 (N.D. Ala. Dec. 13, 2016) ("Because he lost no pay due to the delay in assigning him to that position, he is not entitled to liquidated damages.").

108 *Compare, e.g., Mahone v. Amazon.com, Inc.,* 668 F. Supp. 3d 1152, 1160 (W.D. Wash. 2023) (allowing claim to go forward on liquidated damages despite defendant "ha[ving] paid any and all back and front pay that was due"), *with Woodard v. New York Health & Hosps. Corp.,* 554 F. Supp. 2d 329, 354 (E.D.N.Y. 2008) (holding discrimination claim moot because employer received the pay increase she requested), *aff'd in part*, *remanded in part*, 350 F. App'x 586 (2d Cir. 2009) (unpublished).

109 *See* 38 U.S.C. § 4334.

110 *Id.* § 4323(d)(D).

111 20 C.F.R. § 1002.312. *See generally* 38 U.S.C. § 4303 (defining various terms). *See also Babineaux,* 2025 WL 2655358, at *10 (discussing lack of significant body of caselaw interpreting term in USERRA context but noting that courts often borrow definition from similar statutes).

112 *See, e.g.*, *Babineaux*, 2025 WL 265538, at *10–11; *Mahone v. Amazon.com, Inc.*, No. C22-594-MJP, 2024 WL 4290275, at *5 (W.D. Wash. Sep. 25, 2024); *Arroyo v. Volvo Grp. N. Am., LLC*, No. 12-CV-6859, 2019 WL 4749869, at *10 (N.D. Ill. Sep. 30, 2019), *aff'd*, 93 F.4th 1066 (7th Cir. 2024). *See also Fryer v. A.S.A.P. Fire & Safety Corp.*, 658 F.3d 85, 90 (1st Cir. 2011) ("USERRA permits the award of liquidated damages 'if the court determines that the employer's failure to comply with [USERRA] was willful.' When a statute does not define the term 'willful,' the Supreme Court has instructed us to look to the standard applied in other statutes employing similar language." (quoting 38 U.S.C. § 4323(d)(1)(C)) (citing *Thurston*, 469 U.S. at 125–26)).

113 *See* 29 U.S.C. § 626 ("[L]iquidated damages shall be payable only in cases of willful violations of this chapter.").

114 *See, e.g.*, *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 615 (1993) ("Surprisingly, the Courts of Appeals continue to be confused about the meaning of the term 'willful' in

ful" in that context to mean that the "employer knew or showed reckless disregard for the matter of whether its conduct was prohibited"[115]

This understanding of "willfulness" rejected a "broader definition" where the employer could be liable for liquidated damages "whenever the employer knew that the ADEA was 'in the picture.'"[116] But it allowed liability on more occasions than knowing violations. Under this line of cases, "where willfulness is a statutory condition of civil liability, [the Supreme Court has] generally taken it to cover not only knowing violations of a standard, but reckless ones as well."[117]

It remains to be seen how courts will define "knowingly" in the context of USERRA, but generally, "the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense."[118] Accordingly, the Department is likely to argue that the Dole Act amendments have included a less stringent standard for obtaining liquidated damages with the replacement of "willful" with "knowingly."

Only developing cases will reveal whether or how much the change to the "knowingly" standard will affect the availability of liquidated damages under USERRA. Given the significant financial liability involved, this change is likely to lead to increased litigation. At the same time, the increased potential for liquidated damages should also encourage employer compliance and early resolution of cases.

E. Providing for mandatory attorneys' fees for prevailing employees

The Dole Act also went to great lengths to provide for attorney fee awards for successful claimants. As originally enacted, USERRA provided that a court "may" award "reasonable attorney fees, expert witness fees, and other litigation expenses" in successful suits against private and state employers.[119] That award is now mandatory:

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§ 7(b) of the ADEA."); *Bryan v. United States*, 524 U.S. 184, 191 (1998) ("The word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears.").

115 *Hazen Paper Co.*, 507 U.S. at 614 (quoting *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126 (1985)).

116 *Id.* (quoting *Thurston*, 469 U.S. at 127–28).

117 *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007).

118 *United States v. Torres*, 599 F. Supp. 2d 767, 769 (W.D. Tex. 2008) (quoting *Bryan*, 524 U.S. at 206). *See also True Health Chiropractic, Inc. v. McKesson Corp.*, Nos. 22-15710, 22-15732, 2023 WL 7015279, at *3 (9th Cir. Oct. 25, 2023) (unpublished) ("[W]e have construed 'willfully' as requiring awareness tha[t] an action constitutes a legal violation and 'knowingly' as requiring awareness of the facts that constitute a legal violation."), *rev'd and remanded on other grounds*, 606 U.S. 146 (2025).

119 38 U.S.C. § 4323(c)(2)(B) (1994).

> In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(3) who obtained private counsel for such action or proceeding, the court *shall* award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.[120]

Practice Note: The Dole Act changed the reference in section 4323(h)(2) from "subsection (a)(2)" to "subsection (a)(3)."[121] This appears to correct a mistake made in the Veterans' Benefits Improvement Act of 2008, which created a new subsection (a)(2), intended to expedite the process, but did not change the cross-reference in the attorney fee section (section 4323(h)(2)).[122]

The same change—from permissive to mandatory language for attorney fee awards—was made in successful cases before the MSPB. USERRA originally provided that the MSPB "may, in its discretion, award . . . reasonable attorney fees, expert witness fees, and other litigation expenses" to a successful party.[123] Under the Dole Act, the "may, in its discretion" language is now "shall."[124]

Importantly, USERRA originally appeared to limit that award to the situation where the MSPB reached its decision "as a result of a hearing or adjudication."[125] The Dole Act added a new sentence clarifying that "[t]he Board may, in its discretion, award reasonable attorney fees in a case settled before the issuance of an order if the person can demonstrate that significant attorney fees were incurred and that justice requires such an award."[126] That is, the MSPB may now award attorney fees even in cases that settle before a final order.

USERRA has always allowed appeals from MSPB decisions to the Federal Circuit consistent with 5 U.S.C § 7703(c) but did not mention attorney fees associated with these appeals.[127] Consistent with suits against private and state employers, attorney fee awards in successful appeals are now mandatory under new subsection, 38 U.S.C. § 4324(d)(3):

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120 *Id.* § 4323(h)(2) (2025) (emphasis added). *See also, e.g.*, *Anderson v. City & Cnty. of San Francisco*, No. 20-CV-1149-DMR, 2025 WL 3785958, at *7 (N.D. Cal. Dec. 18, 2025) (applying mandatory language), *judgment entered*, No. 20-CV-1149-ASK, 2026 WL 485486 (N.D. Cal. Feb. 20, 2026).

121 *Id.* § 4323(h)(2) (2025).

122 *See* Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, 122 Stat. 4145.

123 38 U.S.C. § 4324(c)(4) (1994).

124 *Id.*; *id.* § 4324(c)(4) (2025).

125 *Id.* § 4324(c)(4) (1994).

126 *Id.* § 4324(c)(4) (2025).

127 *Id.* § 4323(d)(1). *See* 5 U.S.C § 7703(c).

> In such Federal Circuit proceeding, the court *shall* award such person reasonable attorney fees, expert witness fees, and other litigation expenses if such person–
>
>> (A) prevails in such Federal Circuit proceeding; and
>>
>> (B) is not represented by the Special Counsel in such Federal Circuit proceeding.[128]

These changes should increase the ability of employees to obtain private counsel to assist them in their claims. That, much like the liquidated damages changes discussed above, should also drive compliance and early case resolutions.

III. Conclusion

The Dole Act includes several significant changes to USERRA, primarily expanding employee rights and remedies as well as increasing employer exposure to fees and costs, hopefully resulting in greater compliance. Although USERRA cases are relatively rare, they are significant for those service members affected. Understanding the Dole Act changes and their potential impact is necessary for evaluating future USERRA cases.

About the Author

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[128] 38 U.S.C. § 4324(d)(3).

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Pro Tips for Handling Pro Se Employment Cases

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I. Introduction

"Just because you can doesn't mean you should." Many of us have heard that phrase more than once from a parent or a grandparent. The maxim is also a good summary of how courts (and often attorneys) feel about representing oneself in just about any kind of legal proceeding. In his dissent in *Faretta v. California*, which guaranteed criminal defendants the right to self-representation, Justice Blackmun quoted the "old proverb that 'one who is his own lawyer has a fool for a client.'"[1] Ill-advised or not, and with varying degrees of success, many litigants disregard that admonition and decide to go it alone anyway.

Those who choose to represent themselves undoubtedly *can* do so in federal court. The right to represent oneself (or proceed pro se) in any federal case, including civil cases, is guaranteed by 28 U.S.C. § 1654, and at least in this century, the number of pro se litigants relying on that guarantee has held steady.[2] A report released by the U.S. Courts in 2021 observed several trends in civil cases with pro se litigants from 2000 to 2019.[3] First, during that 20-year period, 27% of all civil cases had at least one pro se party.[4] As one might expect, "the self-represented party predominantly is the plaintiff," and 69% of those plaintiffs were prisoners.[5] However, 11% of civil cases involved at least one unrepresented non-

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[1] 422 U.S. 806, 852 (1975) (Blackmun, J., dissenting).
[2] 28 U.S.C. § 1654 ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.").
[3] *Just the Facts: Trends in Pro Se Litigation from 2000 to 2019*, U.S. Cts. (Feb. 11, 2021), https://www.uscourts.gov/data-news/judiciary-news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019.
[4] *Id.*
[5] *Id.*

prisoner party, and civil rights cases accounted for the largest percentage of cases involving non-prisoner pro se parties.[6]

For those of us defending civil cases in federal courts on a regular basis, we should be prepared to handle cases brought by pro se plaintiffs, particularly civil rights cases. That brings us to the topic at hand: tips for litigating employment cases brought by pro se plaintiffs.

Many of us spend a large chunk of our waking hours at work. Unsurprisingly, many civil rights laws regulate employment matters. And with civil rights cases making up the largest share of pro se cases, we would expect to see (and the authors can attest to having seen) plenty of employment cases brought by unrepresented employees and former employees.

For many of us, work is also personal. It is how we provide for ourselves and our families, how we spend our time away from our families and private lives, and sometimes, for better or for worse, how we define ourselves. Handling a case with someone who might be unfamiliar with the legal system already presents a challenge, but because of that personal element, employment cases often invite big emotions (from the pro se plaintiff, the employer, and sometimes other employees involved in the matter) that require foresight and care.

In this article, we aim to provide some practical tips for the practitioner defending an employment case against a pro se plaintiff. To start, we discuss communication. Communication is essential in any case but particularly important in matters involving an adversary who is likely unsophisticated in legal matters. Then, we turn to more substantive matters; specifically, we consider how to construe a pro se plaintiff's pleadings. Are they afforded more leniency? Or should we expect the courts to hold them to the same standard as their represented counterparts? Finally, we offer what we hope will be some helpful tips about how to narrow the substantive issues in discovery if the case proceeds that far.

II. Communication is key

A. Put it in writing

The summer after my freshman year of college, my dad's assistant had a baby, and I spent the summer filling in for her. Besides teaching me how to take dictation and answer the phone, my dad also ingrained in me that it is almost always better to call someone than email them; better still to have an in-person conversation instead of a phone call. I still try to follow that advice in my personal and professional life.

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[6] *See id.*

Communicating with pro se plaintiffs, however, is the exception to my dad's in-person-communication rule. The default form of communication with an unrepresented party should be an email or formal letter. Why? Start with the rules. Under Model Rule of Professional Conduct 4.3, lawyers who find themselves communicating with a person who is not represented by counsel must "not state or imply that the lawyer is disinterested."[7] If the lawyer "knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."[8]

What is the best way to avoid a misunderstanding and document that you are not on the pro se plaintiff's side? Put it in writing from the start. Rule 4.3 goes on to say that lawyers "shall not give legal advice to an unrepresented person, other than the advice to secure counsel."[9] In our experience, many early phone calls from pro se plaintiffs understandably involve some sort of request for legal advice, whether they frame it that way or not. One may expect to receive the following initial inquiries:

- "What should happen next in this case?"
- "If I want to tell the judge *X*, how would I go about doing that?"
- "What will happen at this next hearing?"

You might be able to answer some of those questions without giving legal advice, but the line between legal advice and kindly answering procedural questions is hazy, which is why starting off with an email or letter is often best.

Your initial written communication after receiving a voicemail with a list of questions might go something like this:

> I wanted to let you know that I received your voicemail. I should start by explaining that I represent your employer in the case you filed. I understand that you do not have an attorney at this time, but unfortunately, I am unable to give you any legal advice, so I will not be able to answer your questions about [specific topic].[10] If you decide to retain legal counsel, please let me know that immediately so that I can communicate with them directly.[11] If you have any further questions

[7] Model Rules of Pro. Conduct r. 4.3 (A.B.A. 2023).
[8] *Id.*
[9] *Id.*
[10] If your district has a pro se resources page, consider referring pro se litigants there.
[11] This will ensure compliance with Model Rule of Professional Conduct 4.2, which prohibits communications with a person the lawyer knows is represented unless the lawyer has the consent of the other lawyer or "is authorized to do so by law or a court order." Model Rules of Pro. Conduct r. 4.2 (A.B.A. 2023).

> or concerns, please reach out to my assistant [or paralegal] at [phone number or email].

This clarification is particularly important when you represent the government, which plays many different roles in people's lives. The comment to Model Rule 4.3 encourages lawyers to "identify the lawyer's client" to communicate that the lawyer is not disinterested.[12] But in certain circumstances, that might be insufficient.

For example, we recently handled a case with a pro se plaintiff suing his government employer.[13] Aside from his employment discrimination claims, the plaintiff also believed that one of his supervisors had committed perjury.[14] In his complaint, he requested that the United States Attorney's Office (USAO) prosecute the supervisor.[15] When communicating with the plaintiff, we took extra care to clarify not just that we were disinterested, but also what role our office would play in the case. While the USAO often prosecutes crime, we explained that we are not acting as prosecutors in this case and instead represent his employer, which means we might be defending the actions of the supervisor rather than prosecuting them.

B. Can I get a witness?

But what happens when you pick up your office phone and realize your pro se adversary is on the other line? Hang up the phone immediately? There will undoubtedly be times when a phone call or in-person conversation is necessary (or unavoidable). In those instances, we recommend trying to include a member of your support staff in the conversation so that if a future dispute arises about what was said, the support staff person can serve as a witness. Consider taking notes or asking the support staff member to take notes. After all, there will already likely be disputes about what the employee and the employer said. No need to subject your own conversations to the fray.

If your first conversation with the plaintiff is a phone call or face-to-face encounter, be sure to cover all the same bases discussed above. After the phone call, consider whether you should confirm the conversation in writing to the plaintiff. While these types of communications may seem uncomfortable, they may be the best way to ensure that you have clearly communicated with the pro se party, and they may be the best evidence

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[12] Model Rules of Pro. Conduct r. 4.3 cmt. (A.B.A. 2023).

[13] Complaint for Employment Discrimination, Jackson v. DeJoy, No. 22-cv-143-CHB (E.D. Ky. June 3, 2022), Dkt. No. 1.

[14] *See id.* at 5–6.

[15] *See id.* at 6.

later if there is a dispute about what was said.

C. Go the extra mile

Judges will often treat pro se litigants with some degree of leniency, and they often will expect you to do the same.[16] With that in mind, if, for example, you need to depose the plaintiff, choose a location and time that are convenient for the plaintiff and ask support staff to send multiple reminders. If you send discovery requests, consider clearly stating when the responses are due. Confirm in writing that the producing party received the requests. Before you file a motion to compel, reach out via various methods of communication multiple times; document those attempts. The idea is to go a step further than you would for opposing counsel and create a record of doing so. This will not only keep you in the judge's good graces but also have the practical effect of making the case run smoothly and the added benefit of making the justice system more accessible for everyone, including self-represented parties.

III. But also, do not do their work for them

When it is time to respond to the plaintiff's complaint and a motion to dismiss seems warranted, many of us rightfully approach drafting the motion like we would a law school exam question. We consider every possible issue and claim. We anticipate every potential counterargument, and we strive to leave nothing to chance and no stone unturned.

But this approach can be problematic when responding to a pro se plaintiff's complaint. Often, pro se plaintiffs will include factual details that have no bearing on the claims they want to assert, leaving defense counsel to wonder how the plaintiff might use those details to buttress potential arguments. Pro se plaintiffs also frequently fail to include any factual statements that support the claims they list in their complaint. This is particularly prevalent in pro se employment cases, where pro se litigants may use the federal courts' standard "Pro Se 7 Complaint Form for Employment Discrimination" in lieu of drafting their own complaint.[17] In many ways, these standard pro se complaint forms help clearly define

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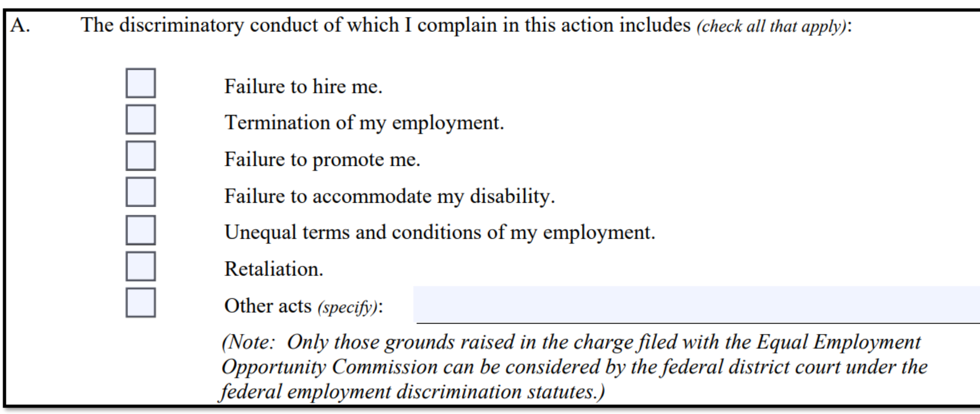
[16] *See e.g.*, *Polinski v. United States,* 177 Fed. Cl. 782, 784 (2025) (acknowledging that pro se litigants are held to "less stringent standards"); *Triestman v. Fed. Bureau of Prisons,* 470 F.3d 471, 475 (2d Cir. 2006) (pro se litigants should be accorded "special solicitude"); *Pilgrim v. Littlefield*, 92 F.3d 413, 416 (6th Cir. 1996) (acknowledging that pro se litigants are "generally accorded" lenient treatment); *Benitez v. King*, 298 F. Supp. 3d 530, 540 (W.D.N.Y. 2018) ("[A]ll *pro se* litigants deserve some degree of leniency."); *Voinche v. Obama*, 744 F. Supp. 2d 165, 171 (D.D.C. 2010) ("[*P*]*ro se* litigants are afforded a more lenient pleading standard.").

[17] U.S. Cts., Complaint for Employment Discrimination (2016).

the issues and parties. They also make the justice system more accessible to everyone. But they can be hard to parse for defense counsel.

Theoretically, the plaintiff will have already narrowed the claims he can bring during the Equal Employment Opportunity (EEO) administrative process.[18] But we often see pro se plaintiffs get check-box happy when they get to page three of the form, shown in Figure 1, which lists several employment laws to choose from, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act of 1990.[19]


A. The discriminatory conduct of which I complain in this action includes *(check all that apply)*:

- ☐ Failure to hire me.
- ☐ Termination of my employment.
- ☐ Failure to promote me.
- ☐ Failure to accommodate my disability.
- ☐ Unequal terms and conditions of my employment.
- ☐ Retaliation.
- ☐ Other acts *(specify)*:

(Note: Only those grounds raised in the charge filed with the Equal Employment Opportunity Commission can be considered by the federal district court under the federal employment discrimination statutes.)

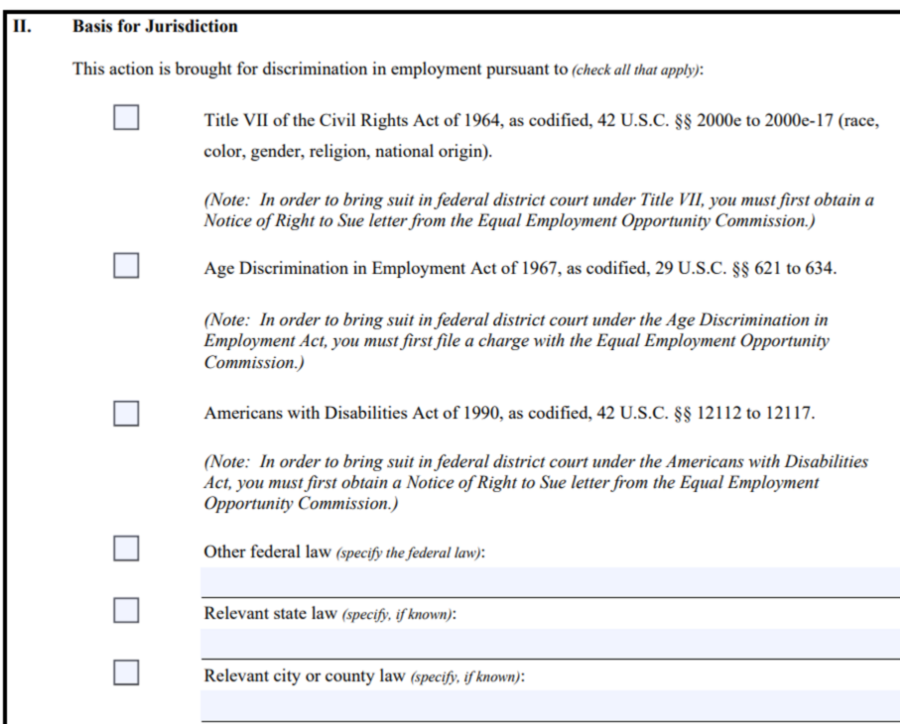
Figure 1: Basis for jurisdiction checkboxes

During the EEO process, the plaintiff may have only raised racial discrimination and retaliation claims under Title VII, but when faced with multiple empty boxes, the plaintiff might also decide to add an age discrimination and disability claim as well. The form also includes empty

[18] *See* 42 U.S.C. § 2000e-16(c). *See also Jimenez v. U.S. Att'y Gen.*, 146 F.4th 972, 990 (11th Cir. 2025) ("To determine whether a plaintiff has exhausted her administrative remedies, then, the proper inquiry is whether the plaintiff's complaint is like or related to, or grew out of, the allegations contained in the EEOC charge." (cleaned up)); *Hambrick v. Kijakazi*, 79 F.4th 835, 841 (7th Cir. 2023) ("Federal government employees may bring Title VII and ADEA employment discrimination claims in federal court only after they have timely exhausted their administrative remedies." (quoting *Formella v. Brennan*, 817 F.3d 503, 510 (7th Cir. 2016))); *Velazquez-Ortiz v. Vilsack*, 657 F.3d 64, 71 (1st Cir. 2011) ("[T]he scope of the federal court complaint is constrained by the allegations made in the administrative complaint: the former must bear some close relation to the latter." (cleaned up)); *Payne v. Salazar*, 619 F.3d 56, 65 (D.C. Cir. 2010) (For a Title VII claim to qualify as administratively exhausted, "it must at a minimum arise from the administrative investigation that can reasonably be expected to follow the charge of discrimination." (cleaned up)).

[19] *See* Complaint for Employment Discrimination, note 17, at 3; 42 U.S.C. §§ 1981–200h-6 (Title VII of the Civil Rights Act of 1964); 29 U.S.C. §§ 621–634 (Age Discrimination in Employment Act of 1967); 42 U.S.C. §§ 12111–12213 (Americans with Disabilities Act of 1990).

blanks for "[o]ther federal law[s]" and "Relevant state law[s]" that the employer might have violated.[20] This is where pro se plaintiffs sometimes get creative. We have seen claims for perjury, violation of merit systems principles, violation of the Uniformed Services Employment and Reemployment Rights Act of 1994, violation of "veteran's preference," and violation of the Veterans Employment Opportunity Act of 1998, not to mention the federal constitutional claims that plaintiffs might throw in for good measure.[21] Likewise, the next section, shown in Figure 2, allows plaintiffs to check boxes for a host of discriminatory conduct, including failure to hire, termination of employment, failure to promote, failure to accommodate a disability, unequal terms and conditions of employment, retaliation, and then a blank space for "other acts."[22]



II. Basis for Jurisdiction

This action is brought for discrimination in employment pursuant to *(check all that apply)*:

☐ Title VII of the Civil Rights Act of 1964, as codified, 42 U.S.C. §§ 2000e to 2000e-17 (race, color, gender, religion, national origin).

(Note: In order to bring suit in federal district court under Title VII, you must first obtain a Notice of Right to Sue letter from the Equal Employment Opportunity Commission.)

☐ Age Discrimination in Employment Act of 1967, as codified, 29 U.S.C. §§ 621 to 634.

(Note: In order to bring suit in federal district court under the Age Discrimination in Employment Act, you must first file a charge with the Equal Employment Opportunity Commission.)

☐ Americans with Disabilities Act of 1990, as codified, 42 U.S.C. §§ 12112 to 12117.

(Note: In order to bring suit in federal district court under the Americans with Disabilities Act, you must first obtain a Notice of Right to Sue letter from the Equal Employment Opportunity Commission.)

☐ Other federal law *(specify the federal law)*:

☐ Relevant state law *(specify, if known)*:

☐ Relevant city or county law *(specify, if known)*:

Figure 2: Discriminatory conduct checkboxes

Finally, as seen in Figure 3, plaintiffs can check boxes indicating discrimination based on their race, color, gender, sex, religion, national origin, age, and disability or perceived disability.[23]

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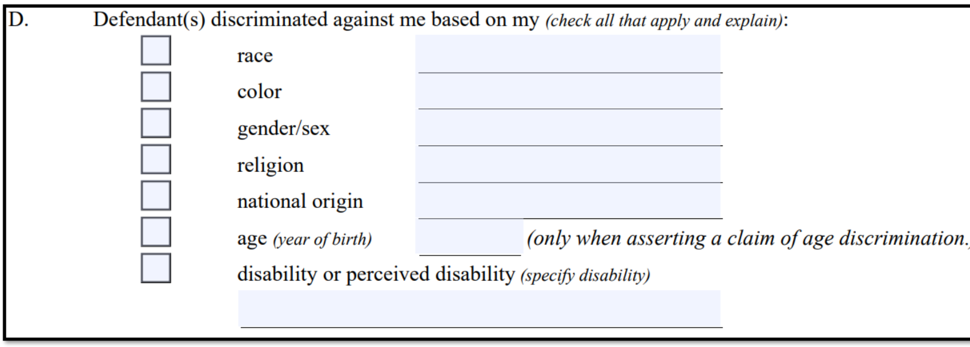
20 Complaint for Employment Discrimination, note 17, at 3.
21 *Id.*; 5 U.S.C. §§ 3330a–3330c (Veteran's Employment Opportunity Act of 1998); 38 U.S.C. §§ 4301–4335 (Uniformed Services Employment and Reemployment Rights Act of 1994).
22 Complaint for Employment Discrimination, note 17, at 4.
23 *See id.*


D. Defendant(s) discriminated against me based on my *(check all that apply and explain)*:

☐ race
☐ color
☐ gender/sex
☐ religion
☐ national origin
☐ age *(year of birth)* *(only when asserting a claim of age discrimination.)*
☐ disability or perceived disability *(specify disability)*

Figure 3: Discrimination basis checkboxes

Just like in the previous "Basis for Jurisdiction" section of the form, plaintiffs might have only raised a sex discrimination claim during the EEO process, but sometimes they check the boxes for other forms of discrimination with little explanation.[24]

Plaintiffs are entitled to include whatever applicable federal and supplemental state claims they think they might have. But that brings us to the bottom of page four, which offers the plaintiff a small space to list the "facts of [their] case" and then invites them to attach additional pages if necessary.[25] Sometimes, the facts plaintiffs decide to list in that short box and the documents they choose to attach to the complaint are difficult to match to the causes of action they selected earlier in the form.

This is where the law-school-exam approach will not work when drafting your motion to dismiss. Where a law school exam question will list a set of facts and ask you to discuss the potential causes of action, a pro se complaint often does the opposite, presenting you with a list of claims and sometimes no factual contentions to support those claims. At first glance, this presents a straightforward case for a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).[26] Without clear factual contentions to support the legal conclusions, the complaint is not well pleaded and should be dismissed.[27] You might also have easy administrative exhaustion arguments to make if the plaintiff checked boxes for forms of discrimination they did not raise at the agency-level.

But what happens when the complaint form contains bare bones factual allegations, but plaintiffs then attach 300 pages of EEO filings to their complaint? Alternatively, what if the complaint contains virtually no factual allegations and the litigant merely attaches the Equal Employment

[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *See Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." (cleaned up)).

Opportunity Commission's (EEOC's) right-to-sue letter without any additional information or documentation? Fortunately, the Supreme Court has already addressed the latter question, finding in *Baldwin County Welcome Center v. Brown,* that merely filing the 90-day right-to-sue letter from the EEOC is not enough to toll the statute of limitations on Title VII actions.[28] Federal courts, however, have denied motions to dismiss where plaintiffs did slightly more than file the right-to-sue letter. In *Mahroom v. Defense Language Institute*, for example, the Ninth Circuit found that by filing her right-to-sue letter from the EEOC along with a copy of the EEOC's decision, the pro se plaintiff presented sufficient material to the district court to avoid dismissal for untimeliness.[29]

Accordingly, if pro se plaintiffs attach more documents to their complaint than their right-to-sue letter, consider whether the factual contentions in the underlying EEO action are sufficient to explain why they might have checked the boxes they did on the complaint form.

As attorneys, we all love to craft a good argument. Our advice is to try not to do that for your pro se adversary. As one district court put it, "[The] Court will not create arguments for Plaintiff, but will do its best to construe the arguments that Plaintiff appears to have made."[30] We recommend that you do the same.

IV. Narrow it down

Maybe you eliminated a few claims with your well-crafted motion to dismiss, but several remain. The first opportunity to narrow the issues might happen before discovery even officially begins. Under Federal Rule of Civil Procedure 26(f)(3)(B), your proposed discovery plan should contain the "parties' views and proposals on . . . the subjects on which discovery may be needed" among other things.[31] So discovery conferences are the perfect time to have frank conversations with your opponents about what they are hoping to focus on during discovery, which might help you drill down to what claims the plaintiffs think they made. You may disagree, at which point, consider filing a separate status report explaining

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[28] 466 U.S. 147, 150–51 (1984); 42 U.S.C. §§ 1981–2000h-6 (Title VII of the Civil Rights Act of 1964).

[29] *See* 732 F.2d 1439, 1440 (9th Cir. 1984) (per curiam). *See also Page v. Arkansas Dep't of Correction,* 222 F.3d 453, 454–55 (8th Cir. 2000) (district court's dismissal reversed where pro se plaintiff filed a letter requesting assistance in filing a lawsuit, her right-to-sue letter from the EEOC, and the EEOC charge).

[30] *Princess J. v. Berryhill*, No. 18-2025-EIL, 2019 WL 2494591, at *2 (C.D. Ill. May 20, 2019), *report and recommendation adopted*, No. 18-CV-2025-JES-EIL, 2019 WL 2494558 (C.D. Ill. June 14, 2019).

[31] Fed. R. Civ. P. 26(f)(3)(B).

your view of the appropriate subjects for discovery given the pleadings.

But what if the Rule 26(f) process yields no further clarity?[32] And you are still left with the EEO charge pro se plaintiffs attached to their complaint that contains 43 discrete issues? Should you be prepared to respond to every one of those issues if the case goes to trial?

A deposition is a great time to ask that question (or likely question*s*, if there are 43 issues). And the good news is pro se plaintiffs' answers at a deposition are likely more binding than they would be if they were represented. After all, pro se plaintiffs are the captains of their own ship, the masters of their own case.[33] Represented parties cannot necessarily abandon their legal claims at a deposition.[34] Pro se plaintiffs act as their own counsel and are therefore charged with knowing how the facts of their own case connect to the legal contentions they made in their complaint.[35] Similarly, asking represented parties whether they possess any proof of their claims only goes so far. Represented parties of course are not charged with knowing what proof their counsel might have gathered to support their claims. But if pro se plaintiffs admit at a deposition that they cannot produce any proof to show that they performed work for which they were not paid, that is a quote worth including in a motion for summary judgment.

Additionally, while we do not often use Requests for Admission to narrow issues with a represented party, it can be a useful tool when defending a case with a pro se plaintiff. Discovery often takes place months, if not

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[32] Fed. R. Civ. P. 26(f). *Practice Note:* Our district court judges sometimes dispense with the Rule 26(f) conference requirement in pro se cases, probably under the assumption that such a meeting might not be fruitful. Instead, the court simply orders both parties to submit separate proposed discovery plans under Rule 26(f)(3). Nevertheless, this still presents an opportunity to distill what issues are appropriate for discovery. *See id.* at 26(f)(3).

[33] *See Myles v. United States,* 416 F.3d 551, 552 (7th Cir. 2005) ("pro se litigants are masters of their own complaints"); *Rangel v. Reynolds,* 607 F. Supp. 2d 911, 916 (N.D. Ind. 2009) (same).

[34] *See, e.g.*, *Stanazai v. Broad. Bd. of Governors,* No. CV 17-2653-RDM, 2020 WL 6118183, at *2–4 (D.D.C. Oct. 16, 2020) (represented plaintiff did not abandon nonselection claim for senior editor position where he repeatedly failed to name that claim during his deposition but where the pleadings filed by his counsel and other discovery indicated he still wished to pursue that claim).

[35] *See, e.g.*, *Progressive N. Ins. Co. v. Gadsen,* No. 21-CV-3614-BHH-MGB, 2024 WL 1051134, at *3 (D.S.C. Feb. 8, 2024), *report and recommendation adopted*, No. 21-CV-3614-BHH, 2024 WL 816504 (D.S.C. Feb. 27, 2024) (granting summary judgment for insurance company where pro se insured unequivocally admitted facts during her deposition which proved there was no coverage for the incident at issue); *Worlds v. Thermal Indus., Inc.,* 928 F. Supp. 115, 121 (D. Mass. 1996) (granting summary judgment to employer in part because pro se plaintiff's "own deposition testimony indicates that his claims of racial bias are based upon speculation and conjecture, not upon facts").

years, after plaintiffs originally filed their charges with the EEOC, and by the time plaintiffs receive your Requests for Admission, they may no longer wish to pursue certain gripes they had at the EEOC level. It is also much more common for pro se parties to abandon their case than parties with representation. As discovery wears on, pro se plaintiffs might not respond to Requests for Admission, which of course will give you grounds to move for summary judgment when the requests are deemed admitted under Federal Rule of Civil Procedure 36(a)(3).[36] For that reason, consider sending Requests for Admission before you expend time and money on a deposition.

Finally, both summary judgment motions and motions in limine are important tools for narrowing the case or, even if not successful, clarifying the evidence and issues for trial. Much like Requests for Admission, pro se plaintiffs often abandon claims or theories when faced with a well-reasoned summary judgment motion. These motions can also be excellent tools to educate plaintiffs about the practical outcomes of their case, often to negotiate a better settlement. For example, we have moved for summary judgment to exclude specific damages, as most pro se plaintiffs seek damages that are simply not available under the law. Sometimes it is only after the court enters an order explaining the available damages that plaintiffs can effectively negotiate. Similarly, we have filed motions in limine to preclude clearly objectionable (and potentially harmful) evidence and arguments that we might not have otherwise filed (for example, "Golden Rule" motions in limine) because we knew that the pro se plaintiff simply did not know any better. Well-supported motions that you might not otherwise file if an attorney was involved might be helpful or even necessary in cases involving pro se plaintiffs both to educate the plaintiffs outside the jury's hearing and establish some basic ground rules before trial.

As attorneys, it is easy to view unrepresented parties as an extra burden, but allowing everyone access to the courts, regardless of education, training, or rhetorical skill, is an important cornerstone of our democracy. In fact, the Magna Carta itself raised the possibility of self-representation over 800 years ago, stating that "to no one will we refuse or delay, right or justice."[37] In its infancy, the United States recognized the right to proceed in court without counsel in the Judiciary Act of 1789, which clearly states that "parties may plead and manage their own causes personally or by

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[36] Fed. R. Civ. P. 36(a)(3).

[37] Nina Ingwer VanWormer, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 Vand. L. Rev. 983, 987 (2007) (referencing Magna Carta art. XL (1215)).

the assistance of . . . counsel" in "all courts of the United States."[38] As representatives of the United States, we continue to preserve and protect that tradition by treating pro se parties with respect and fairness.

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[38] *Id.* at 987 (quoting Judiciary Act of 1789 § 35).

Defending Law Enforcement After *Martin v. United States*

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I. Introduction

The Federal Tort Claims Act (FTCA) waives the United States' sovereign immunity subject to certain enumerated exceptions.[1] Two of those exceptions—the discretionary-function exception and the intentional-tort exception—sometimes interact.[2]

The discretionary-function exception "bars '[a]ny claim' based on the exercise of an official's 'discretionary function.'"[3] The Supreme Court has a two-part test for determining whether this exception applies. First, courts consider the official's conduct and ask whether the conduct "involv[es] an element of judgment or choice."[4] Even if the conduct meets this requirement, courts must "decide whether that judgment is of the kind that the discretionary function exception was designed to shield."[5]

The intentional-tort exception bars "[any] claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[6] The FTCA has an exception to the intentional-tort

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[1] *See Levin v. United States,* 568 U.S. 503, 506–07 (2013) ("[T]he FTCA makes the United States liable 'to the same extent as a private individual under like circumstances,' under the law of the place where the tort occurred, [section] 1346(b)(1), subject to enumerated exceptions to the immunity waiver, [section] 2680(a)–(n)." (quoting 28 U.S.C. § 2674) (citing *id.* §§ 1346(b)(1), 2680(a)–(n)). *See Millbrook v. United States*, 569 U.S. 50, 51 (2013) (The FTCA "waives the Government's sovereign immunity from tort suits, including those based on certain intentional torts committed by federal law enforcement officers" (citing 28 U.S.C. § 2680(h)).

[2] *Martin v. United States*, 605 U.S. 395, 401 (2025).

[3] *Id.* (quoting 28 U.S.C. § 2680(a)).

[4] *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (cleaned up).

[5] *Id.* at 322–23 (cleaned up).

[6] 28 U.S.C. § 2680(h).

exception for claims arising out of allegedly wrongful conduct of law-enforcement officers.[7] Called the law-enforcement proviso, this exception extends the United States' waiver of sovereign immunity for certain intentional torts "based on the 'acts or omissions of investigative or law enforcement officers.'"[8]

In 2025, the Supreme Court in *United States v. Martin* clarified the relationship between the discretionary-function exception, intentional-tort exception, and law-enforcement proviso.[9] This article addresses *Martin*, which resolved a split among the circuit courts on how to interpret these provisions.[10] This article also offers practice tips on litigating claims for torts allegedly committed by law-enforcement officers.

II. Factual background of *Martin*

On October 18, 2017, the Federal Bureau of Investigation raided the wrong house in Atlanta, Georgia, when executing search and arrest warrants, causing personal injuries and property damage.[11] Rather than search the home of a suspected gang member, six FBI agents, led by FBI Special Agent Lawrence Guerra, stormed another home that was "approximately 436 feet from" the suspect's address.[12]

A team of FBI agents "breached the front door and detonated a flash-bang grenade" at the entrance of a home "occupied by Hilliard Toi Cliatt, his partner Curtrina Martin, and her 7-year-old son."[13] Mr. Cliatt and Ms. Martin hid in a closet, "[f]earing a home invasion.[14] When the Special Weapons and Tactics team found them, they "dragged Mr. Cliatt from the closet, threw him down on the floor, handcuffed him, and began bombarding him with questions," while an "officer trained his weapon on Ms. Martin."[15] Another officer discovered mail with the home's address on it and realized that the team was in the wrong house.[16]

Shortly before the raid, Agent Guerra drove by the correct house.[17] But he testified that he used his personal GPS device to find the house

[7] *Millbrook*, 569 U.S. at 52.
[8] *Id.* (quoting 28 U.S.C. § 2680(h)).
[9] 605 U.S. 395 (2025).
[10] *Id.* at 403.
[11] *Id.* at 399.
[12] *Martin v. United States*, No. 23-10062, 2024 WL 1716235, at *2 (11th Cir. Apr. 22, 2024), *vacated and remanded*, 605 U.S. 395 (2025).
[13] *Martin*, 605 U.S. at 399.
[14] *Id.*
[15] *Id.* (cleaned up).
[16] *Id.*
[17] *Id.*

on the day of the raid and it sent him to the home of Mr. Cliatt and Ms. Martin.[18] The FBI agents failed to notice the street sign and house number, which did not match the suspected gang member's address, and "Agent Guerra failed to appreciate that a different car was parked in the driveway, one not present during his previous visit."[19]

Mr. Cliatt and Ms. Martin sued the United States under the FTCA, alleging that the officers committed negligent and intentional torts.[20] The Complaint also contained a *Bivens* claim against Agent Guerra and six unidentified FBI agents.[21] The district court granted summary judgment on the *Bivens* claim, and the Eleventh Circuit affirmed.[22] The Supreme Court in *Martin* did not address the *Bivens* claim.[23]

III. Legal background of *Martin*

The Supreme Court agreed to review this case to resolve a split among the Eleventh Circuit and other circuits.[24] Specifically, before *Martin*, the Eleventh Circuit had "an understanding of the FTCA that no other circuit ha[d] adopted" on how to apply the FTCA's discretionary-function exception, intentional-torts exception, and law-enforcement proviso.[25]

In most courts, "if a plaintiff alleges that a federal law enforcement officer committed one or more of those six torts, the proviso will ensure that those claims survive an encounter with the intentional-tort exception."[26] Typically, courts then move to the discretionary-function exception which bars "any claim based on the exercise of an official's discretionary function."[27] This exception "forbids suits challenging decisions that 'involv[e] an element of judgment or choice' of a 'kind that the . . . exception was designed to shield.'"[28] The Supreme Court recognized that "several of our lower court colleagues report that they have 'struggl[ed]' to discern what this direction requires of them."[29] Without weighing in on the merits, the Supreme Court noted some "have held that the discretionary-function

18 *Id.* at 399–400.
19 *Id.* at 400 (cleaned up).
20 *Id.*
21 *Martin*, 2024 WL 1716235, at *3.
22 *Id.*
23 *Martin*, 605 U.S. at 395.
24 *Id.*
25 *Id.* at 400, 403.
26 *Id.* at 401 (cleaned up).
27 *Id.* (cleaned up).
28 *Id.* (quoting *United States v. Gaubert*, 499 U.S. 315, 322–23 (1991)).
29 *Martin*, 605 U.S. at 401 (quoting *Xi v. Haugen*, 68 F.4th 824, 842 (3d Cir. 2023) (Bibas, J., concurring)).

exception does not shield 'careless' or 'unconstitutional' police conduct from judicial scrutiny, but others have taken a contrary view and read the exception much more broadly."[30] For any negligence or intentional-tort claims that survive the discretionary-function analysis, "[o]rdinarily, then, courts will find for the plaintiff if he can demonstrate that federal officials committed a tort under applicable state law."[31]

In contrast, before *Martin*, courts in the Eleventh Circuit did not ask "whether the discretionary-function exception bars *either* the plaintiff's negligent-tort claims *or* his intentional-tort claims," but instead applied the discretionary-function exception "*only* to the plaintiff's negligence claims."[32] The Eleventh Circuit's approach assumed that the law-enforcement proviso overrode all exceptions, including the discretionary-function exception. Thus, "any intentional-tort claim covered by the proviso automatically proceed[ed] to the merits."[33] Once the case reached the merits, courts in the Eleventh Circuit allowed the government to use a Supremacy Clause defense to defeat the intentional-tort claim "whenever a law enforcement officer's contested actions bear 'some nexus with furthering federal policy and can reasonably be characterized as complying with the full range of federal law.'"[34]

A. The opinion of the Supreme Court

In *Martin*, the Supreme Court issued a unanimous opinion, vacating and remanding the judgment of the Eleventh Circuit.[35] The analysis of the Supreme Court contrasted the approach taken by most courts from that adopted by the Eleventh Circuit.

The Supreme Court rejected the Eleventh Circuit's approach, finding ample support in the statute for an interpretation that the law-enforcement proviso countermands only section 2680(h)'s intentional-tort exception.[36] The Supreme Court also found that legislative history did not dictate a different result. Recognizing that "a committee report discuss[ed] how Congress enacted the proviso in response to two wrong-house raids much like [the plaintiffs'] own," the Supreme Court held that "no amount of guesswork about the purposes behind legislation can displace

[30] *Id.* (cleaned up)
[31] *Id.* at 402 (citing *Brownback v. King*, 592 U.S. 209, 218 (2021)).
[32] *Id*. (emphasis in original).
[33] *Id*.
[34] *Id.* at 403 (quoting *Denson v. United States*, 574 F.3d 1318, 1348 (11th Cir. 2009)) (citing *Kordash v. United States,* 51 F.4th 1289, 1293 (11th Cir. 2022)).
[35] *Id.* at 415.
[36] *Id.* at 403–08.

what the law's terms clearly direct."[37]

Turning to "the Eleventh Circuit's second outlier position," based on a Supremacy Clause defense, the Supreme Court explained that "[t]he Supremacy Clause supplies a rule of decision when federal and state law conflict."[38] Thus, "when a regulated party cannot comply with both federal and state directives, the Supremacy Clause tells us the state law must yield."[39] In most FTCA cases, the Supremacy Clause would not apply "[b]ecause the FTCA's liability rule incorporates state law," and "there is no conflict for the Supremacy Clause to resolve."[40] By "instruct[ing] courts to apply those same state rules to decide whether the United States is liable to the plaintiffs, there is no discord between the two."[41]

In this case, the Eleventh Circuit did not explain why a conflict existed to trigger applicability of a Supremacy Clause defense. For example, the court of appeals "did not identify any federal statute or constitutional provision displacing Georgia tort law" as the statute or provision would in "an action between private parties."[42] While not applicable here, the Supreme Court recognized that "federal law will control other FTCA suits where 'a litigant [can] point specifically to a constitutional text or a federal statute' that supplies controlling liability rules, displacing contrary state law."[43]

Instead of identifying a displacing federal statute or constitutional provision, the Eleventh Circuit relied on *In re Neagle* and its progeny.[44] The Supreme Court found that case inapplicable because "Congress has entered the field and expressly bound the federal government to accept liability under state tort law on the same terms as a 'private individual,'" and "no private individual could deploy *In re Neagle* to his advantage."[45]

Having rejected the Eleventh Circuit's approach, the Supreme Court instructed the court on remand to "consider whether subsection (a)'s discretionary-function exception bars either the plaintiff's negligent- or intentional-tort claims . . . without reference to its mistaken view that the law-enforcement proviso applies to subsection (a)."[46] If any claim survives

[37] *Id.* at 408.
[38] *Id.* at 409.
[39] *Id.* (citing *Virginia Uranium, Inc. v. Warren*, 587 U.S. 761, 767 (2019)).
[40] *Martin*, 605 U.S. at 410.
[41] *Id.*
[42] *Id.* (quoting *Hess v. United States*, 361 U.S. 314, 318 (1960) (federal maritime law supplied law of the place in FTCA suit involving accident on Columbia River)).
[43] *Id.* at 410 (quoting *Virginia Uranium*, 587 U.S. at 767) (citing *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 618 (2011)).
[44] *Id.* 410–11 (citing *Cunningham v. Neagle*, 135 U.S. 1, 75 (1890)).
[45] *Id.* at 412 (quoting 28 U.S.C. § 2674).
[46] *Id.* at 414 (referencing the exception in 28 U.S.C. § 2680(a)).

the discretionary-function analysis, then the court must ask whether, under state law, a "private individual under like circumstances would be liable for the acts and omissions the plaintiffs allege, subject to the defenses discussed in [section] 2674—not a Supremacy Clause defense nowhere mentioned there."[47]

B. The concurrence

Justice Sotomayor, joined by Justice Jackson, concurred, in part to "clarify" that "the United States . . . may not defeat an FTCA suit simply by showing that a federal officer's acts had some nexus with furthering federal policy and complied with the full range of federal law."[48] Additionally, Justice Sotomayor wrote separately "to underscore that there is reason to think the discretionary-function exception may not apply to these claims."[49]

To set the stage, Justice Sotomayor recognized that "[t]he FTCA shields the United States from liability for claims 'based upon' a federal employee's 'exercise or performance' (or failure to exercise or perform) 'a discretionary function or duty,' 'whether or not the discretion involved be abused.'"[50] Turning to the two-part discretionary-function analysis, the concurrence noted that "[f]irst, courts must consider the nature of the official's conduct and decide whether it 'involv[es] an element of judgment or choice.'"[51] "The requirement of judgment or choice . . . is not satisfied if a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow'" because that "employee has no rightful option but to adhere to the directive."[52]

The concurrence then emphasized the importance of the second part of the discretionary-function inquiry, noting that, "[e]ven where a federal employee retains an element of choice[,] . . . the exception does not apply reflexively."[53] Instead, the court must "determine, at the second step, whether 'th[e] judgment is of the kind that the discretionary function exception was designed to shield.'"[54] "[T]he exception protects only those governmental actions and decisions that are themselves 'based on con-

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47 *Id.* (cleaned up).
48 *Id.* at 415–16 (cleaned up).
49 *Id.* at 416.
50 *Id.* (quoting 28 U.S.C. § 2680(a)).
51 *Id.* (quoting *United States v. Gaubert*, 499 U.S. 315, 322 (1991); *Berkovitz v. United States*, 486 U.S 531, 536 (1988)).
52 *Id.* (quoting *Gaubert*, 499 U.S. at 322).
53 *Id.*
54 *Id.* at 416 (quoting *Berkovitz*, 486 U.S. at 536).

siderations of public policy.'"[55] "[I]t is 'obviou[s]' that some discretionary acts performed by Government agents 'are within the scope of [their] employment but not within the discretionary function exception.'"[56]

The concurrence then challenged the Eleventh Circuit's position "that the discretionary-function exception might apply '*unless* a source of federal law "specifically prescribes" a [federal employee's] course of conduct.'"[57] According to the concurrence, such approach improperly relies only on the first part of the discretionary-function analysis and entirely disregards the second part.[58]

Moving to the underlying facts, the concurrence intimated that a court would have to ignore the second part of the discretionary-function analysis to find that the discretionary-function exception immunizes the government from certain wrong-house raids:

> [E]xecuting a warrant always involves some measure of discretion. Yet it is hard to see how Guerra's conduct in this case, including his allegedly negligent choice to use his personal GPS and his failure to check the street sign or house number on the mailbox before breaking down Martin's door and terrorizing the home's occupants, involved the kind of policy judgments that the discretionary-function exception was designed to protect.[59]

The concurrence then discussed the legislative history and characterized the law-enforcement proviso as a "solution . . . add[ed] to the end of the intentional-tort exception that 'deprive[s] the Federal Government of the defense of sovereign immunity' for FTCA suits arising out of the state-law torts of 'assault, battery, false imprisonment, false arrest, malicious prosecution, or abuse of process' by federal law enforcement officers."[60] While agreeing that courts must consider whether intentional-tort claims that fall within the law-enforcement proviso are barred by the discretionary-function exception, the concurrence advised that courts "should not ignore the existence of the law enforcement proviso, or the factual context that inspired its passage, when construing the discretionary-function exception."[61] Further, the concurrence emphasized that "[w]hatever else is true of that exception, any interpretation

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[55] *Id.* at 417 (quoting *Berkovitz*, 486 U.S. at 536–37) (citing *Gaubert*, 499 U.S. at 323).
[56] *Id.* (quoting *Gaubert*, 499 U.S. at 325 n.7).
[57] *Id.* at 418 (quoting *Martin v. United States*, No. 23-10062, 2024 WL 1716235, at *6 (11th Cir. Apr. 22, 2024)).
[58] *Id.* at 418.
[59] *Id.* at 418–19.
[60] *Id.* at 420 (quoting S. Rep. No. 93-588, at 3 (1973)) (citing 28 U.S.C. § 2680(h)).
[61] *Id.* at 420.

should allow for liability in the very cases Congress amended the FTCA to remedy."[62]

IV. Early post-*Martin* decisions

Between the issuance of the *Martin* opinion on June 12, 2025, and September 30, 2025, 16 federal courts issued decisions that cited *Martin*.

Five decisions cited *Martin* for general principles of law.[63] One included a footnote stating that *Martin* rejected an expansive reading of *In re Neagle*.[64] Seven decisions considered the discretionary-function exception and related analysis in the context of negligence claims.[65] Three decisions assessed both the law-enforcement proviso in the context of intentional-tort allegations and the discretionary-function exception.[66]

While it is too soon to identify "trends" developing in the wake of *Martin*, the latter three opinions illuminate questions making their way to the Supreme Court. These cases, from within the D.C., Fifth, and Eleventh Circuits, explore some of *Martin*'s unanswered questions, including:

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[62] *Id.*

[63] *See Pacchielat v. U.S. Dep't of Health & Hum. Servs. Admin.*, No. 24-cv-11234-ADB, 2025 WL 2576820, at *4 (D. Mass. Sep. 5, 2025) (citing *Martin* for the proposition that the FTCA "supplies the 'exclusive remedy' for damages arising out of federal employees' official conduct"); *Busby v. Hemingway*, No. 24-cv-12064-JEL, 2025 WL 2247534, at *5 (E.D. Mich. Aug. 6, 2025) (citing *Martin* for the proposition that the "FTCA is the 'supreme' federal law addressing the United States' liability for torts committed by its agents"); *Spears v. United States*, No. 24-cv-4239-PJS, 2025 WL 2172291, at *2 (D. Minn. July 31, 2025) (citing *Martin* for the proposition that the "FTCA waives the United States' sovereign immunity for certain tort claims committed by federal employees"); *Becker v. Vaughn*, No. 25-cv-372-RFR, 2025 WL 1745134, at *1 (D. Neb. June 24, 2025) (citing *Martin* for the proposition that the FTCA waives sovereign immunity and allows those injured by federal employees to sue the United States for damages); *King v. United States*, No. 23-cv-03512-SLS, 2025 WL 2480070, at *2 (D.D.C. Aug. 28, 2025) (same proposition as *Becker*).

[64] *See Newsom v. Trump*, 797 F. Supp. 3d 1092, 1123 n.20 (N.D. Cal. 2025) (citing *Cunningham v. Neagle,* 135 U.S. 1, 69 (1890)).

[65] *See Salas v. United States,* 787 F. Supp. 3d 799 (W.D. Tex. 2025); *Concepcion v. United States*, No. 23-cv-9219-NGG, 2025 WL 2638469 (E.D.N.Y. Sep. 12, 2025); *Dimas v. Perez*, No. 25-cv-165-KWR, 2025 WL 2533607 (D.N.M. Sep. 3, 2025); *Unnamed Mother v. United States*, No. 25-cv-154-KWR, 2025 WL 2390227 (D.N.M. Aug. 18, 2025); *Leibowitz v. United States*, No. 23-cv-5677-LGD, 2025 WL 2252386 (E.D.N.Y. July 30, 2025); *Oladokun v. United States*, No. 23-cv-5899-NRM, 2025 WL 1786913 (E.D.N.Y. June 26, 2025); *Taylor v. United States*, No. 2:23-cv-04671-RMG-MHC, 2025 WL 1943011 (D.S.C. July 10, 2025), *report and recommendation adopted*, No. 23-cv-4671-RMG, 2025 WL 2633095 (D.S.C. Sep. 13, 2025).

[66] *See Carmer v. United States,* No. 22-cv-1100-BAH, 2025 WL 2674766 (D.D.C. Sep. 18, 2025); *M.M.B.B. v. United States*, No. 24-cv-5031-TWT, 2025 WL 2645912 (N.D. Ga. Sep. 15. 2025); *Hunt v. United States*, No. 24-cv-441-DPJ, 2025 WL 2598365 (S.D. Miss. Sep. 8, 2025).

- Should courts interpret the discretionary-function exception narrowly, or should they favor the government by interpreting it more generously?
- How should courts define conduct? Should they assess the *actual* decisions law-enforcement officers made or the *types* of decisions law enforcement made?
- How does the discretionary-function exception apply when a plaintiff alleges one or more of the law-enforcement proviso's six intentional torts alongside constitutional violations?
- Does the "negligent guard" or carelessness theory remain viable, or does the discretionary-function exception shield careless law-enforcement conduct from judicial scrutiny?

The litigation in these cases largely predate *Martin*. Thus, they are not true harbingers regarding practical issues, such as likelihood of success of motions to dismiss based on lack of subject-matter jurisdiction or even the government's chances for defeating motions for limited discovery related to subject-matter jurisdiction. Nonetheless, the opinions offer insights into the ways that courts interpret *Martin* and continue to struggle with issues now that the Supreme Court has spoken. Additionally, these cases reveal arguments that are working, facts that courts are seeking, and evidence to consider compiling to support the defense.

After briefly describing the background and posture of the cases when they reached the courts on the motions decided, this article will summarize the positions, if any, outlined by the three courts regarding *Martin*'s unanswered questions. Where appropriate, this article notes the positions taken by the other post-*Martin* cases identified above that focused on the discretionary-function exception outside the context of intentional torts.

A. Three cases decided in the wake of *Martin*

1. *Carmer v. United States*

Carmer involved FTCA and *Bivens* claims that arose from the alleged assault and battery of a protester by law enforcement during a protest over the death of George Floyd.[67] The court dismissed the *Bivens* claims asserting violations of the First, Fourth, and Fifth Amendments.[68] The government moved for summary judgment.[69] Among other arguments, the government asserted that the discretionary-function exception preserved

[67] *See Carmer*, 2025 WL 2674766, at *1.
[68] *See id.* at *4.
[69] *See id.* at *1.

sovereign immunity and precluded tort liability.[70] The court denied the government's motion.[71]

2. *M.M.B.B. v. United States*

M.M.B.B. was an FTCA action that arose from the expulsion of the plaintiff and her newborn U.S. citizen son by the U.S. Custom and Border Patrol (CPB).[72] The government moved to dismiss based on lack of subject-matter jurisdiction.[73] The court granted the motion as to the plaintiffs' counts 1 through 3: (1) false imprisonment of son; (2) false imprisonment of mother; and (3) negligence based on expulsion without first seeking the United States Citizenship and Immigration Services (USCIS)'s review of fear claims.[74] The court also granted the defendant's motion as to count 5 regarding negligence based on failure to secure proper medical treatment for the plaintiff's mother while in CPB custody.[75] The court denied the motion as to count 4, regarding negligence based on expulsion to locations or into conditions that placed the plaintiffs' health and safety at risk.[76] As for count 6—regarding negligence based on failure to provide information regarding obtaining a U.S. birth certificate—the court concluded that the plaintiffs failed to state a negligence claim and granted the government's motion to dismiss that claim.[77]

The court found that count 7 (intentional infliction of emotional distress) was poorly pleaded and, therefore, considered the claim subsumed within the first six causes of action.[78]

3. *Hunt v. United States*

Hunt was a mixed FTCA and *Bivens* case that arose from the plaintiff's indictment and arrest on charges that the government later dismissed.[79] The government moved to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).[80] The court dismissed the *Bivens* claims (for unconstitutional seizure and conspiracy to maliciously prosecute and falsely arrest the plaintiff) against the individual defendants

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[70] *See id.* at *5.
[71] *See id.* at *14.
[72] *See M.M.B.B.,* 2025 WL 2645912, at *1.
[73] *See id.* at *3.
[74] *See id.* at *13.
[75] *See id.*
[76] *See id.* at *11.
[77] *See id.* at *11.
[78] *See id.* at *12.
[79] *See Hunt v. United States,* No. 24-cv-441-DPJ, 2025 WL 2598365, at *1 (S.D. Miss. Sep. 8, 2025).
[80] *See id.* at *2.

but allowed limited discovery regarding the malicious-prosecution and false-arrest claims against the United States.[81]

B. Narrow versus broad construction of the discretionary-function exception

1. *Martin*

Martin noted that lower courts were divided, with some reading the discretionary-function exception more narrowly and others reading it "much more broadly."[82] The concurrence seemed willing to go farther. By noting that "[e]ven where a federal employee retains an element of choice, however, the exception does not apply reflexively," the concurrence could be interpreted as suggesting that a narrower reading of the exception is proper.[83]

C. *Carmer*—the narrow construction

Without specific guidance from *Martin*, the *Carmer* court adopted a narrow construction, stating that "[t]he FTCA's discretionary function exception is generally read narrowly."[84] The court reasoned that "[t]his narrow reach of the discretionary function exception is especially appropriate in the law enforcement context because of the interplay with another, related FTCA exception codified at 28 U.S.C. § 2680(h)."[85] After discussing the law-enforcement proviso's legislative history, the *Carmer* court agreed with other courts that "declined to adopt an 'overly broad conception' of the discretionary function exception under 28 U.S.C. § 2680(a) as applied to law enforcement, as such a reading would 'eviscerate' the law enforcement proviso under 28 U.S.C. § 2680(h)."[86] Selecting a narrow interpretation as a starting point informed the court's approach

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[81] *See id.* at *1–2.

[82] *Martin v United States*, 605 U.S. 401 (2025) (cleaned up).

[83] *Id.* at 416.

[84] *Carmer v. United States*, No. 22-cv-1100-BAH, 2025 WL 2674766, at *5 (D.D.C. Sep. 18, 2025) (citing *O'Toole v. United States*, 295 F.3d 1029, 1037 (9th Cir. 2002) ("[I]n order to effectuate Congress's intent . . . , the FTCA, as a remedial statute, should be construed liberally, and its exceptions should be read narrowly."); *Cestonaro v. United States*, 211 F. 3d 749, 755 (3d Cir. 2000) (explaining that the discretionary-function exception should not be a "toothless standard that the government can satisfy merely by associating a decision with a regulatory concern"); *Usoyan v. Republic of Turkey*, 438 F. Supp. 3d 1, 16 (D.D.C. 2020), *aff'd*, 6 F.4th 31 (D.C. Cir. 2021) (noting that the "discretionary function exception should not be applied too broadly immunizing almost all governmental activity").

[85] *Carmer*, 2025 WL 2674766, at *5.

[86] *Id.* at *6 (quoting *Beran v. United States*, 759 F. Supp. 886, 892 (D.D.C. 1991)).

to defining the conduct and finding that "the two line officers' violent confrontation with plaintiff does not implicate . . . high-level decisions" and did not include "immunized discretionary functions."[87]

1. ***Hunt*—likely narrow construction**

While the court in *Hunt* largely avoided the construction question, the opinion suggested a narrower construction that would follow the *Martin* concurrence.[88] The court offered another clue regarding its inclination when it rejected the government's argument "that prosecutorial decisions are inherently discretionary."[89] Specifically, the court reflected that, "[w]ere it so, then the law-enforcement proviso would be 'illusory.'"[90]

2. ***M.M.B.B.*—the broad construction**

In contrast with *Carmer* and *Hunt*'s apparent propensities, the court in *M.M.B.B.* found that the FTCA's "exceptions 'must be strictly construed in favor of the United States,' and when an exception applies to neutralize what would otherwise be a waiver of immunity, a court will lack subject matter jurisdiction over the action."[91] Thus, "[a]ny ambiguities are . . . interpreted in one direction—in favor of immunity."[92]

As in *Carmer*, the selected starting point impacted the *M.M.B.B.* court's decision on the motion to dismiss. Specifically, the plaintiffs asserted that the discretionary-function exception did not apply because the agency protocol did not provide U.S. Customs and Border Protection (CBP) agents discretion, and the CBP agents failed to comply with es-

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[87] *Id.* at *12 (cleaned up).

[88] *See, e.g.*, *Hunt v. United States*, No. 24-cv-441-DPJ, 2025 WL 2598365, at *7 n.6 (S.D. Miss. Sep. 8, 2025) (Justice Sotomayor's contention that "[w]hatever else is true of [the discretionary-function] exception, any interpretation should allow for liability in the very cases Congress amended the FTCA to remedy" (quoting *Martin*, 605 U.S. at 420)).

[89] *Id.* at *8.

[90] *Id.* (quoting *Sutton v. United States*, 819 F.2d 1289, 1297 (5th Cir. 1987)).

[91] *M.M.B.B. v. United States*, No. 24-cv-5031-TWT, 2025 WL 2645912, at *3 (N.D. Ga. Sep. 15. 2025) (quoting *Zelaya v. United States*, 781 F.3d 1315, 1321 (11th Cir. 2015)).

[92] *Id.* at *3 (quoting *Smith v. United States*, 14 F.4th 1228, 1231 (11th Cir. 2021)). *See also Taylor v. United States,* No. 2:23-cv-4671-RMG-MHC, 2025 WL 1943011, at *13 (D.S.C. July 10, 2025) (noting "it is presumed that if the government is given discretion under the first prong, the decision is grounded in public policy considerations"); *Dimas v. Perez*, No. 25-cv-165-KWR, 2025 WL 2533607, at *3 (D.N.M. Sep. 3, 2025) (noting that "[a]bsent from this analysis is the factual question of whether the government official(s) abused their discretion or negligently discharged their duties" because "the question of negligence is irrelevant" (cleaned up)).

tablished regulations.[93] The court disagreed, finding that "[d]iscretion is baked into this directive."[94] Because "the Court is obligated to construe application of the discretionary function exception in the Government's favor . . . the CBP agents' actions of expelling the Plaintiff Son with his mother represented an exercise of their discretion to keep their family unit together."[95] Thus, the court found that the first part of the discretionary-function exception analysis was satisfied regarding these claims.

D. Defining the conduct

1. *Martin*

Beyond underscoring the importance of "what the law's terms clearly direct" and declining to carve wrong-house raids out of the discretionary-function exception, *Martin* did not expressly address how the conduct should be defined.[96] The concurrence appeared to suggest that courts should analyze in detail the specific acts taken by the government employees.[97]

2. *Carmer*—limiting analysis to the specific tortious conduct

In *Carmer*, the government advocated a middle ground based on the concept of conduct that is inextricably intertwined with policy.[98] To that end, the government asserted that law enforcement's actions against the plaintiff were inseparable from the government's policy decision that balanced the rights of protesters against the public and officer safety.[99] Specifically, the government focused on law enforcement's "decision to install an anti-scale fence . . . in response to violent protests" and the "related decision after weighing their options to clear" the street using law enforcement.[100] The government asserted that law enforcement's actions to "remove plaintiff by force cannot be viewed in isolation, because those removal actions were inextricably intertwined with the [high-level] decision to use [law enforcement] as the front line of the clearing operation."[101]

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93 *M.M.B.B.*, 2025 WL 2645912, at *5 (relying on CBP guidance).

94 *Id.*

95 *Id.*

96 *See, e.g., Martin v United States,* 605 U.S. 395, 408, 413–14 (2025).

97 *Id.* at 417–19 (Sotomayor, J., concurring).

98 *See Carmer v. United States,* No. 22-cv-1100-BAH, 2025 WL 2674766, at *12 (D.D.C. Sep. 18, 2025) (discussing the government's reliance on *Gray v. Bell*, 712 F.2d 490 (D.C. Cir. 1983)).

99 *See id.* at *5.

100 *Id.* (cleaned up).

101 *Id.* (cleaned up).

Further, the government asserted that "because the challenged conduct [was] inextricably intertwined with a discretionary decision, sovereign immunity [was] not waived and no subject matter jurisdiction exist[ed]."[102]

The plaintiff specifically focused on the "moment of her battery" by law enforcement.[103] The *Carmer* court found that "[d]etermining exactly what conduct is at issue and identifying which specific policies or regulations the plaintiff alleges were violated [was] paramount."[104] The court deemed the government's "proposed framing" as sitting at "too high a level of generality."[105] The court rejected the government's argument, finding that "[v]iewed from 50,000 feet, virtually any action can be characterized as discretionary."[106]

Because the discretionary-function exception requires the court to "focus on the *specific conduct* at issue," the alleged battery was a "discrete injury-causing action" that was "sufficiently separable from protected discretionary decisions."[107] "The correct analysis is whether the alleged *tortious conduct* is discretionary."[108] Consequently, "the specific tortious conduct that plaintiff challenges in support of her battery claim is Officer Sinacore's and Kellenberger's act of 'ramm[ing] her with a shield' and 'bludgeon[ing] her with batons.'"[109]

> [A]lthough the [civil disturbance units of the Park Police and the Arlington County Police Department's] general mission to clear H street was a discretionary decision, [the officer's] *specific* decisions to shove and hit plaintiff was not grounded in policy considerations because that decision did not 'entail[] balancing competing demands for funds and resources.'[110]

Thus, the discretionary-function exception did not apply.[111]

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[102] *Id.* (cleaned up).
[103] *Id.* at *8 (cleaned up).
[104] *Id.* (cleaned up).
[105] *Id.* at *9 (quoting *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1142–43 (D.C. Cir. 2015)).
[106] *Id.* at *9 (quoting *Usoyan v. Republic of Turkey*, 6 F.4th 31, 47 (D.C. Cir. 2021)). *See also Salas v. United States,* 787 F. Supp. 3d 799, 807 (W.D. Tex. 2025) (focusing on specific conduct at issue: driving).
[107] *Carmer*, 2025 WL 2674766, at *9.
[108] *Id.* (quoting *Usoyan*, 6 F.4th at 46).
[109] *Id.* at *9 (cleaned up).
[110] *Id.* at *11 (emphasis added) (quoting *Macharia v. United States*, 334 F.3d 61, 67 (D.C. Cir. 2003)).
[111] *Id.* at *12.

3. *M.M.B.B.*—using a mixed approach (general to specific)

In contrast, the *M.M.B.B.* court took a mixed approach.[112] The court started with a higher-level view, determining that this case arose in "the context of border security" and "law enforcement decisions regarding immigration and criminal investigations and arrests are clothed in public policy considerations."[113] The court found that "[d]ecisions such as . . . whether to assess the Plaintiff Mother's fear claim or subject her to the Title 42 Order and whether to separate the Plaintiffs—clearly implicate choices 'grounded in social, economic, and political policy.' "[114] The court's assessment was bolstered by "the fact that there was specific agency guidance that gave CBP agents discretion on these issues."[115]

Nonetheless, the *M.M.B.B.* court's tolerance had its limits. The government argued that the negligence claim regarding expulsion to locations or into conditions which placed the plaintiffs' health and safety at risk was derivative of the negligence claim based on expulsion without first seeking USCIS review of fear claims.[116] Essentially arguing that the negligent-expulsion, health-and-safety claim was inextricably intertwined with the policy decisions that led the Supreme Court in *Martin* to dismiss some of the negligence claims, the government contended that the discretionary-function exception likewise should bar this claim.[117] The *M.M.B.B.* court disagreed, finding that the federal policy prescribed a course of action related to a migrant's property that left "no wiggle room for CBP agents to act differently."[118] Thus, the discretionary-function exception did not apply.[119]

Regarding negligence based on failure to provide information on obtaining a U.S. birth certificate, the *M.M.B.B.* court found that the failure to provide an accurate phone number satisfied the first part of the discretionary-function exception analysis because "there is no federal statute, regulation, or policy requiring agents to provide a working consulate

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112 *See M.M.B.B. v. United States,* No. 24-cv-5031-TWT, 2025 WL 2645912, at *5–6 (N.D. Ga. Sep. 15, 2025). *See also Leibowitz v. United States,* No. 23-cv-5677-LGD, 2025 WL 2252386, at *11–14 (E.D.N.Y. July 30, 2025) (taking a mixed approach and considering policy level issues and day-to-day operations).

113 *M.M.B.B.*, 2025 WL 2645912, at *5 (quoting *Cantu Silva v. United States*, 110 F.4th 782, 790 (5th Cir. 2024)).

114 *Id.* at *6 (quoting *United States v. Gaubert*, 499 U.S. 315, 323 (1991)).

115 *Id.* at *6 (cleaned up).

116 *Id.* at *7.

117 *Id.*

118 *Id.* (discussing CBP guidance).

119 *Id.* at *8.

phone number to a detainee."[120] Further, turning to the second part of the analysis, the court determined that "there is no question that the CBP agent's action here did not involve a legislative or administrative decision at all."[121] Consequently, the "agent's failure to provide a working consulate phone number is not the kind of choice that the discretionary function exception was designed to shield, so the exception is inapplicable."[122]

E. Unconstitutional conduct

1. *Martin*

As noted above, *Martin* recognized that "some lower courts have held that the discretionary-function exception does not shield . . . 'unconstitutional' police conduct from judicial scrutiny, but others have taken a contrary view and read the exception much more broadly."[123] The Supreme Court did not specifically decide whether unconstitutional conduct would be carved out of the discretionary-function exception's protection. Instead, the Supreme Court homed in on the language of the statute.[124] For example, when considering the Supremacy Clause defense, the Supreme Court noted that the available defenses are those "discussed in [section] 2674—not a Supremacy Clause defense nowhere mentioned there."[125]

While the statute does not expressly mention unconstitutional conduct, the Supreme Court may have telegraphed the viability of a constitutional challenge by emphasizing liability under state law and by noting that "federal law will control other FTCA suits where a litigant [can] point specifically to a constitutional text or a federal statute that supplies controlling liability rules, displacing contrary state law."[126]

The concurrence seemed to suggest that the discretionary-function exception should not protect unconstitutional conduct. Discussing the law-enforcement proviso's legislative history, Justice Sotomayor highlighted the intent to give victims a *Bivens* claim for constitutional violations against the individual federal agents and a matching claim against the United States based on the same unconstitutional conduct.[127] Specifi-

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[120] *Id.* (cleaned up).
[121] *Id.*
[122] *Id.* (cleaned up).
[123] *Martin v United States*, 605 U.S. 395, 401 (2025) (citing *Xi v. Haugen*, 68 F.4th 824, 843 (3d Cir. 2023) (Bibas, J., concurring)). *See* subsection IV.B.1.
[124] *See Martin*, 605 U.S. at 403–08.
[125] *Id.* at 414. *See* 28 U.S.C. § 2674.
[126] *Martin*, 605 U.S. at 410 (cleaned up).
[127] *Id.* at 420 (Sotomayor, J., concurring).

cally, the concurrence noted that "[t]he Committee designed the proviso to ensure 'innocent individuals who are subjected to raids of the type conducted in Collinsville, Illinois, will have a cause of action against the individual Federal agents' [via suits under *Bivens v. Six Unknown Fed. Narcotics Agents*] *and* the Federal Government [through the FTCA]."[128]

2. *Carmer*—unconstitutional conduct falls outside discretionary-function exception

The *Carmer* court found that "unconstitutional conduct," such as that alleged by the plaintiff, "falls outside the sweep of the discretionary function exception."[129] Relying on *Loumiet v. United States*, the *Carmer* court found "that the discretionary-function exception does not provide a blanket immunity against tortious conduct that a plaintiff plausibly alleges also flouts a constitutional prescription."[130] Focusing on the battery claim, the court further found that "successfully alleging constitutionally *ultra vires* conduct does not 'convert an FTCA claim into a constitutional damages claim against the government; state law is necessarily still the source of the substantive standard of FTCA liability.'"[131] Because a "reasonable jury could find" that law enforcement's actions were "unreasonable under the Fourth Amendment, and thus not shielded by the discretionary function exception," denial of the government's summary judgment motion was appropriate.[132]

While the court suggested that its analysis could end there, the court proceeded to address the claims under the two-part discretionary-function analysis.[133]

3. *Hunt*—unconstitutional conduct likely exceeds the discretionary-function exception

In *Hunt*, the court noted that "the Fifth Circuit has not yet determined—as other circuits have—whether acting contrary to the Con-

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[128] *Id.* (emphasis added) (quoting S. Rep. No. 93-588, at 3 (1974)).
[129] *Carmer v. United States*, No. 22-cv-1100-BAH, 2025 WL 2674766 at *6 (D.D.C. Sep. 18, 2025).
[130] *Id.* (quoting *Loumiet v. United States*, 828 F. 3d 935, 943–44 (D.C. Cir. 2016)) (noting that the D.C. Circuit joined "[a]t least seven circuits, including the First, Second, Third, Fourth, Fifth, Eighth, and Ninth, [which] have either held or stated in dictum that the discretionary-function exception does not shield government officials from FTCA liability when they exceed the scope of their constitutional authority").
[131] *Id.* (quoting *Loumiet*, 828 F.3d at 945–46).
[132] *Id.* at *8.
[133] *Id.* at *8–12.

stitution exceeds discretionary function."[134] Nonetheless, Fifth Circuit precedent "at least suggests that constitutional violations exceed discretion."[135] "In short, there are malicious-prosecution cases that survive the discretionary-function exception to the FTCA's sovereign-immunity waiver."[136]

F. The negligent-guard theory (also known as carelessness)

1. *Martin*

Martin noted the division among lower courts, with some holding that the discretionary-function exception does not shield "careless" police conduct from judicial scrutiny.[137] The concurrence seemed willing to go farther. By emphasizing that "it is hard to see how Guerra's conduct in this case, including his allegedly *negligent* choice to use his personal GPS and his failure to check the street sign or house number on the mailbox before breaking down Martin's door and terrorizing the home's occupants, involved the kind of policy judgments that the discretionary-function exception was designed to protect," the concurrence could be interpreted as suggesting that the negligent-guard theory is a viable argument for circumventing the discretionary-function exception.[138]

2. *Carmer*—likely adopter of the theory

In *Carmer*, the court alluded to the negligent-guard theory. Specifically, the *Carmer* court "cautioned against applying the discretionary function exception to shield actions implicating only the faintest hint of policy concern," and noted that "[m]ere garden-variety discretion receives no protection, nor can *blatantly careless* or malicious *conduct* be recast in the language of cost-benefit analysis."[139] The court did not rely on a carelessness theory to find liability. Instead, the court determined that, because the plaintiff's claims arose from a "scuffle with [officers] for which the government typically enjoys no immunity," law enforcement's confrontation with the plaintiff did not implicate high-level policy

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[134] *Hunt v. United States*, No. 24-cv-441-DPJ, 2025 WL 2598365 at *8 (S.D. Miss. Sep. 8, 2025) (cleaned up).
[135] *Id.* (citing *Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987)).
[136] *Id.*
[137] *Martin v. United States*, 605 U.S. 395, 401 (2025) (cleaned up).
[138] *Id.* at 419 (Sotomayor, J., concurring) (emphasis added).
[139] *Carmer v. United States*, No. 22-cv-1100-BAH, 2025 WL 2674766, at *10 (D.D.C. Sep. 18, 2025) (emphasis added) (cleaned up).

decisions.[140] Nonetheless, the court suggested that the theory could be viable.[141]

3. ***M.M.B.B.*—rejecting the theory**

In *M.M.B.B.*, the court found that whether the agents made the wrong choice was "not the relevant inquiry for whether the discretionary function exception applies; the Court must focus on the *types* of decisions being made, not on the decisions themselves."[142] The court focused on decisions "clothed in public policy considerations" as examples of the conduct that the discretionary function is intended to shield.[143] For example, "in the context of border security," the types of decisions that the discretionary function is intended to shield include "law enforcement decisions regarding immigration and criminal investigations and arrests."[144] Moving away from an inquiry focused on whether "the agent made the wrong choice," the court declined to adopt the negligent-guard theory advocated by the plaintiffs.[145] The court found that "the judicially created doctrine . . . ignores the plain language of the FTCA which stipulates that the discretionary function exception applies 'whether or not the discretion involved be abused.'"[146] The court then found that the second part of the discretionary-function exception analysis was satisfied regarding these claims.

For similar reasons, the court found that the discretionary-function exception barred the plaintiffs' negligence claim based on failure to provide proper medical treatment.[147]

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140 *Id.* at *11–12 (cleaned up).
141 *See also Oladokun v. United States,* 23-cv-5899-NRM, 2025 WL 1786913, at *5 (E.D.N.Y. June 26, 2025) (discussing negligent guard theory and finding discovery necessary before deciding whether the theory would apply); *Concepcion v. United States*, No. 23-cv-9219-NGG, 2025 WL 2638469, at *10 (E.D.N.Y. Sep. 12, 2025) (applying negligent guard theory).
142 *M.M.B.B. v. United States*, No. 24-cv-5031-TWT, 2025 WL 2645912, at *6 (N.D. Ga. Sep. 15. 2025) (citing *Shivers v. United States*, 1 F.4th 924, 928 (11th Cir. 2021)).
143 *Id.* at *5 (quoting *Cantu Silva v. United States*, 110 F.4th 782, 790 (5 Cir. 2024).
144 *Id.*
145 *Id.* at *6; *id.* at *6 n.3.
146 *Id.* at *6 n.3 (quoting 28 U.S.C. § 2680(a)). *See also Leibowitz v. United States,* No. 23-cv-5677-LGD, 2025 WL 2252386, at *14–15 (E.D.N.Y. July 30, 2025) (rejecting carelessness or laziness argument).
147 *M.M.B.B.*, 2025 WL 2645912, at *7–8 (noting that, "although the Plaintiffs argue that the CBP agent erred in exercising his discretion by failing to provide any medical care at all, the Court's inquiry here focuses on the type of decision being made rather than the actual decision made in this particular case." (citing *Shivers*, 1 F.4th at 928)).

V. Litigating law-enforcement liability cases after *Martin*

A. Identify and detail all potential statutes, regulations, policies, and procedures and specify how the judgment or conduct was grounded in those policy choices

Consider identifying with specificity the relevant policy or planning-level decisions and day-to-day management decisions, including identifying and discussing applicable federal statutes, federal regulations, statutory discretion related to antecedent issues (for example, staffing decisions), the presence of mandatory policies or directives, standard operating practices, and informal procedures.[148] Then, consider detailing how each disputed judgment or conduct was grounded in the statutes, regulations, policies, and procedures—identifying where discretion exists and where it does not.[149] Discuss with law enforcement how these statutes, regulations, policies, and procedures are incorporated into day-to-day decisions.

Even if the court is inclined to take a higher-level view of the conduct or to defer to the government, such a detailed analysis can help identify any details that could be bolstered by a declaration or reveal strengths and weaknesses of the argument. Identify potential declarants and discuss the detailed analysis with them to ascertain any issues, gaps, or different understandings.

B. Motions to dismiss for lack of subject-matter jurisdiction

The plaintiff has the burden to establish subject-matter jurisdiction.[150] Because that burden is favorable to the defendant, the defendant should continue to explore filing motions to dismiss for lack of subject-matter jurisdiction as the first line of responding to a complaint alleging law-enforcement misconduct.

Even in the subject-matter jurisdiction context, however, some courts have found that the government bears the burden of demonstrating the discretionary-function exception's applicability.[151] Assess whether courts

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[148] *See, e.g.*, *Leibowitz*, 2025 WL 2252386, at *10–12.
[149] *Id.* at *12–15.
[150] *See, e.g.*, *Unnamed Mother v. United States*, No. 25-cv-154-KWR, 2025 WL 2390227, at *6 (D.N.M. Aug. 18, 2025).
[151] *See, e.g.*, *Leibowitz*, 2025 WL 2252386, at *9 (collecting cases).

in the circuit where the litigation is filed have taken a position regarding the government's burden. Consider bolstering a motion to dismiss with detailed declarations and exhibits that would enable the government to carry the burden.[152] Note that the burden is on the defendant to support the affirmative defense of protection under the discretionary-function exception.

C. Discovery

The government should anticipate early motions to conduct discovery or to conduct limited discovery related to subject-matter jurisdiction. It is not clear whether appending declarations and related material to the motion to dismiss would prompt or strengthen such a discovery motion. Nonetheless, there is an ongoing debate related to defining conduct and establishing policy considerations on higher and day-to-day levels. *Martin* did not clear up that debate, opting instead for lower courts to deal with the uncertainty. As a result, courts might be inclined to allow the parties to develop a record before granting a motion to dismiss for lack of subject-matter jurisdiction.

Hunt provides a good example. There, the court ruefully noted that neither party submitted evidence in connection with the motion to dismiss, and the court only was able to consider the allegations in the complaint.[153] Plaintiff couched his claim as "not challenging the decision to prosecute or investigate" but instead asserting that "the prosecutor and case agents unlawfully and intentionally withheld information or misled the grand jury" *after* making the discretionary choice to present the case to the grand jury.[154]

Without any evidence, the court was left to review the allegations (some of which were "conclusory").[155] The court then identified "facts to consider" (including failure to conduct pre-indictment interviews, Department of Justice practices within the district, dismissals after interviewing the plaintiff) and "other facts" that are "impossible" for a plaintiff to know (including whether information was withheld from the grand jury that lead to an indictment without probable cause, whether exclusion violated regulations, policies, or the Constitution, and what agents did or did not do during the investigation).[156] Relying on *Sutton*, the court

[152] *See id.* at *2 n.3.
[153] *See Hunt v. United States,* No. 24-cv-441-DPJ, 2025 WL 2598365, at *8 (S.D. Miss. Sep. 8, 2025).
[154] *Id.* (cleaned up).
[155] *Id.* at *9 (cleaned up).
[156] *Id.* (cleaned up).

denied the motion and allowed "limited discovery."[157]

Before preparing the motion to dismiss, consider identifying those types of "facts to consider" and "facts impossible for plaintiff to know" discussed by the *Hunt* court and assessing whether it would be advantageous to provide the evidence in connection with the motion. That approach might allow the government to avoid discovery or to narrow the scope of any discovery sought by plaintiff. Regarding the latter, the government should consider whether to object to producing certain discovery based on the deliberative-process privilege or the law-enforcement privilege.[158]

> [T]he party asserting the law enforcement privilege must show that the documents contain information that the law enforcement privilege is intended to protect[,] . . . includ[ing] information pertaining to "law enforcement techniques and procedures," information that would undermine "the confidentiality of sources," information that would endanger "witness and law enforcement personnel [or] the privacy of individuals involved in an investigation," and information that would "otherwise . . . interfere[] with an investigation."[159]

D. Monitoring the post-*Martin* landscape

Finally, consider setting up alerts for cases and articles discussing *Martin* and talking with law-enforcement partners regarding developments.

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157 *Id.* ("Permitting limited discovery for the purpose of providing the court with sufficient information to answer the threshold question of governmental immunity is consistent with both the spirit and holding of [*Harlow v. Fitzgerald*] (holding that officers entitled to absolute or qualified immunity should be protected when possible from burdens of discovery)." (quoting *Sutton v. United States*, 819 F.2d 1289, 1299 (5th Cir. 1987)) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))).

158 *See U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.,* 592 U.S. 261, 267 (2021) ("[T]he deliberative process privilege shields from disclosure 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" (quoting *Nat'l Lab. Rels. Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975))).

159 *In re The City of New York*, 607 F.3d 923, 944 (2d Cir. 2010) (quoting *Dep't of Investigation of New York*, 856 F.2d 481, 484 (2d Cir. 1988)).

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Remembering What You Do Not Remember in a Digital Age

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I. Introduction

What happens when a witness no longer remembers having a memory, but a third party has an electronic record of what the witness said happened? Can a litigant rely on a third party instead of on the witness's first-hand knowledge of an event to establish what happened? That question is a difficult one to answer and has become increasingly important in the digital era in which police officers record statements through body cameras, citizens broadcast their daily lives on social media, and electronic records replace paper records.

This article discusses the dispute over whether the Federal Rules of Evidence permit a party to share with the jury what a third party claims a witness stated occurred when the witness cannot remember making the statement to the third party.[1] It begins by discussing key concepts, including refreshed memories, recorded memories, and authentication. It then discusses the duality of a "past recollection recorded," which is both a "recollection" and a "record." Finally, it turns to examples that we might encounter in the future and explores potential paths courts might adopt to resolve the inherent tensions that arise in a digital age when witnesses no longer remember what they once remembered.

II. Setting the scene

To understand the inherent tensions that arise when we ask witnesses to testify about facts that they no longer remember but third parties claim to have preserved what those witnesses said occurred, consider the following three examples drawn from recent cases.

In the first example, a bank teller typed an electronic record documenting his interactions with a particular bank customer. Five years later, when the United States Attorney's Office called that bank teller to testify at a criminal trial against that bank customer in federal court, the

[1] FED. R. EVID. 803(5).

bank teller no longer recalled any of his interactions with the customer. As he explained on the witness stand, he sees hundreds of customers per day, and he cannot recall any interaction with particularity. The bank, however, has a record of the incriminating conduct that the teller said that he observed. According to a bank representative, the teller recorded in the bank's electronic system that the customer told the teller she was trying to avoid the requirement that a bank report to the federal government any cash transaction over $10,000.[2] Can the federal government use the teller's electronic record in a trial against the bank customer for structuring currency transactions when the teller has no memory of making that electronic entry?

In the second example, a police officer wearing a body camera (bodycam) pulls over a vehicle with a male and female inside. The bodycam video shows the male driver telling the officer that the female passenger, who is sleeping in the car, "might be on something." When the officer asks both occupants whether there are any firearms in the vehicle, the female responds in a "groggy" manner that the male driver handed his firearm to her and that it is under her seat. When called to testify against the male driver in a felon-in-possession trial, the female passenger claims that she cannot remember anything about the incident—including her statement to the officer—because of her drug use.[3] Can the government use the bodycam video as evidence that the male passenger handed the female passenger a firearm during the examination of the female passenger if a custodian from the police department is available to authenticate the bodycam video?

In the third example, a Facebook user broadcasts via livestream that she can see her neighbor flash firearms and threaten to shoot members of another gang. The video, which Facebook stored electronically on its system, shows its user near an unidentified male with what appears to be a firearm. When called to testify, the frightened Facebook user denies remembering the encounter or livestreaming her observations.[4] Can the prosecution call a custodian of records from Facebook to testify about

[2] These facts are like those in *United States v. Foster*. Transcript of Criminal Jury Trial, United States v. Foster, No. 13-CR-20063-DLG (S.D. Fla. Apr. 1, 2015), Dkt. No. 456 (testimony of Shawn McBride and Mario Torano). *See* 31 C.F.R. § 1010.311; *id.* § 1020.320(a); 31 U.S.C. § 5324.

[3] These facts are like those in *United States v. Harris*. No. 16-04073-01-CR-C-BCW, 2018 WL 522784, at *2 (W.D. Mo. Jan. 23, 2018). *See also* 18 U.S.C. § 922(g) (unlawful for convicted felons to possess firearms in or affecting commerce)

[4] *See generally United States v. Burney,* 740 F. App'x 683, 686 (11th Cir. 2018) (unpublished) (case involving "Facebook Live stream"); *United States v. Tocco*, 135 F.3d 116, 122 (2d Cir. 1998) (witness's prior sworn testimony admissible as past recollection recorded where witness "claimed a memory loss" regarding statements).

the video that the Facebook user posted on live stream after the witness claims not to recall anything when testifying at trial?

In each of these scenarios, a witness had a memory that a third party recorded and preserved electronically. The bank recorded and preserved the teller's observations; the police officer's bodycam recorded the passenger's statements; and Facebook authenticates a livestream portraying a user's observation. And in each circumstance, the witness cannot recall observing the specific encounter *or* making a statement to the third party, whether because of the passage of time, drug use, or fear of retaliation.

As technology advances and we use more electronic media, we can expect such scenarios to multiply. Facebook and Ray-Ban, for example, introduced "smart glasses" with the ability to "capture photos and video" of "life's spontaneous moments as they happen from a unique first-person perspective."[5] With this technology, we might see the user of smart glasses unable to recall seeing something that Facebook's electronic records establish was in the user's perspective. Fitness trackers, meanwhile, can monitor and preserve a user's heart rate, sleeping pattern, and location with levels of specificity that users might never be able to recall on their own if called to testify.[6] Microsoft's artificial intelligence program Copilot promises to assist users "by automatically compiling status updates from team communications, converting meeting notes into assigned action items, and crafting targeted stakeholder updates," suggesting that a company might generate and preserve detailed notes about employees' interactions that none of the employees can later recall at trial.[7]

III. Setting the legal framework

To understand how courts might deal with these scenarios, we should begin with the simplest scenario: A witness recalls and testifies about personal observations on the witness stand. For example, a witness testifies during a car accident case, "I saw that the light was green." In such circumstances, a party may use that testimony to prove the truth of the matter asserted—that the light was green. In this simplest instance, the testimony and the statement about what happened both come from the same person: the person on the witness stand.

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[5] *Ray-Ban and Facebook Introduce Ray-Ban Stories, First-Generation Smart Glasses*, Meta (Sep. 9, 2021), https://tech.facebook.com/reality-labs/2021/9/ray-ban-and-facebook-introduce-ray-ban-stories-first-generation-smart-glasses/.

[6] *Fitness Trackers: How They Work and Their Highly Anticipated Future*, Illumin Mag. (Apr. 9, 2019), https://illumin.usc.edu/fitness-trackers-how-they-work-and-their-highly-anticipated-future/.

[7] *Boost Workplace Productivity with Copilot for Work*, Microsoft https://www.microsoft.com/en-us/microsoft-365-copilot/copilot-for-work (last visited June 17, 2026).

The rules change when the person testifying is not the same person who observed a fact. In such scenarios, the rule against hearsay generally prevents a party from using one witness's testimony to introduce the statement of a third person—the declarant—for the truth of the matter asserted, provided that federal statute, the rules of evidence, or other rules prescribed by the Supreme Court do not otherwise render that statement admissible.[8] For example, a party cannot call one witness to testify that a different person told the witness that the traffic light was green to prove that the traffic light was green at the time of an accident.

There are, however, exceptions to the rule.[9] The following examples both fall within exceptions to the hearsay rule: (1) a "statement describing or explaining an event or condition, made while or immediately after the declarant perceived it," for example, "Wow! I just saw the car go through a red light"; and (2) a "statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health)," for example, "Oh boy, I feel nauseous after seeing that accident."[10] The exception for "Records of a Regularly Conducted Activity" is another exception to the rule against hearsay.[11] The Federal Rules of Evidence also contain a catch-all "Residual Exception" that permits the introduction of a statement that would otherwise be barred by the rule against hearsay if both of the following conditions apply: (1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and any evidence corroborating the statement; and (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.[12]

Federal Rule of Evidence 803(5), which governs "Recorded Recollection[s]," is slightly different in that it permits a party seeking to use a "Recorded Recollection" *only* to read a "record" into evidence (and not to introduce it into evidence, unless "offered by an adverse party") if that record fits the following criteria: (1) it "is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately"; (2) it "was made or adopted by the witness when the matter was fresh in the witness's memory"; and (3) it "accurately reflects the

[8] Fed. R. Evid. 802.

[9] *Id.* at 801 (excludes a declarant-witness's own prior statement and an opposing party's statement from the definition of hearsay).

[10] *Id.* at 803 (1), (3), (6).

[11] *Id.*

[12] *Id.* at 807.

witness's knowledge."[13]

We begin to see tensions emerge between the rule against hearsay and its exemptions when we consider the previous examples involving a bank and its bank teller, a police department's bodycam video and a passenger, and Facebook's electronic records and the user broadcasting a livestream. In each scenario, there are electronic records (the bank's electronic records, a flash drive containing the police department's video, and Facebook's electronic preservation of the livestream) purporting to show that a real person (the bank teller, the passenger, and the user) knew something (that a customer was trying to evade currency transaction reports or that someone had a firearm). Moreover, the electronic records show that a real person made a statement about that real person's actual knowledge. Finally, in each scenario, the real person is prepared to testify but no longer has a memory of that event.

But how should we treat these electronic records? Are they the preserved memory of a witness who once had a memory? If they are, will courts be more likely to permit a party to read those electronic records to the jury because they appear like traditional exceptions to hearsay rules, including bank records and evidence that would be admitted under the residual exception? Or will courts view these electronic records as traditional hearsay in that a party appears to be seeking to introduce evidence of an out-of-court statement by a declarant for the truth of the matter asserted (for example, Facebook is attesting that a non-testifying witness saw a person flash a gun)? And will courts be uniform in their treatment of such evidence as these types of scenarios arise more frequently, for example, when a party receives electronic evidence from Ray-Ban that a user recorded a particular conversation, GPS evidence from a fitness tracker that a user was in a particular location, or an AI-generated summary of a team meeting from Microsoft's Copilot describing how employees discussed a particular subject, where the smart glasses user, the fitness enthusiast, or the employees claim to not remember seeing something, being somewhere, or discussing something?

IV. Memories, refreshed memories, recorded memories, and denials

To answer the complex questions at issue and to see how courts might develop an analytical framework to understand the applicable rules, one must first understand a few key concepts: memories, refreshed memories, recorded memories, and authentication—concepts that appear in the following example.

[13] *Id.* at 803(5).

A. Memories and refreshed memories

Begin with the following scenario: A victim was raped and remembers it fully. The victim can recall critical details from the witness stand about the rape with no assistance: a scar on her assailant's face, the color of his clothing, the location of the crime, and her response.

But what if we alter one aspect of that scenario? Let us say that, while testifying, the victim cannot recall a particular detail about the rape without assistance, like the type of car that the assailant was driving. Assume, however, that the victim brought to the stand her diary in which she recorded details from the night of the rape, including the type of getaway car. The key to unlocking her memory—the diary containing the type of car that the assailant was driving—helps the victim remember what occurred. The victim can authenticate the diary and the entries within it as hers because she maintained custody of her diary and recognizes her handwriting. But those entries are inadmissible as hearsay—out-of-court statements offered for the truth of the matter asserted—to prove the details of the night of the rape. Thus, those details will only come into evidence if the victim can remember them on the stand or if a hearsay exception applies to the diary entries.

When the prosecutor asks the victim to describe the getaway car and the victim admits on the stand that she does not recall the make and model of the vehicle, the law permits the observer to look at her own key—her diary—to *refresh her recollection.* Without reading her diary into the record, the victim can look at her handwritten diary, remind herself of the type of car the assailant was driving, then—putting the diary down—testify about the important fact from the witness stand as a current memory.[14] The law permits a victim who has refreshed her own memory by looking at a key to testify about a refreshed memory: the make and model of the getaway vehicle.[15]

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[14] *See United States v. Humphrey,* 279 F.3d 372, 377 n.3 (6th Cir. 2002) (describing how a document that a witness uses to refresh his or her recollection is not introduced into evidence at trial); *Rush v. Ill. Cent. R. Co.*, 399 F.3d 705, 718 (6th Cir. 2005) (describing how a transcript of witness's interview with risk manager, taken immediately after railcar accident, could not be read aloud to jury); *Collins v. Kibort*, 143 F.3d 331, 338 (7th Cir. 1998) ("Even if [a party] had satisfied Rule 803(5)'s admissibility requirements, the diary itself may not be received as an exhibit unless it is offered by an adverse party.").

[15] *See Blowers v. United States,* 600 F. App'x 548 (9th Cir. 2015) (unpublished) (describing how a witness could use his or her own letter which "contained various dates" that the defendant violated the law "to refresh the witness' recollection"); *United States v. Gonzalez-Aguilar*, 680 F. App'x 330, 331 (5th Cir. 2017) (unpublished) (describing how an agent could review a report to refresh his recollection of what he observed); *United States v. Rinke*, 778 F.2d 581, 588 (10th Cir. 1985) (describ-

But what if the victim lacks the key to unlock her own memory? Imagine that the victim recalls that the rape occurred on a street named after a tree but cannot recall whether the street was called *Pine*, *Oak*, or another common tree name. The law permits the prosecutor to hand a map of the neighborhood to the victim to refresh her memory.[16] If the unauthenticated external key—here the map that the prosecutor provides to the victim—can trigger the victim's memory on the witness stand, it matters not that a prosecutor provided the key to the victim. Indeed, a prosecutor can show a witness a police report documenting how the victim previously stated that the rape occurred on *Spruce Street* or even ask a leading question to refresh her memory.[17] It only matters that the victim testifies that she *now* remembers a particular fact having had her memory refreshed, not that she can authenticate the material that refreshed her memory.

B. Records of forgotten memories

But what if no key can unlock a witness's memory? Imagine instead that the victim wrote down the car's vehicle identification number (VIN) on a note before the assailant drove off, but no matter how many times she looks at her notes from that night, she cannot refresh her recollection of the long series of numbers she saw. She can, however, confirm that she accurately recorded the VIN that night, even though she cannot recall the number from the witness stand. What should happen? As with the

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ing how "witnesses had independent recollections of prior events after being permitted to refresh their memories by consulting their notes"); *United States v. Tatum*, 548 F.3d 584, 587 (7th Cir. 2008) (describing how "the government was entitled to refresh [a witness's] recollection during his testimony with the inventory sheet that he prepared at the time of the incident").

[16] 1 McCormick on Evid. § 9 (7th ed. 2025) ("Any kind of stimulus, 'a song, a face, or a newspaper item,' can produce the 'flash' of recognition, the subjective feeling that 'it all comes back to me now.'" (footnotes omitted) (citing *United States v. Weller*, 238 F.3d 1215, 1221 (10th Cir. 2001))).

[17] *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 233 (1940) (use of leading questions to refresh recollection is in the sound discretion of the trial judge). *See also Rush,* 399 F.3d at 716–18 ("While we have authorized the use of leading questions to establish a witness's lack of memory as to a particular event, we have cautioned that the trial court may abuse its discretion when otherwise inadmissible evidence is introduced to the jury through the guise of refreshing a witness's recollection."); *Pittman by Hamilton v. Cnty. of Madison, Ill.*, 863 F.3d 734, 737 (7th Cir. 2017) (describing how a witness refreshed his memory by a transcript of a video recording); *United States v. Shoupe*, 548 F.2d 636, 641 (6th Cir. 1977) ("Case law supports the limited incorporation of a witness's prior sworn statements within leading questions designed to refresh his recollection of their contents." (citing *Socony-Vacuum Oil Co.*, 310 U.S. at 231–33)); *Roberson v. United States*, 249 F.2d 737, 742 (5th Cir. 1957).

make and model of the car, we have a victim who once had a memory of a particular fact and currently possesses the key to unlocking that memory. In this scenario, however, the key cannot unlock the memory when the victim is on the stand.

Federal Rule of Evidence 803(5) covers such a scenario, called "past recollection recorded." In this hypothetical, the victim once knew the VIN of her assailant's car; she wrote it down when she saw it. In addition, she can testify that the memory she previously recorded was accurate and that she did not fabricate the VIN in her note. Moreover, the victim can testify that she cannot refresh her recollection during her testimony by looking at the note. Under this scenario, Rule 803(5) allows the victim to read that record for the jury as a "Recorded Recollection," but the record itself does not go into evidence.[18] The record only goes into evidence as an exhibit if an adverse party offers it.

The party seeking to introduce evidence of a past recollection recorded that a third party stored must first "establish that the recording accurately reflected" the original observer's past recollection.[19] What if the observer lacks any personal record of her memory, but a *third party* maintained such a record? The Tenth Circuit Court of Appeals encountered such a situation in *United States v. Hernandez*, where a third party held an observer's recollections recorded and the observer could not authenticate the record.[20] In *Hernandez*, a witness testified that she could not

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[18] Fed. R. Evid. 803(5); *Winters v. McFaul*, 905 F.2d 1539 (6th Cir. 1990) (unpublished table decision) ("[U]nder Rule 803(5) the report itself should not have been admitted into evidence because it was not offered by an adverse party . . . ."). *See also United States v. Namer,* 149 F. App'x 385, 398 (6th Cir. 2005) (unpublished) ("Clearly the district court did not abuse its discretion by allowing [a witness] to read his notes into the record under the recorded recollection exception."); *Greger v. Int'l Jensen, Inc.*, 820 F.2d 937, 943 (8th Cir. 1987) (permitting reading of diary into record where witness testified that she helped write information in a diary, she made "correct entries at the time the noted events occurred, and that she could not recall and testify to the events in the diary from memory"); *United States v. Marcantoni*, 590 F.2d 1324, 1330 n.6 (5th Cir. 1979) (describing how an officer who read a VIN likely "could not recall the precise serial numbers and that his testimony was strictly a recital of what he had recorded"); *United States v. Ramsey*, 785 F.2d 184, 192–93 (7th Cir. 1986) (describing how a witness's "calendar should have been used, if at all, as a recorded recollection under Rule 803(5)").

[19] *See United States v. Mornan*, 413 F.3d 372, 378 (3d Cir. 2005) (government failure to call official examiner who recorded statement precluded use of past recollection recorded).

[20] 333 F.3d 1168, 1179 (10th Cir. 2003). *See also Rathbun v. Brancatella,* 107 A. 279 (N.J. Sup. Ct. 1919) (witness saw license number of car that struck plaintiff and called it out, second witness wrote that number on an envelope and gave it to investigating officer, the officer copied it into his report evidences; the transmitted fact was identical from its inception to its delivery at police headquarters); *Swart v. United States*, 394

remember "the serial number of the gun that she said [the defendant] stored at her home"; however, she testified that she "accurately recited the serial number" to a third party, who wrote that number down.[21] Because the observer and the third party testified at trial "that they performed their roles accurately," that is, that the observer accurately told the serial number to the third party and that the third party accurately recorded it, the Tenth Circuit affirmed that it was proper to read the serial number to the jury.[22] The court reasoned, "a recorded recollection compiled through the efforts of more than one witness is admissible under Rule 803(5), where, as here, each participant in the chain testifies at trial as to the accuracy of his or her piece of the chain."[23]

Other Circuits agree as to the scope of Federal Rule of Evidence 803(5) where observers testify that they provided a truthful statement to law enforcement but no longer remember that statement. The Seventh Circuit in *United States v. Lewis* permitted a Federal Bureau of Investigation agent to testify about what an observer told him because the observer testified the following: (1) "the events were fresher in [the observer's] memory when he was interviewed," and (2) that the observer told the FBI agent the truth; and (3) the FBI agent "testified he accurately transcribed his notes of the interview when he prepared the report."[24] Similarly, the Eighth Circuit in *United States v. Riley* permitted the prosecutor to play to the jury a video of an interview with an observer where the observer "testified that, at the time of the interviews, she remembered what had happened" but could no longer remember what occurred.[25]

F.2d 5, 6 (9th Cir. 1968) (noting that "when the observer testifies to the accuracy of his report to the recorder and the latter testifies to the accuracy of the recording, the trial court may in its discretion admit the contents of the written report as the recorded past recollection of the observer").

[21] *Hernandez*, 333 F.3d at 1177. The facts of Hernandez were more complicated and involved a third witness. For purposes of this article, I simplified the fact pattern.

[22] *Id.*

[23] *Id.* at 1178–79 (citing *United States v. Schoenborn*, 4 F.3d 1424, 1427–28 (7th Cir. 1993)); *United States v. Booz*, 451 F.2d 719, 725 (3d Cir. 1971); 5 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 803.07(3)(d), at 803–53 (Joseph M. McLaughlin ed., 2d ed. 2002).

[24] 954 F.2d 1386, 1395 (7th Cir. 1992).

[25] 657 F.2d 1377, 1386 (8th Cir. 1981). *See also United States v. Sollars,* 979 F.2d 1294, 1298 (8th Cir. 1992) (same result as to a tape recorded interview where witness "testified at trial that she remembered talking to [a law enforcement] [defendant] was on the roof"); *United States v. Smith*, 197 F.3d 225, 231 (6th Cir. 1999) (past recollection recorded where witness testified that "she had the intent to tell [law enforcement] the truth during that interview" but no longer remembered facts).

C. Conflicts between memories and records of recollections

There is, however, an exception where witnesses recall that they *did not* make a particular statement. In *United States v. Schoenborn*, a defendant convicted of assault with a dangerous weapon challenged the admission of an FBI report that documented how an inmate told the FBI that the inmate observed a Native American man (the defendant) hit another inmate in the head with a pipe.[26] When called to testify, the inmate who spoke with the FBI claimed only to remember the incident "to a point" and that he could not remember if the defendant was the one who committed the assault.[27] As to speaking with the FBI, the witness "testified that he could not remember if had provided a statement to an agent," that "he had answered truthfully" when questioned by the FBI, but that he did not remember whether the FBI report accurately recorded his statement.[28] On cross-examination, the witness testified that he denied telling the FBI agent that the typed FBI report was accurate and that his statement was not based on personal knowledge.[29]

The government moved to introduce the report pursuant to Federal Rule of Evidence 803(5), which governs past recollections recorded after the FBI agent testified that he accurately took notes during the interview with the witness, and that the witness said the report was accurate.[30] The district court agreed that the report met the requirements of Rule 803(5).[31]

On appeal, the court stated that "the evidence should not have been admitted" because the witness "did not adopt the agent's report as his own."[32] The Court of Appeals treated Rule 803(5) as requiring both the recordkeeper and the memory holder to agree in that the "person who witnessed the event must testify to the accuracy of his oral report to the person who recorded the statement" and the "recorder must also testify to the accuracy of his transcription."[33] The Seventh Circuit held that if the memory holder disagrees with "whether or not the recorder's transcription of the witness's statement is correct," the past recollection recorded is not admissible.[34]

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[26] 4 F.3d 1424, 1426 (7th Cir. 1993).
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.* at 1427. *See* Fed. R. Evid. 803(5).
[31] *United States v. Schoenborn*, 4 F.3d 1424, 1427 (7th Cir. 1993).
[32] *Id.*
[33] *Id.* at 1428. *See also* Fed. R. Evid. 803(5) (recorded recollections).
[34] *Schoenborn*, 4 F.3d at 1428.

V. The tension of "past recollection recorded" in a digital age

In the scenarios discussed earlier, observers can testify about certain *facts* (in the case of a refreshed memory) or the *process* they used to provide their memory to the third party (in the case of a past recollection recorded) and they remembered enough to attest to any inaccuracies of the recorded memory.[35] We can now turn to a far more difficult scenario likely to occur with more frequency in our increasingly digital age: A third party holds a record of an observer's statement about a memory, but the observer cannot (or perhaps never could) recall the process of providing that memory to the third party.

Go back to the rape example.[36] Imagine that the assailant drugged the victim, but the victim was able to provide some details about the crime to a first responder by showing the first responder a video of the incident that she had on her phone. Assume further that by the time of the trial, she no longer remembers making the recording. When the observer spoke to the first responder and recorded her video, she provided details "on a matter the witness once knew," that is, the crime that she just witnessed. Moreover, the observer made that statement "when the matter was fresh in the witness's memory," right after the offense. Finally, the responding officer could establish facts to suggest that the victim's statement "accurately reflects the witness's knowledge" by offering corroborating evidence about what the victim said to that officer.

A. The duality of past recollections recorded

To understand how a court might deal with this scenario, we must recognize that, as its name suggests, a past recollection recorded is a *record* much like a business record. Both the rule governing past recollections recorded and business records, for example, appear in Federal Rule of Evidence 803, and neither rule requires the original record holder to testify about first-hand knowledge about the record.[37] The hearsay exception for business records does not require the clerk who made an entry to testify that he remembered and accurately recorded how much wheat arrived at the store on June 1, and the past recollection recorded rule does not require the memory holder to testify that she now has an accurate recollection of a VIN that she told a third party. In these important aspects, past recollections recorded are more like traditional *records*.

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[35] *See* sections II–III.
[36] *See* subsection IV.A.
[37] Fed. R. Evid. 803.

Alternatively, past recollections recorded are also *recollections*, or memories linked to a particular observer. Past recollections recorded emerged from a body of law governing a testifying witness's ability to rely on writing as an aid to memory.[38] Although past recollections recorded evolved away from refreshed memories to become a distinct legal concept, the law governing past recollections recorded maintains some aspects that link it to its origins.

This duality is important and separates past recollection recorded from other rules.[39] For example, the original record of the memory is not introduced and sent back to the jury, but is instead read to the jury, in stark contrast with a business record which a jury can review during deliberations. In addition, the original memory holder can preclude the use of his past recollection recorded when he testifies that a third party recorded that past recollection incorrectly, as the Seventh Circuit ruled in *United States v. Schoenborn*.[40] Because past recollections recorded were historically an aid to assist *testifying witnesses* in recalling events, a witness's own memories trump any third party's records of those memories. The business record exception, however, contains no absolute veto by the memory holder. As a district court recently explained, "Where it has been shown that business records were made and kept as a regular practice in the ordinary course of business," for example, a bank teller testifies that his records were generated at or near the time that they were created, "attacks on the records as inaccurate or incomplete" for example, the teller says he made a mistake in entering that information, "are generally treated as going to their weight rather than admissibility."[41]

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[38] *See* Newell H. Blakely, *Past Recollection Recorded: Restrictions on Use as Exhibit and Proposals for Change*, 17 Hous. L. Rev. 411, 416 (1980); 2 McCormick on Evidence § 279 (7th ed. 2025); 1 McCormick on Evidence § 9 (7th ed. 2025)).

[39] *Compare* 1 McCormick on Evidence § 9 (7th ed. 2025) ("writing is the real evidence" where a witness does not recall an event), *with* Blakely, note 38, at 441 (a "paper is not a memory").

[40] 4 F.3d 1424 (7th Cir. 1993).

[41] *Nutrien AG Sols., Inc. v. Anderson*, No. 21-CV-1035-LCB, 2025 WL 2743414, at *11 (N.D. Ala. Mar. 31, 2025). *See Crompton-Richmond Co., Factors v. Briggs*, 560 F.2d 1195, 1202 n.12 (5th Cir. 1977); *Hanley v. United States*, 416 F.2d 1160, 1167 n.14 (5th Cir. 1969); *Moss v. Ole S. Real Est., Inc.*, 933 F.2d 1300, 1307 (5th Cir. 1991) ("[C]ourts should not focus on questions regarding the accuracy" of a record in making the trustworthiness determination because the factfinder is responsible for weighing the evidence and assessing its credibility); *United States v. Hathaway*, 798 F.2d 902, 907 (6th Cir. 1986) ("Once a foundation is laid, in the absence of specific and credible evidence of untrustworthiness, the proper approach is to admit the evidence and permit the jury to determine the weight to be given the records."); *Eco Sols., LLC v. Verde Biofuels, Inc.*, No. 4:09-CV-0125-HLM, 2011 WL 13135785, at *17 (N.D. Ga. Sep. 21, 2011) ("Courts 'tend to overlook accidental errors or omissions made by employees who

B. Competing interests

When balancing this duality, we must recognize that there are reasons to prefer records to recollections, just as there are justifications for preferring memories to memoranda. Consider the Sixth Circuit's reasoning in *Cathey v. Johns-Manville Sales Corp.*, where the court noted that the "admission of items pursuant to [Federal Rule of Evidence] 803(5) is justified only because 'a contemporary, accurate record is inherently superior to a present recollection subject to the fallibility of human memory.'"[42] Indeed, when faced with deciding between a handwritten note containing a VIN that a witness wrote on the night of a rape and a witness's own, unassisted present recollection years later of that VIN, we would prefer the former. We should be skeptical that a witness could better recall a long string of digits years after the fact, and all things being equal, should believe that a contemporaneous handwritten note from the night of the event is more accurate.[43] In this context, records are likely better than recollections. But there are other situations where memories are preferable to memoranda. In 1927, when analyzing past recollections recorded in the *Harvard Law Review*, Edmund M. Morgan noted the real "danger of having the examiner," the trial court or a jury, "fall between the stools of [an original observer's] forgetfulness and [a third-party record keeper's] ignorance" where "the likelihood of the trier's failure to recognize the attendant perils of perjury or honest mistake is not to be overlooked."[44] Because past recollections recorded often involve two parties—the observer and the record keeper—there are two risks, one associated with the original observer's ability to observe correctly and the second tied to the third party's ability to record accurately that past recollection. Moreover, an expansive reading of Federal Rule of Evidence 803(5) creates incentives for witnesses to feign lack of memory to avoid cross-examination. As Morgan cautioned in 1927, before the Federal Rules of Evidence even existed, extensive use of past recollections recorded "would provide too handy a

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generally seek to record information accurately.'" (quoting *United States v. Price*, 516 F.3d 597, 605 (7th Cir. 2008))); *United States v. McGill*, 953 F.2d 10, 15 (1st Cir. 1992); *Itel Cap. Corp. v. Cups Coal Co.*, 707 F.2d 1253, 1259–60 (11th Cir. 1983) (where documents are sufficiently shown to qualify as business records, the Eleventh Circuit has held that a court may admit them and allow the trier of fact to pass on a claim by their opponent that the records are forged).

[42] *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565, 1583 (6th Cir. 1985) (quoting 4 Weinstein's Evidence § 803(5), at 803-158.

[43] *Cf. Blowers v. United States,* 600 F. App'x 548, 548 (9th Cir. 2015) (unpublished) (letter containing "various dates"); *United States v. Tatum*, 548 F.3d 584, 587 (7th Cir. 2008) (refreshed memory through use of "inventory sheet").

[44] Edmund M. Morgan, *The Relation Between Hearsay and Preserved Memory*, 40 Harv. L. Rev. 712, 731–32 (1927).

device for [a witness] to escape real cross-examination . . . especially in cases where the reported facts were at all complicated."[45] Indeed, it is because of "the law's preference for live testimony" to avoid such pitfalls that the Third Circuit held that a past recollection recorded does not "remain[] before the eyes of the jurors during their deliberations," where it can do harm.[46] Thus, in some situations, reliance on memories can prevent risks from memoranda.

C. Balancing interests

The competing risks of memories and memoranda, however, do not mandate a particular result where those hazards are inconsequential or other means exist to reduce those perils. For example, even in the context of refreshed recollections, "[t]here is a danger that the mind will 'remember' something that never happened," for example when an attorney asks a gullible witness a leading question.[47] Courts, nevertheless, routinely permit a party to refresh a witness's recollection because they can balance the risk of false memory by permitting opposing counsel to cross-examine that witness.[48] We must not, as Judge Hand cautioned, "cook the egg by burning down the house," or in the modern terms, microwave popcorn by nuking a village.[49] We must instead consider costs, including the difficulties and expenses, and potential benefits to determine whether a particular rule would "add[] anything to the credibility" of the past recollection recorded.[50]

To understand how this balancing works, consider two different circumstances. First, assume that in a civil rights lawsuit where a minority customer sues an establishment for racial discrimination, the plaintiff gathered thousands of Foursquare records and calculated the amount of time each customer waited for a table to prove racial discrimination in wait times. "Foursquare offers a mobile device application that allows its users to view nearby businesses and points of interest, 'check-in' at these locations, and comment upon their experiences, services, and/or goods received at said locations."[51] Now assume that a single loyal customer,

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45 *Id.*
46 *United States v. Casoni*, 950 F.2d 893, 914 (3d Cir. 1991).
47 1 McCormick on Evidence § 9 (7th ed. 2025).
48 *Blowers*, 600 F. App'x at 548; *United States v. Gonzalez-Aguilar*, 680 F. App'x 330, 331 (5th Cir. 2017) (unpublished); *United States v. Rinke*, 778 F.2d 581, 588 (10th Cir. 1985); *Tatum*, 548 F.3d at 587.
49 *Mass. Bonding & Ins. Co. v. Norwich Pharmacal Co.*, 18 F.2d, 934, 937 (2d Cir. 1927).
50 *See id.* at 938.
51 *Evolutionary Intel., LLC v. Foursquare Labs, Inc.*, No. 6:12-CV-785-CMC, 2013 WL 12140952, at *1 (E.D. Tex. Aug. 27, 2013). *See also In re Search of Three Hotmail*

in an effort to protect her favorite restaurant from closing, is prepared to testify that, several years after she checked into the restaurant, she believes that Foursquare's records are inaccurate, thereby contradicting the past recollections recorded maintained electronically by the technology company. Could the establishment call dozens of Foursquare users to recant their Foursquare records?

Contrast the Foursquare scenario with one in which a property owner, who despises her tenant, calls the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) agent whose last investigation into that tenant for possessing a firearm as a felon resulted in an acquittal. Imagine further that the property owner is prepared to tell the ATF agent in a video that the tenant possesses a firearm. After recording the video, the property owner feigns lack of memory to ensure that the government can play the video of her statement to the jury as a past recollection recorded.

Let's see how these scenarios fit within Federal Rule of Evidence 803(5).[52] First, both the Foursquare user and the property owner recorded facts—the time of the former's check-in and the tenant's possession of a firearm—that they once purportedly "knew about but now cannot recall well enough to testify fully and accurately."[53] Those records were also "made . . . by the witness when the matter was fresh in the witness's memory," specifically when the Foursquare user checked in to the establishment and when the ATF agent recorded the property owner.[54] And there is evidence that the records "accurately reflect[] the witness's knowledge," as demonstrated by circumstantial evidence in the Foursquare example, despite the later incredible claim that the records were improperly recorded by Foursquare, or by the ATF agent's live testimony.[55]

But the law likely permits the use of *only* the latter statement by the property owner, for which there is every indication that it is false.[56] The loyal customer's Foursquare records would be inadmissible, despite there being every indication that the past recollection recorded is accurate, simply because that Foursquare user is prepared to dispute the accuracy of her digital memory. Moreover, constitutional concerns arise only in the latter situation, where the tenant's inability to cross-examine the property owner whose statements the government seeks to introduce in video form

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Email Accounts, No. 16-MJ-8036-DJW, 2016 WL 1239916, at *13 (D. Kan. Mar. 28, 2016).

[52] *See* Fed. R. Evid. 803(5).

[53] *See id.*

[54] *See id.*

[55] *See id.*

[56] *See* Edmund M. Morgan, *The Relation Between Hearsay and Preserved Memory*, 40 Harv. L. Rev. 712, 719 ("If this is not hearsay, it comes perilously close to it.").

during his criminal trial implicates his Sixth Amendment right to confront the true "witness[] against him."[57]

D. Calibrating duality

To calibrate Rule 803(5) correctly, we must therefore ask new questions instead. First, we must categorize the original memory holder. In many circumstances, the original memory holder will be a person who routinely has memories that lend themselves to being recorded. These include highway patrol officers and chemists who routinely memorialize their observations to avoid later confusion.[58] Conversely, the original memory holder might be an individual for whom we expect a lesser ability to recall details: a young child, an individual with a mental defect, or a drug user.[59] We can contrast these examples with individuals who possess normal capacities to recall facts.

Second, and relatedly, we must turn to the memory itself. We might expect all individuals to lack the ability to recall a long VIN or the price of ribbons, but we would not expect any witness to soon forget other details, like the image of a loved one's bloodied body.[60] Thus, the nature of the memory and the original memory holder matter.

Third, we must turn to the third party that recorded the past recollection recorded. Did a bank, technology company, government agency, or police officer preserve the record?[61] This question is important because law enforcement have the ability to "threaten[] or coerce [a witness] to make [a] statement," or persuade a witness to make a statement "in exchange for leniency," whereas a bank or technology company have less ability to do so.[62] Fourth, and relatedly, we must ask whether the original memory holder had any other reason to lie or to act in a way more

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[57] U.S. Const. Amend. VI.

[58] *See Newton v. Ryder Transp. Servs.*, 206 F.3d 772, 773 (8th Cir. 2000) (highway patrol officers); *United States v. Marshall*, 532 F.2d 1276, 1285–86 (9th Cir. 1976) (chemists).

[59] *See Mordick v. Valenzuela*, 780 F. App'x 430, 433 (9th Cir. 2019) (unpublished) (young child); *United States v. Ford*, 789 F. App'x 117, 119 (11th Cir. 2019) (unpublished) (individual who "underwent brain surgery"); *People v. Farrell*, 34 P.3d 401, 406–07 (Colo. 2001) (asking "whether the declarant was mentally or physically unstable at the time of the confession"); *United States v. Harris*, No. 16-4073-1-CR-C-BCW, 2018 WL 522784, at *2 (W.D. Mo. Jan. 23, 2018) (drug user).

[60] *See United States v. Marcantoni*, 590 F.2d 1324 (5th Cir. 1979) (lack of an ability to recall a long VIN); *Town of Norwalk v. Ireland*, 68 Conn. 1 (Conn. 1896) (lack of an ability to recall the price of ribbons).

[61] *See Ford*, 789 F. App'x at 117; *United States v. Sollars,* 979 F.2d 1294, 1298 (8th Cir. 1992).

[62] *Farrell*, 34 P.3d at 406–07.

favorable to a particular party.[63] Incentives matter, and the law should ask whether a third-party memory holder is a party to dispute and whether an observer is neutral.

Fifth, we must ask whether the third party's record is itself reliable. We might be more comfortable with a record that demonstrates reliability, for example a video recording, a transcript of a sworn statement, or an inventory sheet, than we would be of a single witness's description of what another witness relayed years earlier without sufficient corroborating evidence that the record keeper accurately preserved the witness's memory.[64]

We can now use these tools to distinguish the two cases. In the civil rights case, the original memory holder is one who routinely makes recollections by checking into establishments on social media applications; and the record at issue, the exact wait time at a particular restaurant, is not one that any witness is likely to recall with specificity years later. Moreover, the third party, Foursquare, has no law-enforcement function or any incentive to curry favor with either party in the civil matter. Finally, the Foursquare user's incentive to protect her favorite establishment shows that her recantation is less reliable than the Foursquare check-in years earlier. Weighing all these factors, a court should allow the introduction of the Foursquare record despite the user's disavowal of her own past recollection recorded.

In stark contrast, where a property owner seeks to evict a tenant by telling law enforcement that she saw the tenant with a firearm, a court should require both the property owner and the law-enforcement officer to testify. The original memory holder has an incentive to use the weight of the federal government to accomplish her desired outcome, here the removal of her tenant. Moreover, the memory at issue—seeing a man with a firearm—is something that one would likely recall years later with a general level of specificity, unlike, for example, a specific VIN. And while the method that the ATF agent used to preserve the property owner's past recollection recorded normally would add to its reliability, in this circumstance the use of a video recording suggests a scheme to avoid cross-examination through Federal Rule of Evidence 803(5).

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63 *See id.* (asking "whether the declarant had a reason to retaliate against the defendant").

64 *See Ford,* 789 F. App'x at 117 (video recording); *United States v. Shoupe*, 548 F.2d 636, 641 (6th Cir. 1977) (transcript of a sworn statement); *United States v. Tatum*, 548 F.3d 584, 587 (7th Cir. 2008) (inventory sheet).

E. Some recent difficult cases

Calibrating the duality is more difficult in the Eleventh Circuit's case, *United States v. Ford*, and the Ninth Circuit's case, *Mordick v. Valenzuela*.[65] During the trial in *Ford*, the government moved to present to the jury, as a past recollection recorded, a recording of a witness's statement to investigators.[66] The witness, after telling investigators about a fire, "underwent brain surgery" which caused her to "no longer recall what she said to investigators."[67] She claimed, however, that although she "could not remember 'the whole conversation' she had with the investigators," she remembered some statements but not others and affirmatively disavowed some of the recorded statements.[68] The district court permitted the government to use the statement, the defendant appealed, and the Eleventh Circuit reversed.

The Eleventh Circuit held that "the district court abused its discretion when it permitted the full recording to be played for the jury," making clear that the district court should have "played only the statements [the witness] could confirm she believed to be accurate at the time she made them."[69] Thus, according to an nonbinding opinion by the Eleventh Circuit, witnesses must affirmatively remember that a particular part of a statement they provided to a third party was true, and a court should not permit the use of a past recollection recorded when witnesses either cannot remember making that statement or affirmatively dispute the accuracy of the statement that a third party preserved. Some earlier cases agree.[70]

Some of the five factors identified above warrant the introduction of the statement in *Ford*; others do not.[71] The witness who underwent brain surgery told investigators about a fire, which explains why that witness could not recall and may have misremembered facts about that arson

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[65] *Ford*, 789 F. App'x at 117; *Mordick v. Valenzuela*, 780 F. App'x 430, 433 (9th Cir. 2019) (unpublished).
[66] *Ford*, 789 F. App'x at 119.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 121–22.
[70] *See also United States v. Collicott,* 92 F.3d 973, 976, 984 (9th Cir. 1996) (stating that Federal Rule of Evidence 803(5) does not permit the reading of an officer's report of a witness's statement where the witness "did not remember making statement and did not adopt them or vouch for their accuracy"); *United States v. Benson*, 961 F.2d 707, 708–09 (8th Cir. 1992) (government officials' reports of defendant's statement, which were unsigned and not verbatim and of which he had no recollection, not admissible under Rule 803(5)). *See* Fed. R. Evid. 803(5).
[71] *See* subsection V.D (describing the five factors).

years later.[72] And while the fact that the witness spoke to law enforcement increases the risks that a party might use Rule 803(5) improperly, the witness, who was available for cross-examination, testified at trial that she "couldn't remember" facts that the government preserved in the recording.[73] Combining all five factors identified above, the facts in *Ford* present a much closer case.

The facts in *Mordick* also present a closer call when applying the five factors above.[74] In *Mordick*, the petitioner alleged that his conviction and incarceration by state officials "was contrary to, or involved an unreasonable application of, clearly established Federal law."[75] One such allegation involved the trial court's failure to permit the reading of a statement that a four-year-old girl made to a police officer regarding the time that her aunt and father ate breakfast.[76] At the time of trial, the minor "had no memory of having made the statement," but the police officer memorialized the statement, which was "partly corroborated" by other facts.[77]

The Ninth Circuit noted that the fact that a child "could not remember making the statement years later is of no moment and not unusual—many adults (perhaps most of us) cannot recall making statements, especially seemingly inconsequential ones, that we made days, weeks, or months before."[78] Indeed, this fact was "one reason why the law has long recognized a hearsay exception for a common category of statements labeled 'past recollection recorded.'"[79] For these reasons, the state trial court deprived the defendant of a fair trial by excluding references to the young girl's statement to the police.

In reaching this conclusion, the majority opinion did not cite prior Ninth Circuit caselaw that would have required the witness to testify as to the accuracy of the prior statement. In *United States v. Collicott*, the Ninth Circuit stated in 1996, albeit tersely, that Rule 803(5) does *not* permit the reading of an officer's report documenting a witness's state-

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[72] *Ford*, 789 F. App'x at 119.
[73] *Id.*
[74] *Mordick v. Valenzuela*, 780 F. App'x 430, 433 (9th Cir. 2019) (unpublished). *See also* subsection V.D (describing the five factors).
[75] *Mordick*, 780 F. App'x at 431 (quoting *Christian v. Frank*, 595 F.3d 1076, 1080 (9th Cir. 2010); 28 U.S.C. § 2254(d)).
[76] *Id.* at 433.
[77] *Id.*
[78] *Id.* at 434.
[79] *Id.* (citing Fed. R. Evid. 803(5) advisory committee's notes to 1972 proposed rules ("A hearsay exception for recorded recollection is generally recognized and has been described as having 'long been favored by the federal and practically all the state courts that have had occasion to decide the question.'" (quoting *United States v. Kelly*, 349 F.2d 720, 770 (2d Cir. 1965))).

ments unless the witness "adopt[s] them or vouch[es] for their accuracy."[80] And, in an unpublished opinion in 2006, the Ninth Circuit reiterated that requirement.[81]

Judge Ikuta, dissenting in *Mordick*, did not cite the Ninth Circuit's earlier cases discussing Rule 803(5) nor did she dispute that Rule 803(5) would have permitted the use of a past recollection recorded where a witness did not remember making the statement. Instead, Judge Ikuta argued that this statement was not "reliable" because "testimony by children (particularly young children) is not very reliable."[82]

As with *Ford*, some of the five factors warrant the introduction of the past recollection recorded in *Mordick* while others do not. On the one hand, the witness made her statement to law enforcement, minimizing its reliability. On the other hand, the Ninth Circuit was correct that this observer would not be able to recall minor facts years later. Moreover, the witness probably did not know that law enforcement could later use her statement about breakfast times in a criminal trial, her statement was "partly corroborated" by other facts, and it was the *defense* that sought to use the child's statement at trial.[83] These factors all add to the statement's reliability and minimize the need to call that child to testify. Combining the five factors identified above, the facts in *Mordick* fall somewhere between the two extremes.[84]

F. Should a witness be able to prevent the use of a past recollection recorded?

We can also use the five factors to evaluate the rule in *Schoenborn* that a party cannot use a past recollection recorded where a witness affirmatively testifies that the recollection is false. As discussed above, *United States v. Schoenborn* involved the introduction of an FBI report where a witness affirmatively denied the accuracy of the content in the report.[85]

When we look at the five factors, we have reasons to have concern about the use of the past recollection recorded. The memory holder was the type of person whom we would expect to remember the incident at hand, namely an attack in a prison, and the incident itself was the type a witness would likely remember. The party who recorded the statement

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[80] 92 F.3d 973, 976, 984 (9th Cir. 1996).
[81] *Current v. Perry*, 178 F. App'x 686, 687 (9th Cir. 2006) (unpublished).
[82] *Mordick*, 780 F. App'x at 435 (citing *Idaho v. Wright*, 497 U.S. 805, 824 (1990); *Kennedy v. Louisiana*, 554 U.S. 407, 443–44 (2008)).
[83] *Id.* at 433.
[84] *See* subsection V.D.
[85] 4 F.3d 1424 (7th Cir. 1993). *See* subsection IV.C.

in *Schoenborn*—an FBI agent investigating the assault—is the type who might "threaten[] or coerce[a witness] to make [a] statement," or induce a witness to make a statement "in exchange for leniency," suggesting less reliability and the potential that the FBI agent had an incentive to create evidence against the charged defendant.[86] All these factors suggest that the live witness, and not the FBI agent's record of what the witness said, should be the primary source of information about the event.

That said, we can imagine incidents where the witness should not have veto power. For example, we might not want to give loyal customers the ability to veto the use of their Foursquare data about an establishment's wait times as part of an effort to protect an establishment that discriminates against minorities. In this scenario, every indication is that the past recollection recorded is accurate, in that we should not expect anyone to remember specific wait times from several years ago, and Foursquare has no direct interest in the litigation. In such circumstances, we might treat the Foursquare records more as business records (even if they are records of the recalled wait times of users) and permit the records to come into evidence but allow the "attacks on the records as inaccurate or incomplete."[87]

Thus, it seems that the Seventh Circuit might have reached the correct result in excluding the FBI report in *Schoenborn* but did so with a blanket rule far broader than necessary to balance the competing factors at issue in past recollections recorded.[88]

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[86] *People v. Farrell*, 34 P.3d 401, 406–07 (Colo. 2001).

[87] *Nutrien AG Sols., Inc. v. Anderson*, No. 21-CV-1035-LCB, 2025 WL 2743414, at *11 (N.D. Ala. Mar. 31, 2025) (citing *Crompton-Richmond Co., Factors v. Briggs*, 560 F.2d 1195, 1202 n.12 (5th Cir. 1977); *Hanley v. United States*, 416 F.2d 1160, 1167 n.14 (5th Cir. 1969); *Moss v. Ole S. Real Est., Inc.*, 933 F.2d 1300, 1307 (5th Cir. 1991) ("[C]ourts should not focus on questions regarding the accuracy" of a record in making the trustworthiness determination because the factfinder is responsible for weighing the evidence and assessing its credibility.); *United States v. Hathaway*, 798 F.2d 902, 907 (6th Cir. 1986) ("Once a foundation is laid, in the absence of specific and credible evidence of untrustworthiness, the proper approach is to admit the evidence and permit the jury to determine the weight to be given the records."); *Eco Sols., LLC v. Verde Biofuels, Inc.*, No. 4:09-CV-0125-HLM, 2011 WL 13135785, at *17 (N.D. Ga. Sep. 21, 2011) ("Courts 'tend to overlook accidental errors or omissions made by employees who generally seek to record information accurately.'" (quoting *United States v. Price*, 516 F.3d 597, 605 (7th Cir. 2008))); *United States v. McGill*, 953 F.2d 10, 15 (1st Cir. 1992); *Itel Cap. Corp. v. Cups Coal Co.*, 707 F.2d 1253, 1259–60 (11th Cir. 1983) (holding that where documents are sufficiently shown to qualify as business records, a court may admit them and allow the trier of fact to pass on a claim by their opponent that the records are forged).

[88] *Schoenborn*, 4 F.3d at 1426–29.

G. Limitations

We must recognize, however, that "[r]eliability is an amorphous, if not entirely subjective, concept."[89] As the Supreme Court noted in *Crawford v. Washington*, factors that one court might believe increase a statement's reliability will reduce its reliability in the eyes of a different court.[90] For example, one court found that a statement was more reliable because it was "detailed," while a different court found that a statement was "more reliable because the portion implicating another was 'fleeting.'"[91] The fact that a witness was in custody might make the witness's statement more reliable to one court, or it might not to another.[92] And the fact that a witness provided a statement "immediately after" the events at issue might make that statement more reliable, or it might not.[93]

Thus, each of the five factors might increase the reliability of a statement in a particular set of circumstances but might equally decrease a similar statement's reliability in a different set of circumstances.[94] Context matters. For these reasons, it is best, in the words of the Advisory Committee, not to "spell out the method of establishing the initial knowledge or the contemporaneity and accuracy of the record, leaving them to be dealt with as the circumstances of the particular case might indicate," and to create a more nuanced understanding of past recollections recorded.[95]

H. Application

We can turn back, then, to the original three examples of third parties recording the past recollections of the bank teller, car passenger, and Facebook user.[96] In each of these scenarios, certain factors weigh in favor of allowing the use of the past recollection recorded, while others weigh against it. The bank teller, for example, recorded his memories in the

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[89] *Crawford v. Washington*, 541 U.S. 36, 63 (2004).

[90] *Id.*

[91] *Id.* (quoting *Farrell*, 34 P.3d at 407 (Colo. 2001); *United States v. Photogrammetric Data Servs., Inc.*, 259 F.3d 229, 245 (4th Cir. 2001)).

[92] *See, e.g.*, *Crawford*, 541 U.S. at 65 (citing *Nowlin v. Commonwealth*, 579 S.E.2d 367 (Va. Ct. App. 2003)); *State v. Bintz*, 650 N.W.2d 913 (Wis Ct. App. 2002)).

[93] *Crawford*, 541 U.S. at 63. (quoting *Farrell*, 34 P.3d at 407 (Colo. 2001)); *Stevens v. People*, 29 P.3d 305, 316 (Colo. 2001) (noting how one court found a statement more reliable because two years had elapsed)).

[94] *Cf.* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons of About How Statutes Are to Be Construed,* 3 Vand. L. Rev. 395 (1950) (describing how each cannon of statutory construction has a counter-maxim of interpretation).

[95] Fed. R. Evid. 803(5) advisory committee's notes to 1972 proposed rules.

[96] *See* section II.

bank's system and did not report his observations directly to law enforcement. Moreover, neither the bank nor the teller was a party to the criminal dispute, and the defendant was able to cross-examine the bank teller at trial. Meanwhile, the car passenger's drug use explains why she was unable to recall her interaction with law enforcement, and the bodycam video provided additional corroboration. Finally, Facebook—which was not a party in the criminal trial—preserved the memories of its user, and images from the video corroborated the eyewitness's statement that her neighbor possessed a firearm. All these factors weigh in favor of allowing the use of the past recollections recorded.

Other factors, however, weigh against their use. The bank teller, for example, knew he was memorializing activity that he believed was illegal and he might have known when the government could possibly use his statement at a future trial. The car passenger, meanwhile, knew that she was providing an incriminating statement to the police officer, and the Facebook user had a reason to prefer not to testify against her violent neighbor. All these factors weigh in favor of requiring the original observer to testify about what, if anything, they can recall about the underlying incidents and possibly exclude the past recollection recorded at trial.

Courts might disagree over the proper balancing of these factors, and they might reach different results on similar facts. That is to be expected. The solution, however, is not to create a blanket rule in which *no* party can use a witness's past recollection recorded where that witness no longer recalls making that statement to a third party. But the solution is also not to create a blanket rule where *any* party can use a witness's past recollection recorded without additional indicia of reliability. We must instead do as Judge Hand did in *Massachusetts Bonding* and reject the "sluggishness of the law."[97] Just as Judge Hand prevented a "system of rules, originally designed to relieve small shopkeepers" from "cook[ing] the egg by burning down the house," so too must we prevent a system of rules originally designed in a pre-digital era from microwaving popcorn by nuking a village.[98] There must be a system of "checks and assurances of veracity" that minimizes "especially disastrous" outcome and reduces any risks of "genuine danger" from the use of past recollections recorded.[99] It is time to permit the flexibility needed to create that system.

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[97] *Mass. Bonding & Ins. Co. v. Norwich Pharmacal Co.*, 18 F.2d 934, 937 (2d Cir. 1927).
[98] *Id.*
[99] *Id.*

VI. Conclusion

With increased use of bodycams, social media, and other forms of electronic media, litigants will increasingly call on judges to determine whether and under what circumstances a party can use a witness's past recollection that a third party recorded where the original witness no longer recalls that memory or can verify transferring that memory to the third party. In balancing the duality at the heart of past recollections recorded, courts are likely to weigh the value of records versus recollections and memories versus memoranda They will consider the nature of the original memory holder and the memory holder's memory, evaluate the reliability of the third party and the third party's ability to preserve memories, and account for any incentives for the memory holder to lie about the quality of the recollections. We must recognize, however, that there is no easy solution because past recollections recorded take on many different forms.

About the Author

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Appendix: Post *Loper Bright* Case Data

This appendix was compiled by Lindsay L. Clayton, Assistant Director, Tax Litigation Branch, Civil Division.

Case	Circuit	Decision date	Agency	Statute(s)	Agency action at issue	Agency action upheld?
Verizon Commc'ns Inc. v. FCC, 156 F.4th 86 (2d Cir. 2025)	2d	9/10/2025	FCC	47 U.S.C. § 503(b)(2)(B)	determination of number of individual acts or failures to act	Yes
United States v. Rauda-Lopez, No. 24-2488-CV, 2025 WL 2536083 (2d Cir. Sep. 4, 2025)	2d	9/4/2025	BIA	8 U.S.C. § 1101(a)(43)(A)	interpretation of "sexual abuse of a minor"	Yes
New Jersey v. Bessent, 149 F.4th 127 (2d Cir. 2025)	2d	8/13/2025	IRS	26 U.S.C. § 170	26 C.F.R. § 1.170A-1(h)(3)	Yes
Wassily v. Bondi, 150 F.4th 100 (2d Cir. 2025)	2d	8/7/2025	BIA	8 U.S.C. § 1159(b)	interpretation of "status of any alien granted asylum"	Yes

Case	Circuit	Decision date	Agency	Statute(s)	Agency action at issue	Agency action upheld?
Garcia Pinach v. Bondi, 147 F.4th 117 (2d Cir. 2025)	2d	8/4/2025	BIA	8 U.S.C. § 1101(a)(43)(A)	interpretation of "sexual abuse of a minor"	Yes
Lainez v. Bondi, 141 F.4th 393 (2d Cir. 2025)	2d	6/23/2025	BIA	8 U.S.C. § 1432	interpretation of "paternity" that is "established by legitimation"	No
Bd. of Trs. of Bakery Drivers Loc. 550 & Indus. Pension Fund v. Pension Benefit Guar. Corp., 136 F.4th 26 (2d Cir. 2025)	2d	4/29/2025	PBGC	29 U.S.C. §§ 1081(c), 1085(b)(6)	denial of SFA application	No
Penaranda Arevalo v. Bondi, 130 F.4th 325 (2d Cir. 2025)	2d	3/7/2025	BIA	8 U.S.C. § 1229	nature of "time and place" requirement as non jurisdictional	Yes
Lau v. Bondi, 130 F.4th 42 (2d Cir. 2025)	2d	3/4/2025	BIA	8 U.S.C. §§ 1101(a)(13), 1182(a)	interpretation of "inadmissibility"	No
United States v. Kukoyi, 126 F.4th 806 (2d Cir. 2025)	2d	1/24/2025	USPO	U.S.S.G. § 2B1.1(b)(1)(J)	sentencing guideline commentary	Not decided

Case	Circuit	Decision date	Agency	Statute(s)	Agency action at issue	Agency action upheld?
Avon Nursing & Rehab. v. Becerra, 119 F.4th 286 (2d Cir. 2024)	2d	10/17/2024	DHHS	42 U.S.C. § 1396r(g)(2)	82 Fed. Reg. 36,530 & 36,531	Yes
Giovinco v. Pullen, 118 F. 4th 527 (2d Cir. 2024), *cert. denied sub nom. Giovinco v. Flowers*, 145 S. Ct. 1947 (2025)	2d	10/8/2024	BOP	18 U.S.C. § 3632(d)(4)(D)	interpretation of ineligibility for time credits	Yes
Thieme v. Warden Fort Dix FCI, 154 F.4th 115 (3d Cir. 2025)	3d	10/8/2025	BOP	18 U.S.C. § 3624(b)(1)	BOP interpretation of timing provisions	Yes
In re Yellow Corp., 152 F. 4th 491 (3d Cir. 2025)	3d	9/16/2025	PBGC	29 U.S.C. § 1432	29 C.F.R. § 4262.16	Yes
Abdulla v. U.S. Att'y Gen., 153 F.4th 342 (3d Cir. 2025)	3d	8/27/2025	BIA	8 U.S.C. § 1432	interpretation of temporal language in statute	No
Miller Plastic Prods. Inc. v. Nat'l Lab. Rels. Bd., 141 F. 4th 492 (3d Cir. 2025)	3d	6/23/2025	NLRB	29 U.S.C. § 151	NLRB interpretation of "concerted activities"	Yes

Case	Circuit	Decision date	Agency	Statute(s)	Agency action at issue	Agency action upheld?
Alaris Health v. Nat'l Lab. Rels. Bd., 123 F.4th 107 (3d Cir. 2024), *cert. denied*, 145 S. Ct. 2682 (2025)	3d	12/9/2024	NLRB	29 U.S.C. § 158	whether hazard pay is appropriately considered "terms and conditions of employment"	Yes
Schaffner v. Monsanto Corp., 113 F.4th 364 (3d Cir. 2024)	3d	8/15/2024	EPA	7 U.S.C. § 136w(a)(1)	40 C.F.R. § 152.44	Yes
Aguilar v. U.S. Att'y Gen., 107 F.4th 164 (3d Cir. 2024)	3d	7/10/2024	BIA	8 U.S.C. § 1101(f)(7)	interpretation of "confined as a result of conviction"	Yes
Ozurumba v. Bondi, 153 F.4th 396 (4th Cir. 2025)	4th	9/2/2025	BIA	8 U.S.C. § 1182(a)(3)(B)	definition of "material support"	No
Alvarez Ronquillo v. Bondi, 151 F.4th 522 (4th Cir. 2025)	4th	8/25/2025	BIA	8 U.S.C. § 1101(a)(43)(c)	interpretation of "illicit trafficking in firearms"	Yes

Case	Circuit	Decision date	Agency	Statute(s)	Agency action at issue	Agency action upheld?
United States v. Kokinda, 146 F.4th 405 (4th Cir. 2025), *cert. denied*, No. 25-6702, 2026 WL 568313 (U.S. Mar. 2, 2026)	4th	7/28/2025	DOJ	18 U.S.C. § 2250	National Guidelines for Sex Offender Registration and Notification	Yes
Cruz v. Bondi, No. 22-1907, 2025 WL 1704426 (4th Cir. June 18, 2025)	4th	6/18/2025	BIA	8 U.S.C. § 1227(a)(2)	interpretation of crimes involving "moral turpitude"	Yes
Chavez v. Bondi, 134 F.4th 207 (4th Cir. 2025)	4th	4/10/2025	BIA	8 U.S.C. § 1227(a)(2)	interpretation of crimes involving "moral turpitude"	Yes
Valladares v. Ray, 130 F.4th 74 (4th Cir. 2025)	4th	2/25/2025	BOP	18 U.S.C. § 3632(d)(4)(D)(lviii)	BOP denial of exception for drug crimes where death resulted	No
Molina-Diaz v. Bondi, 128 F.4th 568 (4th Cir. 2025)	4th	2/19/2025	BIA	8 U.S.C. § 1101(a)(42)(A)	interpretation of "unable or unwilling" to return	Yes
Nicoletti v. Bayless, No. 24-6012, 2025 WL 80294 (4th Cir. Jan. 13, 2025)	4th	1/13/2025	BOP	18 U.S.C. § 3632(d)	BOP calculation of time credits	Yes

Case	Circuit	Decision date	Agency	Statute(s)	Agency action at issue	Agency action upheld?
Anderson v. Diamondback Inv. Grp., LLC, 117 F.4th 165 (4th Cir. 2024)	4th	9/4/2024	DEA	7 USC § 1639o	85 Fed. Reg. 51639-01 & 51641 February DEA letter	Mixed
Maranon-Acuna v. Bondi, No. 25-60035, 2025 WL 2851875 (5th Cir. Oct. 8, 2025)	5th	10/8/2025	BIA	8 U.S.C. § 1255(i)	interpretation of eligibility for adjustment of status	Yes
Texas v. EPA, 156 F.4th 523 (5th Cir. 2025)	5th	9/22/2025	EPA	42 U.S.C. §§ 7401–7671q	SIP review & denial	Yes
Nat'l Ass'n of Priv. Fund Managers v. SEC, 151 F.4th 252 (5th Cir. 2025)	5th	8/25/2025	SEC	15 U.S.C. § 78m(f), 78j	17 C.F.R. § 240.10c-1a, 240.13f-2	Yes
Bruckner Truck Sales, Inc. v. Guzman, 148 F.4th 341 (5th Cir. 2025)	5th	8/6/2025	SBA	15 U.S.C. § 636m(a)	85 Fed. Reg. 33,010 & 33,012–13	Yes

Case	Circuit	Decision date	Agency	Statute(s)	Agency action at issue	Agency action upheld?
United Nat. Foods, Inc. v. NLRB, 138 F.4th 937 (5th Cir. 2025), *cert. denied sub nom. United Nat. Foods, Inc. v. NLRB*, 223 L. Ed. 2d 508 (Jan. 12, 2026)	5th	5/28/2025	NLRB	29 U.S.C. § 151	decision to withdraw complaint	Yes
Texas v. EPA, 137 F.4th 353 (5th Cir. 2025)	5th	5/16/2025	EPA	42 U.S.C. § 7407(d)(1)(A)(iii)	designation of area as "unclassifiable" and obsolescenece of related 2015 guidance	Yes
Sandoval Argueta v. Bondi, 137 F.4th 265 (5th Cir. 2025)	5th	5/9/2025	BIA	8 U.S.C. § 1227(a)(2)(E)(i)	interpretation of crime of child abuse	Yes
Airlines for Am. v. DOT, 127 F.4th 563 (5th Cir. 2025), *reh'g en banc granted, opinion vacated*, 154 F.4th 323 (5th Cir. 2025), and *on reh'g en banc*, 166 F.4th 487 (5th Cir. 2026)	5th	1/28/2025	DOT	49 U.S.C. § 41712	extent of rulemaking authority	No

Case	Circuit	Decision date	Agency	Statute(s)	Agency action at issue	Agency action upheld?
Van Loon v. Dep't of the Treasury, 122 F.4th 549 (5th Cir. 2024)	5th	11/26/2024	OFAC	50 U.S.C. § 1702(a)(1)(B)	31 C.F.R. § 510.323	No
Texas Med. Ass'n v. DHHS, 120 F.4th 494 (5th Cir. 2024), *reh'g en banc granted, opinion vacated*, 138 F.4th 961 (5th Cir. 2025)	5th	10/30/2024	DHHS	42 U.S.C. § 300gg-111	86 Fed. Reg. 36,872	Mixed
Mem'l Hermann Accountable Care Org. v. Comm'r, 120 F.4th 215 (5th Cir. 2024)	5th	10/28/2024	IRS	26 U.S.C. § 501(c)(4)	26 C.F.R. § 1.501(a)-1	No
Hudson Inst. of Process Rsch. Inc. v. NLRB, 117 F.4th 692 (5th Cir. 2024)	5th	9/18/2024	NLRB	29 U.S.C. § 152(3)	NLRB determintion regarding supervisory status	No
Mayfield v. DOL, 117 F.4th 611 (5th Cir. 2024)	5th	9/11/2024	DOL	29 U.S.C. § 213	84 Fed. Reg. 51,230 & 51,231	Yes
Rest. L. Ctr. v. DOL, 120 F.4th 163 (5th Cir. 2024)	5th	8/23/2024	DOL	29 U.S.C. § 203(t)	29 C.F.R. § 531.56(f)	No
Texas Med. Ass'n v. DHHS, 110 F.4th 762 (5th Cir. 2024)	5th	8/2/2024	DHHS	42 U.S.C. § 300gg-111	87 Fed. Reg. 52,618	No

Case	Circuit	Decision date	Agency	Statute(s)	Agency action at issue	Agency action upheld?
Utah v. Su, 109 F.4th 313 (5th Cir. 2024)	5th	7/18/2024	DOL	29 U.S.C. § 1001	87 Fed. Reg. at 72,884, 73,825, & 73,856	Yes
Ohio Telecom Ass'n v. FCC, 150 F.4th 694 (6th Cir. 2025)	6th	8/13/2025	FCC	47 U.S.C. §§ 201(b), 222	89 Fed. Reg. 9,968	Yes
Zai v. Nat'l Credit Union Admin. Bd., 149 F.4th 837 (6th Cir. 2025)	6th	8/11/2025	FDIC	12 U.S.C. § 1787(b)(5)(C)(ii)(I)	interpretation of "claim"	Mixed
Bivens v. Zep, Inc., 147 F.4th 635 (6th Cir. 2025), *cert. denied*, No. 25-932, 2026 WL 1052175 (U.S. Apr. 20, 2026)	6th	8/8/2025	EEOC	42 U.S.C. § 2000e-2(a)(1)	29 C.F.R. § 1604.11(e)	No
McGowan v. United States, 143 F.4th 686 (6th Cir. 2025)	6th	7/9/2025	IRS	26 U.S.C. § 61	26 C.F.R. § 1.61-22	Yes
Castillo v. Bondi, 140 F.4th 777 (6th Cir. 2025)	6th	6/18/2025	BIA	8 U.S.C. § 1227(a)(2)(E)(i)	interpretation of "alien . . . who is convicted"	No
United States v. Bricker, 135 F.4th 427 (6th Cir. 2025)	6th	4/22/2025	USSC	18 U.S.C. § 3582(c)(1)(A)	U.S.S.G. § 1B1.13(b)(6)	No

Case	Circuit	Decision date	Agency	Statute(s)	Agency action at issue	Agency action upheld?
Pickens v. Hamilton-Ryker IT Sols., LLC, 133 F.4th 575 (6th Cir. 2025)	6th	4/1/2025	DOL	29 U.S.C. §§ 207, 213	29 C.F.R. § 541.602	Yes
Ceniceros v. Bondi, No. 24-3345, 2025 WL 1012712 (6th Cir. Mar. 31, 2025)	6th	3/31/2025	BIA	8 U.S.C. § 1229b(b)(1)(D)	interpretation of "exceptional and extremely unusual"	Yes
Fitzgerald Truck Parts & Sales, LLC v. United States, 132 F.4th 937 (6th Cir. 2025), *reh'g denied*, No. 24-5078, 2025 WL 1512190 (6th Cir. May 21, 2025), and *cert. denied sub nom. Fitzgerald Truck Parts & Sales v. United States*, 223 L. Ed. 2d 506 (Jan. 12, 2026)	6th	3/31/2025	IRS	26 U.S.C. §§ 4051(a)(1), 4052(a)(1)	26 C.F.R. § 145.4052-1(a)(2)	Yes
Linden v. Comm'r of Soc. Sec., 131 F.4th 531 (6th Cir. 2025)	6th	3/17/2025	SSA	42 U.S.C. § 402(j)(5)	20 C.F.R. § 404.633(a)	Yes

Case	Circuit	Decision date	Agency	Statute(s)	Agency action at issue	Agency action upheld?
Tennessee v. Becerra, 131 F.4th 350 (6th Cir. 2025), *cert. granted, judgment vacated sub nom. Tennessee v. Kennedy*, 223 L. Ed. 2d 554 (Jan. 20, 2026)	6th	3/10/2025	HHS	42 U.S.C. § 300a-6	86 Fed. Reg. 56,144	Yes
Dayton Power & Light Co. v. FERC, 126 F.4th 1107 (6th Cir. 2025), *cert. denied sub nom. FirstEnergy Serv. Co. v. FERC*, 146 S. Ct. 397 (2025), and *cert. denied sub nom. Am. Elec. Power Serv. Corp. v. FERC*, 146 S. Ct. 398 (2025)	6th	1/17/2025	FERC	16 U.S.C. § 824s(c)	18 C.F.R. § 35.35	Yes
In re MCP No. 185, 124 F.4th 993 (6th Cir. 2025)	6th	1/2/2025	FCC	47 U.S.C. § 153	89 Fed. Reg. 45,404	No
Moctezuma-Reyes v. Garland, 124 F.4th 416 (6th Cir. 2024)	6th	12/23/2024	BIA	8 U.S.C. § 1229b(b)(1)(D)	definition of "exceptional and extremely unusual hardship"	Yes

Case	Circuit	Decision date	Agency	Statute(s)	Agency action at issue	Agency action upheld?
Kentucky v. EPA, 123 F.4th 447 (6th Cir. 2024), *cert. denied sub nom. EPA v. Kentucky*, 145 S. Ct. 2847 (2025)	6th	12/6/2024	EPA	42 U.S.C. §§ 7410(a)(2)(D), 7607	interpretation of "nationwide scope or effect" 88 Fed. Reg. 9,336 & 9,356	No
Mazariegos-Rodas v. Garland, 122 F.4th 655e (6th Cir. 2024)	6th	12/5/2024	BIA	8 U.S.C. § 1158(b)(1)(B)(i)	interpretation of "one central reason"	No
Seldon v. Garland, 120 F.4th 527 (6th Cir. 2024)	6th	10/31/2024	BIA	8 U.S.C. §§ 1182(i), 1227(a)	obligation of ILJ to inform individual of fraud waiver and asylum	Yes
In re Harley-Davidson Aftermarket Parts Mktg., Sales Pracs. & Antitrust Litig., 151 F.4th 922 (7th Cir. 2025)	7th	8/15/2025	FTC	15 U.S.C. § 2302	16 C.F.R. § 700.10(c)	Yes
Grand Trunk Corp. v. Surface Transp. Bd., 143 F.4th 741 (7th Cir. 2025)	7th	7/8/2025	STB	49 U.S.C. § 11102(a)	89 Fed. Reg. 38,646	No

Case	**Circuit**	**Decision date**	**Agency**	**Statute(s)**	**Agency action at issue**	**Agency action upheld?**
United States v. Black, 131 F.4th 542 (7th Cir. 2025)	7th	3/11/2025	USSC	18 U.S.C. § 3582(c)(1)(A) 28 U.S.C. § 994	U.S.S.G. § 1B1.13(b)(6)	No
United States v. Poore, No. 22-3154, 2025 WL 1201946 (7th Cir. Apr. 25, 2025)	7th	4/25/2025	USSC	18 U.S.C. § 3582(c)(1)(A)	U.S.S.G. § 4B1.2(a), Application Note 1	Yes
Gulomjonov v. Bondi, 131 F.4th 601 (7th Cir. 2025)	7th	3/14/2025	BIA	8 U.S.C. § 1158(a)(2)(D)	8 C.F.R. § 1208.4(a)(4)(ii)	Yes
Bernardo-De La Cruz v. Garland, 114 F.4th 883 (7th Cir. 2024), *cert. denied sub nom. Cruz v. Bondi*, 145 S. Ct. 1902 (2025)	7th	8/15/2024	DOJ	8 U.S.C. § 1229(c)	8 C.F.R. § 1240.26(i)	Yes
Consumer Fin. Prot. Bureau v. Townstone Fin., Inc., 107 F.4th 768 (7th Cir. 2024)	7th	7/11/2024	CFPB	15 U.S.C. § 1691e(g)	12 C.F.R. § 1002.4(b)	Yes
3M Co. v. Comm'r, 154 F.4th 574 (8th Cir. 2025)	8th	10/1/2025	IRS	26 U.S.C. § 482	26 C.F.R. § 1.482-1(h)(2)	No
Iowa v. Wright, 154 F.4th 918 (8th Cir. 2025)	8th	9/5/2025	DOE	49 U.S.C. §§ 32902(a), 32904(a)	10 C.F.R. § 474.3(b)	No

Case	Circuit	Decision date	Agency	Statute(s)	Agency action at issue	Agency action upheld?
Zimmer Radio of Mid-Missouri, Inc. v. FCC, 145 F.4th 828 (8th Cir. 2025)	8th	7/23/2025	FCC	Telecommunications Act of 1996, PL 104–104, February 8, 1996, 110 Stat 56	38 FCC Rcd. 12,782	Mixed
United States v. Johnson, No. 24-2393, 2025 WL 1949738 (8th Cir. July 16, 2025)	8th	7/16/2025	USSC	18 U.S.C. § 3582(c)(1)(A) 28 U.S.C. § 994	U.S.S.G. § 1B1.13(b)(6)	No
Missouri v. Trump, 128 F.4th 979 (8th Cir. 2025)	8th	2/18/2025	DOE	20 U.S.C. § 1087e	88 Fed. Reg. 43,820	No
Quito-Guachichulca v. Garland, 122 F.4th 732 (8th Cir. 2024)	8th	12/9/2024	BIA	8 U.S.C. § 1227(a)(2)(A)(iii)	definition of aggravated felony	No
Union Pac. R.R. Co. v. Surface Transp. Bd., 113 F.4th 823 (8th Cir. 2024)	8th	8/20/2024	STB	49 U.S.C. § 10701(d)(3)	88 Fed. Reg. 299 & 300	No
O.C.V. v. Bondi, 153 F.4th 974 (10th Cir. 2025)	9th	8/26/2025	BIA	8 U.S.C. § 1101(a)(42)(A)	interpretation of "on account of" and nexus standard	Mixed

Case	Circuit	Decision date	Agency	Statute(s)	Agency action at issue	Agency action upheld?
Las Vegas Sun, Inc. v. Adelson, 147 F.4th 1103 (9th Cir. 2025), *cert. denied*, 224 L. Ed. 2d 9 (Feb. 23, 2026)	9th	8/4/2025	DOJ	15 U.S.C. § 1803	28 C.F.R. § 48.1	No
Yuga Labs, Inc. v. Ripps, 144 F.4th 1137 (9th Cir. 2025)	9th	7/23/2025	PTO & USCO	15 U.S.C. §§ 1114, 1125	interpretation of "goods"	Yes
Nolasco-Rodriguez v. Bondi, No. 23-3951, 2025 WL 1983953 (9th Cir. July 17, 2025)	9th	7/17/2025	BIA	8 U.S.C. § 1227(a)(2)	interpretation of crimes involving "moral turpitude"	No
Pac. Gas & Elec. Co. v. FERC, No. 24-2527, 2025 WL 1912363 (9th Cir. July 11, 2025), *cert. denied sub nom. PG&E v. FERC*, 224 L. Ed. 2d 4 (Feb. 23, 2026)	9th	7/11/2025	FERC	16 U.S.C. § 824s(c)	116 FERC ¶ 61,057	Yes
Lemus-Escobar v. Bondi, 140 F.4th 1079 (9th Cir. 2025)	9th	6/16/2025	BIA	8 U.S.C. § 1227(a)(2)	interpretation of crimes involving "moral turpitude"	Yes

Case	**Circuit**	**Decision date**	**Agency**	**Statute(s)**	**Agency action at issue**	**Agency action upheld?**
Alaska Dep't of Fish & Game v. Fed. Subsistence Bd., 139 F.4th 773 (9th Cir. 2025)	9th	6/2/2025	FSB	16 U.S.C. § 3121(a)	50 C.F.R. § 100.19	Yes
Gonzalez-Juarez v. Bondi, 137 F.4th 996 (9th Cir. 2025)	9th	5/20/2025	BIA	8 U.S.C. § 1229b(b)(1)(D)	interpretation of "exceptional and extremely unusual"	Yes
Bussey v. Driscoll, 131 F.4th 756 (9th Cir. 2025)	9th	3/12/2025	U.S. Army	10 U.S.C. § 1552	DOD memoranda interpreting "liberal consideration"	No
Murillo-Chavez v. Bondi, 128 F.4th 1076 (9th Cir. 2025)	9th	2/13/2025	BIA	8 U.S.C. § 1227(a)(2)	interpretation of crimes involving "moral turpitude"	Yes
Bartolo v. Garland, No. 23-1578, 2025 WL 32825 (9th Cir. Jan. 6, 2025)	9th	1/6/2025	BIA	8 U.S.C. § 1231(b)(3)(B)(ii)	interpretation of "particularly serious crime"	Yes
China Unicom (Americas) Operations Ltd. v. FCC, 124 F.4th 1128 (9th Cir. 2024)	9th	12/24/2024	FCC	47 U.S.C. § 214	authority to revoke certificate	Yes

Case	Circuit	Decision date	Agency	Statute(s)	Agency action at issue	Agency action upheld?
United States v. Multistar Indus., Inc., No. 23-3765, 2024 WL 5055552 (9th Cir. Dec. 10, 2024)	9th	12/10/2024	EPA	42 U.S.C. § 7412(r)	63 Fed. Reg. 640 & 643	Yes
Grand Canyon Univ. v. Cardona, 121 F.4th 717 (9th Cir. 2024)	9th	11/8/2024	DOE	20 U.S.C. § 1003(13)	34 C.F.R. § 600.2 incorporation of related IRS regulations for nonprofits	No
Lopez v. Garland, 116 F.4th 1032 (9th Cir. 2024)	9th	9/11/2024	BIA	8 U.S.C. § 1227(a)(2)	interpretation of crimes involving "moral turpitude"	Yes
Rangel-Fuentes v. Bondi, 155 F.4th 1138 (10th Cir. 2025)	10th	9/29/2025	BIA	8 U.S.C. § 1229b(b)(1)(D)	timing of evaluating age for eligibility	Yes
Ctr. for Biological Diversity v. EPA, 129 F.4th 1266 (10th Cir. 2025)	10th	3/4/2025	EPA	42 U.S.C. § 7410	88 Fed. Reg. 29,827-01	Yes

Case	Circuit	Decision date	Agency	Statute(s)	Agency action at issue	Agency action upheld?
Sunnyside Coal Co. v. Dir., Off. of Workers' Comp. Programs, DOL, 112 F.4th 902 (10th Cir. 2024)	10th	8/13/2024	DOL	30 U.S.C. § 802(h)(2), 921(c)(4)	interpretation of "in" and scope of coal mine	Yes
Baltazar-Miranda de Velasquez v. U.S. Att'y Gen., No. 24-14117, 2025 WL 2793664 (11th Cir. Oct. 1, 2025)	11th	10/1/2025	BIA	8 U.S.C. § 1101(a)(42)(A)	interpretation of "particular social group"	Yes
Perfection Bakeries Inc v. Retail Wholesale & Dep't Store Int'l Union & Indus. Pension Fund, 147 F.4th 1314 (11th Cir. 2025), *cert. denied sub nom. Perfection Bakeries, Inc. v. Retail Wholesale & Dep't Store*, No. 25-809, 2026 WL 1052143 (U.S. Apr. 20, 2026)	11th	8/1/2025	PBGC	29 U.S.C. § 1386(b)(2)	PBGC Opinion Letter 85-4 (Jan. 30, 1985)	No

Case	Circuit	Decision date	Agency	Statute(s)	Agency action at issue	Agency action upheld?
Sunshine State Reg'l Ctr., Inc. v. Dir., U.S. Citizenship & Immigr. Servs., 143 F.4th 1331 (11th Cir. 2025)	11th	7/10/2025	USCIS	8 U.S.C. § 1153(b)(5)(J)(ii)(I)	88 Fed. Reg. 13,141	Yes
Ponce v. U.S. Att'y Gen., 141 F.4th 1214 (11th Cir. 2025)	11th	6/23/2025	BIA	8 U.S.C. § 1101(a)(42)(A)	interpretation of "particular social group"	Yes
Pina v. U.S. Att'y Gen., No. 24-12590, 2025 WL 1216719 (11th Cir. Apr. 28, 2025), *cert. denied sub nom. Pina v. Bondi*, 146 S. Ct. 610, 223 L. Ed. 2d 227 (2025)	11th	4/28/2025	BIA	8 U.S.C. § 1229b(b)(1)(D)	timing of evaluating age for eligibility	Yes
Watts v. Joggers Run Prop. Owners Ass'n, Inc., 133 F.4th 1032 (11th Cir. 2025)	11th	4/7/2025	HUD	42 U.S.C. § 3604(f)(2)	24 C.F.R. § 100.65(b)(4)	Yes
Org. of Pro. Aviculturists, Inc. v. U.S. FWS, 130 F.4th 1307 (11th Cir. 2025)	11th	3/14/2025	USFWS	16 U.S.C. § 4905	59 Fed. Reg. 62,255 & 62,257	Yes

Case	Circuit	Decision date	Agency	Statute(s)	Agency action at issue	Agency action upheld?
Turner v. U.S. Att'y Gen., 130 F.4th 1254 (11th Cir. 2025)	11th	1/30/2025	BIA	8 U.S.C. § 1432 (1999)	N/A	Not decided
Ins. Mktg. Coal. Ltd. v. FCC, 127 F.4th 303 (11th Cir. 2025)	11th	1/24/2025	FCC	47 U.S.C. § 227(b)	38 FCC Rcd. 12,782	No
Diaz-Arellano v. U.S. Att'y Gen., 120 F.4th 722 (11th Cir. 2024)	11th	10/29/2024	BIA	8 U.S.C. § 1229b(b)(1)(D)	timing of evaluating age for eligibility	Yes
Siqueira v. U.S. Att'y Gen., No. 23-13710, 2024 WL 4590031 (11th Cir. Oct. 28, 2024)	11th	10/28/2024	BIA	8 U.S.C. § 1101(a)(42)(A)	interpretation of "particular social group"	Yes
Alabama v. U.S. Sec'y of Educ., No. 24-12444, 2024 WL 3981994 (11th Cir. Aug. 22, 2024)	11th	8/22/2024	DOE	20 U.S.C. § 1681(a)	34 C.F.R. §§ 106.10, 106.31(a)(2)	No

Case	Circuit	Decision date	Agency	Statute(s)	Agency action at issue	Agency action upheld?
Perez v. Owl, Inc., 110 F.4th 1296 (11th Cir. 2024)	11th	8/6/2024	DOL	29 U.S.C. §§ 206, 207	29 C.F.R. § 778.108 DOL Wage and Hour Division's Field Operations Handbook	Yes
Solar Energy Indus. Ass'n v. FERC, 154 F.4th 863 (D.C. Cir. 2025)	D.C.	9/9/2025	FERC	16 U.S.C. § 796(17)(A)	definition of "power production capacity"	Yes
Nat'l Ass'n of Broadcasters v. FCC, 147 F.4th 978 (D.C. Cir. 2025)	D.C.	8/1/2025	FCC	47 U.S.C. § 317	FCC No. 24-61, 2024 WL 2972402	Yes
Crowley Gov't Servs., Inc. v. GSA, 143 F.4th 518 (D.C. Cir. 2025)	D.C.	7/18/2025	DOT	49 U.S.C. § 13102	49 C.F.R. § 371.2	Mixed

Case	Circuit	Decision date	Agency	Statute(s)	Agency action at issue	Agency action upheld?
Institutional S'holder Servs., Inc. v. SEC, 142 F.4th 757 (D.C. Cir. 2025)	D.C.	7/1/2025	SEC	15 U.S.C. § 78n(a)(1)	84 Fed. Reg. 47,416 & 47,417 17 C.F.R. § 240.14a-1(l)	No
Jazz Pharms., Inc. v. Kennedy, 141 F.4th 254 (D.C. Cir. 2025)	D.C.	6/27/2025	DHHS	21 U.S.C. § 360cc(a)	21 C.F.R. § 316.3 57 Fed. Reg. 62,076 & 62,078	Yes
Thaler v. Perlmutter, 130 F.4th 1039 (D.C. Cir. 2025), *cert. denied*, No. 25-449, 2026 WL 568327 (U.S. Mar. 2, 2026)	D.C.	3/18/2025	USCO	17 U.S.C. § 201(a)	interpretation of term "author"	Yes
Lissack v. Comm'r of Internal Revenue, 125 F.4th 245 (D.C. Cir. 2025)	D.C.	1/10/2025	IRS	26 U.S.C. § 7623	26 C.F.R. § 301.7623-2	Yes
Env't Def. Fund v. EPA, 124 F.4th 1 (D.C. Cir. 2024)	D.C.	12/20/2024	EPA	15 U.S.C. §§ 2602(8), 2613(b)(2)	40 C.F.R. § 703.3(1), (4)	Mixed
NextEra Energy Res., LLC v. FERC, 118 F.4th 361 (D.C. Cir. 2024)	D.C.	10/4/2024	FERC	16 U.S.C. § 824(b)(1)	68 Fed. Reg. 49,846 FERC orders	Yes

Case	Circuit	Decision date	Agency	Statute(s)	Agency action at issue	Agency action upheld?
Lake Region Healthcare Corp. v. Becerra, 113 F.4th 1002 (D.C. Cir. 2024)	D.C.	9/3/2024	DHHS	42 U.S.C. § 1395ww(d)(5)(D)(ii)	calculation of volume-decrease adjustment	No
U.S. Sugar Corp. v. EPA, 113 F.4th 984 (D.C. Cir. 2024)	D.C.	9/3/2024	EPA	42 U.S.C. §§ 7401, 7412	87 Fed. Reg. 60,816, 60,830, & 60841	Mixed
Pac. Gas & Elec. Co. v. FERC, 113 F.4th 943 (D.C. Cir. 2024)	D.C.	8/23/2024	FERC	16 U.S.C. § 824k(h)(2)	interpretation of "ultimate consumer"	No
Amazon Servs. LLC v. USDA, 109 F.4th 573 (D.C. Cir. 2024)	D.C.	7/26/2024	USDA	7 U.S.C. §§ 7702(9)(B), 8302(12)(B)	interpretation of "aiding, abet, cause, or induce"	No
Lashify, Inc. v. USITC, 130 F.4th 948 (Fed. Cir. 2025), *amended*, No. 2023-1245, 2026 WL 293128 (Fed. Cir. Feb. 4, 2026)	Federal	3/5/2025	ITC	19 U.S.C. § 1337(a)(3)	interpretation of "or" and relationship between requirements	Mixed
Acuna v. EEOC, No. 2024-2114, 2025 WL 685915 (Fed. Cir. Mar. 4, 2025)	Federal	3/4/2025	EEOC	5 U.S.C. § 5582	interpretation of "money due an employee at the time of his death"	Yes

Case	Circuit	Decision date	Agency	Statute(s)	Agency action at issue	Agency action upheld?
Solar Energy Indus. Ass'n v. United States, 111 F.4th 1349 (Fed. Cir. 2024)	Federal	8/13/2024	USCBP	19 U.S.C. § 2254(b)(1)	85 Fed. Reg. 65,639	Yes